REPORT of the EFTA Court

2011

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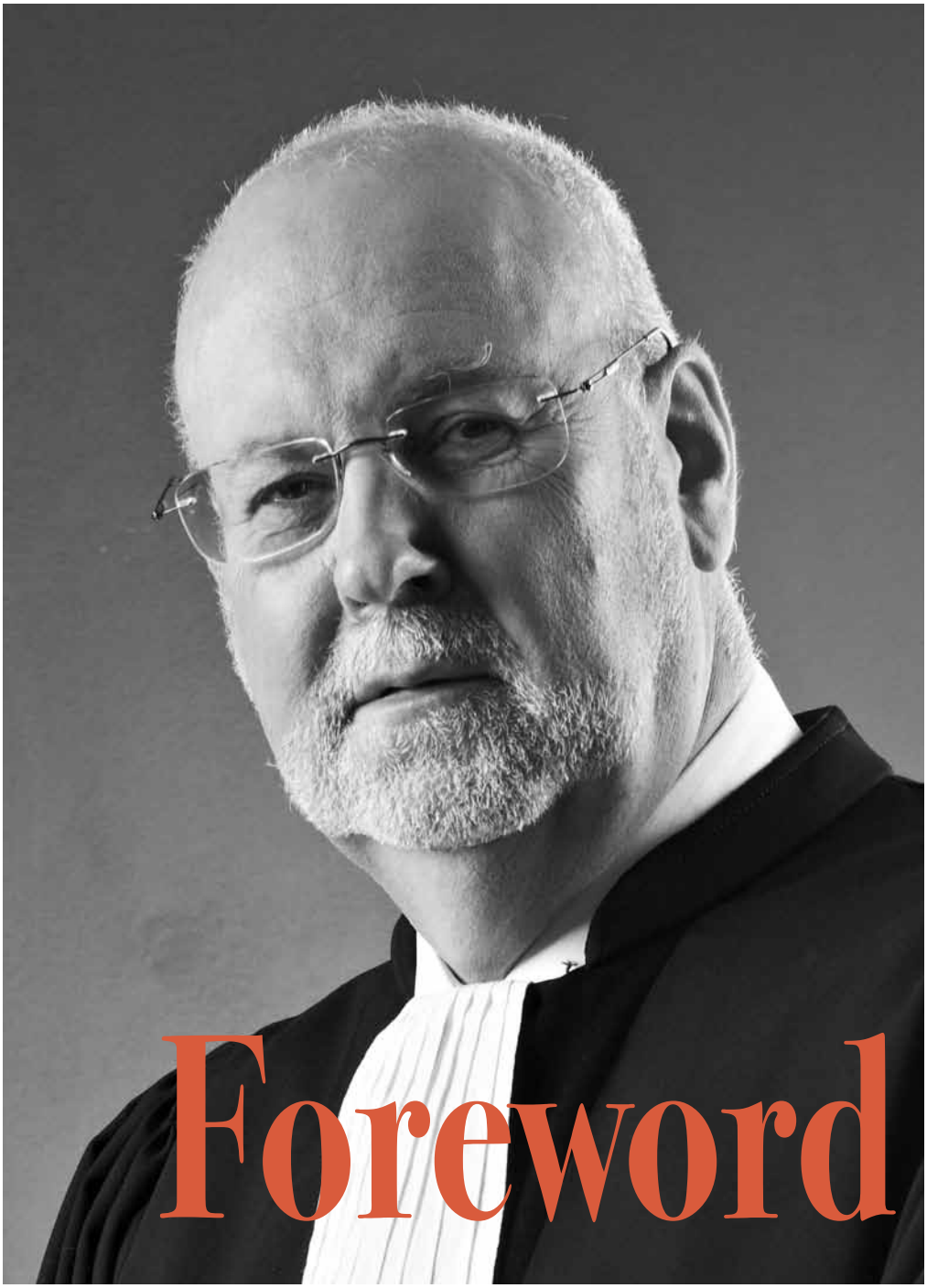

Foreword

The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. This was originally a treaty between, on the one hand, the European Communities and their then twelve Member States and, on the other hand, the EFTA States Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. The treaty entered into force on 1 January 1994, except for Liechtenstein and Switzerland. Accordingly, the EFTA Court took up its functions on 1 January 1994 with five judges nominated by Austria, Finland, Iceland, Norway and Sweden and appointed by common accord of the respective Governments. Austria, Finland and Sweden joined the European Union on 1 January 1995. Liechtenstein became a member of the EEA on 1 May 1995. The EFTA Court continued its work in its original composition of five judges until 30 June 1995, under a Transitional Arrangements Agreement. Since that date, the Court has been composed of three Judges appointed by common accord of the Governments of Iceland, Liechtenstein and Norway. Since 1 August 2007, the EEA has consisted of the 27 Member States of the European Union and of the three EFTA States Iceland, Liechtenstein and Norway.

The present Report of the EFTA Court covers the period from 1 January to 31 December 2011 and contains the decisions rendered during that period as well as an overview of other activities of the Court. The reader is referred to the first Report of the Court 1994-1995, for general information on the establishment of the Court, its jurisdiction, legal status and procedures.

The working language of the Court is English, and its Judgments, other decisions and Reports for the Hearing are published in English. Judgments in the form of Advisory Opinions, as well as the respective Reports for the Hearing, are translated to the language of the requesting national court. Both language versions are authentic and published in the Court Reports. When a case is published in two languages, the different language versions are published with corresponding page numbers to facilitate reference.

A collection of relevant legal texts for the EFTA Court, as amended, can be found in the booklet EFTA Court Texts (latest edition, September 2008). The booklet is available in English, German, Icelandic and Norwegian, and can be obtained from the Registry. All language versions of the texts can also be accessed on the EFTA Court website www.eftacourt.int

The EFTA Court has also published a booklet entitled “Legal framework, case law and composition – 1994-2003”, which was republished in an updated form in November 2006 under the shorter title “Legal framework and case law”. The booklet was updated and published for the third time in July 2008. As the title indicates, the publication summarises the Court’s legal framework and its case law since 1994. In addition, it gives an account of the Court’s composition, including the former Members and Registrars of the Court. Its aim is to serve as a tool of information for those who take interest in European integration. The booklet can be obtained from the Registry, by request by e-mail to registry@eftacourt.int or accessed on the EFTA Court website www.eftacourt.int

Decisions of the EFTA Court, which have not yet been published in the Court Report, may be obtained from the Registry by mail or e-mail registry@eftacourt.int, or accessed on the EFTA Court website www.eftacourt.int

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CASE E-13/10

Aleris Ungplan AS

v

EFTA Surveillance Authority

(Refusal of the EFTA Surveillance Authority to commence proceedings for alleged failure of an EEA State to fulfil its obligations in the field of procurement – Actionable measures – Admissibility)

Summary of the Order

1. Article 88(1) of the Rules of Procedure provides that the Court may, where an action is manifestly inadmissible, by reasoned order, and without taking further steps in the proceedings, declare the action inadmissible.

2. Although the Court is not required by Article 3(1) SCA to follow the reasoning of the Court of Justice of the European Union when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in Union law is relevant, for the sake of procedural homogeneneity, when those expressions are identical in substance to those which fall to be interpreted by the Court.

3. The procedure for direct intervention, defined in Article 23 SCA and Protocol 2 thereto, corresponds in substance to the special procedures relating to public procurement contracts in Article 3 of Directive 89/665 and Article 8 of Council Directive 92/13/EEC. In this respect, the Court notes that there is consistent case-law of the ECJ to the effect that the procedure entailed in these legislative provisions is a preventive measure which can neither derogate nor replace the powers of the Commission under Article 258 of the Treaty on the functioning of the European Union

4. According to this case-law it is irrelevant when deciding on the admissibility of infringement proceedings, whether the Commission did or did not invoke the special procedure in relation to public procurement contracts. In this regard the ECJ has held

that the Commission alone is competent to decide whether it is appropriate to bring proceedings under Article 258 TFEU for failure to fulfil obligation. Furthermore, the choice between that procedure and the special procedure in matters of public procurement is within its discretion.

5. Article 31 SCA corresponds in substance to Article 258 TFEU. It is clear from settled case-law of the Courts of the European Union, that private applicants do not have the right to challenge a refusal by the Commission to initiate proceedings against a Member State for failure to fulfil its obligations under the EU Treaties.

6. The findings contained in ESA's decision to close the case do not have the effect of resolving the dispute between Aleris Ungplan and the Norwegian authorities as to the legality of the procurement procedures undertaken by the latter. The opinion notified in that decision is a factual element which a national court called upon to rule on the dispute may certainly take into account in the course of its examination of the case. However, findings resulting from an examination under Article 31 SCA are not binding on national courts. Based on these considerations, the Court finds that the application is manifestly inadmissible.

ORDER OF THE COURT

31 January 2011

(Refusal of the EFTA Surveillance Authority to commence proceedings for alleged failure of an EEA State to fulfil its obligations in the field of procurement – Actionable measures – Admissibility)

In Case E-13/10,

Aleris Ungplan AS, represented by Jon Midthjell, advokat, Advokatfirmaet Midthjell AS, Oslo, Norway,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION under the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice for annulment of the EFTA Surveillance Authority's Decision No 248/10/COL of 21 June 2010 on procurement for youth care services in Norway,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Per Christiansen, Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties,

makes the following

ORDER

I FACTS AND PROCEDURE

1 The applicant is a private company which provides youth care services and is registered in Norway, with its head office in Oslo. In 2008 the company provided care for more than 250 children in Norway, employed 350 people, and had a turnover of approximately NOK 350 million. The applicant is a subsidiary of the Aleris Group, which has a turnover of approximately SEK 3 billion, employs more than 5000 people and is headquartered in Stockholm, Sweden.

2 On 20 June 2008, the Norwegian Directorate for Children, Youth and Family Affairs published a contract notice for placements in child welfare institutions. According to the contract documents, the contract was to be awarded during a two stage negotiated procedure, the first of which would be a pre-qualification stage, in which the Directorate would select only those parties which satisfied the criteria set out in the contract notice. A key criterion in this respect was that only non-commercial private institutions would be permitted to go onto the second stage. Consequently, the applicant, which is a commercial service provider, was not able to compete for a contract.

3 On 3 February 2009, the applicant lodged a complaint against Norway with the EFTA Surveillance Authority (hereinafter "ESA"), alleging that by permitting the exclusion of commercial operators from this award procedure, the Norwegian Directorate for Children, Youth and Family Affairs, Norway had failed to fulfil its obligations arising from Article 2 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; and Articles 3, 31 and 36 of the Agreement on the European Economic Area (hereinafter "EEA").

4 In the complaint, the applicant submitted that the contracts covered the need for 170 to 300 places in child welfare institutions for four years (1 December 2008 to 30 November

2010) with the possibility of extensions up to six years (to 30 November 2014). The contract value was estimated to range between NOK 900 million and NOK 2.6 billion.

5 The applicant lodged a second complaint on 15 June 2009, regarding a contract awarded by the Municipality of Oslo, concerning the procurement of 35 places in child welfare institutions on four year contracts from 1 May 2009 to 30 April 2013, with the possibility of extensions up to six years in total (to 30 April 2015). The contract had been awarded following a procurement procedure initiated by a contract notice, published on 17 December 2008. Since only non-commercial service providers were invited to submit tenders pursuant to the contract notice, the applicant was disqualified. The applicant estimates the contract value at approximately NOK 230 million and maintains that the Municipality of Oslo has violated Article 2 of Directive 2004/18/EC by excluding commercial service providers from the procurement.

6 ESA started its investigation after receiving the first complaint and requested further information from the Norwegian Government in a letter on 23 February 2009, which the Government replied to on 4 May 2009, and in a letter on 8 September 2009, which the Government answered on 28 September 2009. The complaints were discussed in meetings between ESA and the Norwegian Government in Oslo on 11 and 12 November 2009.

7 By Decision No 248/10/COL of 21 June 2010, ESA closed the cases regarding the two complaints, considering that EEA States were permitted to exclude commercial operators from the market for public social services and hence also from the market for childcare and welfare services.

8 By an application registered at the Court on 23 August 2010, the applicant brought an action under the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the "SCA"). By the application, the applicant requests the Court:

(a) *to annul the EFTA Surveillance Authority Decision No 248/10/COL concerning Cases No 66111 and 66744 of 21 June 2010.*

(b) *to order the EFTA Surveillance Authority to pay the costs of these proceedings.*

9 The action is based on two pleas in law, namely that ESA infringed its duty to uphold Article 2 of Directive 2004/18/EC and the fundamental rules of the EEA Agreement applicable to public procurements, and that ESA infringed its duty to state reasons.

10 On 14 October 2010, the defendant lodged an application for a decision on the admissibility of the action as a preliminary matter pursuant to Article 87(1) of the Court's Rules of Procedure (hereinafter "RoP"). The defendant claims that the Court should:

(1) dismiss the application as inadmissible; and

(2) order the applicant to pay the costs.

11 On 26 November 2010, the applicant submitted, pursuant to Article 87(2) RoP, its observations to the preliminary objection, requesting the Court to:

[...] declare the application admissible.

II LEGAL BACKGROUND

12 According to Article 65(1) EEA, Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified. The provisions on procurement are also subject to the monitoring by ESA under Article 109 EEA.

13 Under the first paragraph of Article 36 SCA, the Court shall have jurisdiction in actions brought by an EFTA State against a decision of ESA on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of that Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers. Challenging ESA's decisions under this Article is, however, subject to the conditions laid out in the second paragraph, which reads:

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

14 ESA's functions are defined inter alia in Article 31 SCA which reads:

If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.

15 Article 23 SCA contains a special provision on procurement which reads:

The EFTA Surveillance Authority shall, in accordance with Articles 22 and 37 of this Agreement and Articles 65(1) and 109 of, and Annex XVI to, the EEA Agreement as well as subject to the provisions contained in Protocol 2 to the present Agreement, ensure that the provisions of the EEA Agreement concerning procurement are applied by the EFTA States.

16 Article 1(1), (2) and (3) of Protocol 2 to the SCA on the Functions and Powers of the EFTA Surveillance Authority in the Field of Procurement reads:

1. Without prejudice to Article 31 and 32 of this Agreement, the EFTA Surveillance Authority may invoke the procedure for which the present Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of the provisions of the EEA Agreement in the field of procurement has been committed during a contract award procedure falling within the scope of the acts referred to in points 2 and 3 of Annex XVI to the EEA Agreement.

2. *The EFTA Surveillance Authority shall notify the EFTA State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.*

3. *Within 21 days of receipt of the notification referred to in paragraph 2, the EFTA State concerned shall communicate to the EFTA Surveillance Authority:*

   (a) its confirmation that the infringement has been corrected; or

   (b) a reasoned submission as to why no correction has been made; or

   (c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a) of the act referred to in point 5 of Annex XVI to the EEA Agreement.

17 Concerning the European Commission, Article 3 of Council Directive 89/665 of December 21 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (hereinafter "Directive 89/665"), referred to at point 5 of Annex XVI to the EEA Agreement, prescribes procedures which are similar in substance to the procedures regarding the powers and functions of the EFTA Surveillance Authority in the field of public procurement under Protocol 2 to the SCA.

III ARGUMENTS OF THE PARTIES WITH RESPECT TO ADMISSIBILITY

18 ESA submits that long established case-law holds that a decision to initiate or not to initiate the procedure laid down in Article 31 SCA is not subject to judicial review. In this regard, ESA refers to the judgments of the Court of Justice of the European Union (hereinafter "the ECJ") in Cases 48/65 *Lütticke and Others* v *Commission* [1966] ECR 19 and 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraphs 10 to 12. Reference is also made to the order of the ECJ in Case C-29/92 *Asia Motor France and Others* v *Commission* [1992] ECR I-3935.

19 ESA argues that the special rules in Protocol 2 to the SCA, cited by the applicant, are first and foremost concerned with the special powers conferred on ESA when it considers, prior to the conclusion of a contract, that a clear and manifest infringement of the procurement rules has taken place. Furthermore, it follows from the provisions of the SCA that to the extent that public procurement is not regulated by Protocol 2 to the SCA, ESA's surveillance in the field of public procurement is governed by the general provisions of the SCA, including Article 31.

20 The applicant contends that the contested decision is binding on it and brings about a distinct change in its legal position to tender its services freely. It submits that the decision is an act reviewable under Article 36 SCA which the applicant has a legal interest in asking the Court to annul. In this regard, the applicant refers to Cases 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42, and 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9. Moreover, the applicant argues that the application does not concern Article 31 SCA, but Article 23 SCA, which includes a specific duty for ESA to ensure that the provisions of the EEA Agreement concerning procurement are complied with by the EFTA States.

IV FINDINGS OF THE COURT

21 Article 88(1) RoP provides that the Court may, where an action is manifestly inadmissible, by reasoned order, and without taking further steps in the proceedings, declare the action inadmissible. After considering the submissions of the parties pursuant to Article 87(1) and (2) RoP, the Court has decided to base its assessment of the case on Article 88(1) RoP.

22 With the present action, brought under the second paragraph of Article 36 SCA, the applicant seeks the annulment of Decision No 248/10/COL of 21 June 2010 by which ESA discontinued its examination of the two complaints submitted by the applicant without taking further action on the breaches alleged therein.

23 In its pleadings, the applicant submits that Article 23 SCA obliges ESA to act and that the application does not concern Article 31

SCA, but the special procedures relating to public procurement contracts under Article 23 SCA. In this regard, the Court notes that according to Article 23 SCA, the process entailed in the special procedures for public procurement is subject to the provisions of Protocol 2 to the SCA. Under Article 1(1) of the Protocol, ESA may, without prejudice to Article 31 and 32 SCA, invoke the procedure for which the Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of the provisions of the EEA Agreement in the field of procurement has been committed during a contract award procedure falling within the scope of the acts referred to in Annex XVI to the EEA Agreement.

24 The Court has repeatedly held, for the sake of procedural homogeneity, that although it is not required by Article 3(1) SCA to follow the reasoning of the ECJ when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see, *inter alia*, Case E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 39, and Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* [2005] EFTA Ct. Rep 117, paragraph 53). This principle also applies to the issue of *locus standi* to bring an action for annulment (see Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 47, and the case-law cited).

25 The procedure for direct intervention, defined in Article 23 SCA and Protocol 2 thereto, corresponds in substance to the special procedures relating to public procurement contracts in Article 3 of Directive 89/665 and Article 8 of Council Directive 92/13/EEC. In this respect, the Court notes that there is consistent case-law of the ECJ to the effect that the procedure entailed in these legislative provisions is a preventive measure which can neither derogate nor replace the powers of the Commission under Article 258 of the Treaty on the functioning of the European Union (hereinafter "TFEU"), previously Article 226 of the EC Treaty (see, in the context of Council Directive 92/13/EEC, Case C-394/02

Commission v *Greece* [2005] ECR I-4713, paragraphs 25 to 28, and the case-law cited).

26 According to this case-law, it is irrelevant when deciding on the admissibility of infringement proceedings, whether the Commission did or did not invoke the special procedure in relation to public procurement contracts. In this regard the ECJ has held that the Commission alone is competent to decide whether it is appropriate to bring proceedings under Article 258 TFEU for failure to fulfil obligation. Furthermore, the choice between that procedure and the special procedure in matters of public procurement is within its discretion (see Case C-394/02 *Commission* v *Greece*, cited above, paragraphs 25 to 28).

27 Article 31 SCA corresponds in substance to Article 258 TFEU. It is clear from settled case-law of the Courts of the European Union, that private applicants do not have the right to challenge a refusal by the Commission to initiate proceedings against a Member State for failure to fulfil its obligations under the EU Treaties (see order of the ECJ in Case C-29/92 *Asia Motor France* [1992], cited above, paragraphs 19 to 21, and the case-law cited, and the orders of the General Court in Case T-29/93 *Calvo Alonso-Cortès* v *Commission* [1993] ECR II-1389, paragraph 55, and Case T-58/09 *Schemaventotto* v *Commission*, order of 2 September 2010, not yet reported, paragraphs 125 and 126).

28 Contrary to what is alleged by the Applicant, the findings contained in ESA's decision to close the case do not have the effect of resolving the dispute between Aleris Ungplan and the Norwegian authorities as to the legality of the procurement procedures undertaken by the latter. The opinion notified in that decision is a factual element which a national court called upon to rule on the dispute may certainly take into account in the course of its examination of the case. However, findings resulting from an examination under Article 31 SCA are not binding on national courts (see, for comparison, with regard to Article 226 EC (now Article 258 TFEU) the order of the General Court in Case T-83/97 *Sateba* v *Commission* [1997] ECR II-1523, paragraph 41, and

see further the order of the ECJ in Case C-422/97 P *Sateba* v *Commission* [1998] ECR I-4913, paragraphs 38 and 39).

29 Based on the above considerations, the Court finds that the application is manifestly inadmissible.

V COSTS

30 Under Article 66(2) Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that the applicant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

On the grounds stated above,

THE COURT

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant bears the costs of the proceedings.

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Luxembourg, 31 January 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President

Joined Cases E-4/10, E-6/10 and E-7/10

Principality of Liechtenstein
Reassur Aktiengesellschaft
Swisscom RE Aktiengesellschaft
v
EFTA Surveillance Authority

JOINED CASES E-4/10, E-6/10 AND E-7/10

Principality of Liechtenstein

Reassur Aktiengesellschaft

Swisscom RE Aktiengesellschaft

v

EFTA Surveillance Authority

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Special tax rules applicable to captive insurance companies – Notion of undertaking – Selectivity – Existing aid and new aid – Distortion of competition and effect on trade – Recovery – Legitimate expectations – Legal certainty – Obligation to state reasons)

Summary of the Judgment

1. Under EEA competition rules, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods or services on a given market is an economic activity.

2. In the case of State aid schemes, it is legitimate for ESA to confine itself to examining the general characteristics of a scheme without being required to examine each particular case in which it applies. For the purposes of applying Article 61(1) EEA to an aid scheme, it is sufficient that the scheme benefits certain undertakings, a finding not called into question by the fact that it may also benefit entities which are not undertakings.

3. The definition of aid is more general than that of a subsidy. The concept of aid not only includes positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect.

A measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, constitutes State aid within the meaning of Article 61(1) EEA.

4. The wording of Article 61(1) EEA requires that a measure must favour certain undertakings or the production of certain goods in order to be classified as State aid. The selective application of a measure therefore constitutes one of the criteria inherent in the notion of State aid.

When applying this criterion, it is necessary to determine whether the measure in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity. Aid in the form of a general scheme may concern a whole economic sector and still be covered by Article 61(1) EEA.

The assessment whether tax provisions "favour certain undertakings or the production of certain goods" under a particular statutory scheme must be conducted on the basis of a comparison with other undertakings which are in a comparable legal and factual situation in the light of the objective pursued by the measure in question. In the case of tax measures, the determination of the reference framework has particular importance for this assessment, since the very existence of an advantage may be established only when compared with "normal" taxation, i.e. the tax rate in force in the geographical area constituting the reference framework.

5. A measure which creates an exception to the application of the general national tax system can be justified by the nature and overall structure of the tax system, if the EEA State concerned can demonstrate that it follows directly from its basic or guiding principles. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.

6. The finding of an effect on trade between EEA States and a distortion of competition, presupposes that the aid in question is capable of strengthening the position of an undertaking as compared to other

undertakings competing in EEA trade. In this regard, ESA is not required to establish that such aid has an appreciable effect on trade between EEA States and that competition is actually being distorted, but only to examine whether such aid is liable to affect trade and distort competition.

7. Whether a national measure constitutes "existing aid" not subject to recovery, depends upon the interpretation of the provisions of Protocol 3 to the SCA, which governs the procedure and the powers of ESA in the field of State aid. The purpose of Protocol 3 is to enable ESA to examine and keep under constant review aid granted by the States or through State resources. The Protocol makes provision for separate procedures of investigation, depending on whether the aid concerned is existing or new aid.

8. With respect to existing aid, Article 1(1) of Part I of Protocol 3 gives ESA the power to keep under constant review the aid systems existing in the EEA States, in cooperation with these States. In the context of that review, it is ESA's task to propose to the EEA States any appropriate measures required by the progressive development or by the functioning of the EEA Agreement. Paragraph 2 of the same Article provides that if ESA finds, after having given notice to the parties concerned to submit their comments, that aid is not compatible with the EEA Agreement, or that such aid is being misused, it shall decide that the EEA State concerned must abolish or alter such aid within aperiod of time to be determined by ESA.

9. As for new aid, Article 1(3) of Part I of Protocol 3 provides that ESA is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. ESA then proceeds to an initial examination of the planned aid. If, at the end of that examination, it considers that any such plan is not compatible with the EEA Agreement, it must initiate the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3. In such a case, the final sentence of Article 1(3) of Part I of Protocol 3 prohibits the EEA State concerned from putting the proposed measures into effect until the procedure has resulted in a final decision. New aid is therefore subject to preventive control by ESA, and in principle may not be granted until ESA has declared it compatible with the EEA Agreement.

10. The determination whether a measure constitutes aid and, having regard to the different regimes governing recovery, whether aid is new or existing cannot depend upon a subjective assessment by ESA. The mere fact that for an admittedly long period ESA does not open an investigation into a State measure cannot in itself confer on that measure the objective nature of existing aid, that is, if indeed it constitutes aid. Any uncertainty which may have existed in that regard may at most be regarded as having given rise to a legitimate expectation on the part of the recipients so as to prevent recovery of the aid granted in the past.

11. The abolition, by means of recovery, of State aid which has been unlawfully granted is the logical consequence of a finding that it is unlawful. The aim of obliging the State concerned to abolish aid found by ESA to be incompatible with the EEA agreement is to restore the previous situation.

By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored. It also follows from that function of repayment of aid that, as a general rule, ESA will not, save in exceptional circumstances, exceed the bounds of its discretion, as recognised by case-law, if it asks the EEA State in question to recover the sums granted by way of unlawful aid, since it is only restoring the previous situation.

12. As regards the right to rely on the principle of legitimate expectations, the principle extends to any economic operator in a situation where an institution has caused him to entertain expectations which are justified. However, a person may not plead infringement of that principle unless he has been given precise assurances by that institution. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a measure likely to affect his interests, he cannot plead that principle if the measure is adopted.

In light of the mandatory nature of the review of State aid by ESA under Article 63 EEA and Protocol 3, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful, unless it has been granted in compliance with the procedure laid down in that Article. Moreover, a

diligent economic operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to ESA, so that it is unlawful under Article 1(3) of Part I of Protocol 3, the recipient of the aid cannot as a rule have a legitimate expectation that its grant is lawful.

13. Legal certainty is a fundamental principle of EEA law, which may be invoked not only by individuals and economic operators, but also by EEA States. In particular, this principle requires rules involving negative consequences for individuals to be clear and precise and their application predictable for those subject to them. With respect to the argument that ESA infringed the principle of legal certainty by adopting the date of publication of a Commission's decision as the date from which the aid was recoverable, the same considerations must apply to the position of the an applicant in this regard as concerning the existence of legitimate expectations. Accordingly, neither the EEA State in question nor the recipients involved can plead the principle of legal certainty in these circumstances in order to prevent recovery of the aid, since the risk of recovery was foreseeable.

14. As to the principle of equal treatment, compliance to it requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

15. In relation to whether ESA failed to comply with its obligation under Article 16 of the SCA, the statement of reasons required by the Article must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review.

The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. In particular, what matters is the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary

for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 16 of the SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

In particular, ESA is not obliged to adopt a position on all the arguments relied on by the parties concerned. Instead, it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision.

JUDGMENT OF THE COURT

10 May 2011

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Special tax rules applicable to captive insurance companies – Notion of undertaking – Selectivity – Existing aid and new aid – Distortion of competition and effect on trade – Recovery – Legitimate expectations – Legal certainty – Obligation to state reasons)

In Joined Cases E-4/10, E-6/10 and E-7/10,

Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, EEA Coordination Unit, Vaduz, Liechtenstein, acting as Agent,

Reassur Aktiengesellschaft, represented by Dr Ulrich Soltèsz and Philipp Melcher, Rechtsanwälte, for Reassur Aktiengesellschaft, Vaduz, Liechtenstein,

Swisscom RE Aktiengesellschaft, represented by Dr Michael Sánchez Rydelski, Rechtsanwalt, for Swisscom RE Aktiengesellschaft, Vaduz, Liechtenstein,

applicants,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Bjørnar Alterskjær, Deputy Director, Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION for the annulment of Decision 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Per Christiansen, Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of

– the Kingdom of Norway, represented by Pål Wennerås, advokat, Office of the Attorney General (Civil Affairs) and Mads Tollefsen, adviser, Ministry of Foreign Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Richard Lyal, legal advisor, and Carlos Urraca Caviedes, member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Reassur Aktiengesellschaft ("Reassur"), represented by Dr Ulrich Soltèsz and Philipp Melcher, Swisscom RE Aktiengesellschaft ("Swisscom"), represented by Dr Michael Sánchez Rydelski, the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, and the Commission, represented by Richard Lyal, at the hearing on 10 March 2011,

gives the following

JUDGMENT

I INTRODUCTION

1 According to the provisions of the Liechtenstein Tax Act (Gesetz über die Landes- und Gemeindesteuern, "the Tax Act"), insurance companies which engage exclusively in captive insurance under the Insurance Supervision Act (Gesetz betreffend die Aufsicht über Versicherungsunternehmen, Versicherungsaufsichtsgesetz, "the Insurance Supervision Act") are subject to special tax provisions.

2 The parties disagree whether the special provisions of Liechtenstein law regarding the taxation of captive insurance companies constitute State aid under Article 61(1) of the EEA Agreement ("EEA"). It is also disputed whether and to what extent legitimate expectations entertained by the beneficiaries of the alleged State aid prevent recovery of State aid granted prior to the final decision of ESA on 24 March 2010. Further, the applicants argue that ESA's Decision infringes the principles of legal certainty, homogeneity and equal treatment, and that it lacks adequate reasoning.

3 Under point 7 of Article 11(1) of the Insurance Supervision Act, "captive reinsurance undertaking" means "a reinsurance undertaking owned either by an undertaking in the financial sector other than an insurance undertaking or a group of insurance undertakings within the meaning of Article 7 of the Act, or by an undertaking not in the financial sector, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which it is a member". Article 6(1) of the same Act stipulates that "self-insurance (captive)" may be provided as direct insurance or reinsurance. Further, according to Article 6(2), insurance companies may provide both self-insurance and insurance of third parties, with Article 6(3) setting out the possibility of supervision being exempted on an individual basis in accordance with Article 2(2) of the Act.

4 The tax provisions applicable to those insurance companies ("captive insurance companies" or "captives") were introduced in the Tax Act in 1997 with effect from 1 January 1998. According to those provisions, captive insurance companies pay a capital tax of 0.1% on their own capital. For capital exceeding CHF 50 million the tax rate is reduced to 0.075% and for capital in excess of CHF 100 million to 0.05%. In addition to paying lower amounts of capital tax, captive insurance companies are also exempt from the obligation to pay coupon tax.

II LEGAL BACKGROUND

EEA law

5 Article 61 EEA reads as follows:

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Contracting Parties, be incompatible with the functioning of this Agreement.

...

6 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement, "SCA") reads as follows:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

7 Article 36(1) and (2) of the SCA reads as follows:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

8 Article 1 of Part I of Protocol 3 to the SCA ("Protocol 3"), as amended by the Agreements amending Protocol 3 thereto, signed in Brussels on 21 March 1994, 6 March 1998 and 10 December 2001, reads as follows:

1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in

those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.

...

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

9 Article 1 of Part II of Protocol 3 reads as follows:

For the purpose of this Chapter:

(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article 61(1) of the EEA Agreement;

(b) "existing aid" shall mean:

(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the EFTA Surveillance Authority or, by common accord as laid down in Part I, Article 1 (2) subparagraph 3, by the EFTA States.

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Chapter or prior to this Chapter but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15 of this Chapter;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

...

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article 1(3) in Part I;

...

10 Article 14(1) of Part II of Protocol 3 reads as follows:

Recovery of aid

1. Where negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The

EFTA Surveillance Authority shall not require recovery of the aid if this would be contrary to a general principle of EEA law.

National law

11 The Liechtenstein Tax Act comprises two kinds of taxes relating to legal entities (*Gesellschaftssteuern*), a business income tax (*Ertragssteuer*) and a capital tax (*Kapitalsteuer*). The legal entities liable to pay income tax in Liechtenstein are listed in Article 73(a) to (f) of the Act, among which foreign companies operating a branch in Liechtenstein are made subject to the income and capital tax under Article 73(e).

12 According to Article 77(1) of the Tax Act, business income tax is assessed on the entire annual net income, which is defined as the entire revenues minus company expenditures, including write-offs and other provisions. Under Article 79(2) of the Tax Act, the income tax rate depends on the ratio of net income to taxable capital and lies between the minimum level of 7.5% and the maximum level of 15%. This tax rate may be increased by certain percentage points, depending on the relation between dividends and taxable capital, as described in Article 79(3) of the Tax Act.

13 Under Article 76(1) of the Tax Act, the basis for the capital tax is the paid-up capital stock, joint stock, share capital, or initial capital, as well as the reserves of the company constituting company equity. According to Article 76(1), the capital tax is assessed at the end of the company's business year at a rate of 0.2%, in accordance with Article 79(1) of the Tax Act.

14 Section 5 of the Tax Act contains provisions regarding coupon tax, which is levied on coupons under Article 88a(1) of the Tax Act. The subjects of the tax are further defined in Article 88b to Article 88e. Pursuant to Article 88a(1), coupon tax is levied on the coupons of securities (or documents treated as equivalent to securities) issued by "a national". According to Article 88a(2), the term "national" covers any person whose place of residence, domicile or statutory seat is in Liechtenstein and undertakings that are registered in the public register of Liechtenstein.

15 The coupon tax applies to companies the capital of which is divided into shares, as provided for in Article 88d(1)(a) of the Tax Act. According to Article 88h(1)(a) and (b), it is levied at the rate of 4% on any distribution of dividends or profit shares (including distributions in the form of shares).

16 According to Article 88i(1) of the Tax Act, the person liable to pay the coupon is also liable to pay the tax. Article 88k(1) of the Tax Act stipulates that the sum paid out on a coupon must be reduced by the amount of the tax levied on such coupons.

17 By virtue of Act of 18 December 1997 on the amendment of the Liechtenstein Tax Act, the Liechtenstein authorities introduced special tax rules applicable to captive insurance companies. Articles 82a and 88d(3) were introduced into the Tax Act with effect from 1998. These Articles are included in the special tax provisions (*Besondere Gesellschaftssteuern*) listed in Section 4.B of the Tax Act for certain company forms such as insurance companies, holding companies, domiciliary companies and investment undertakings.

18 Article 82a of the Tax Act refers to captive insurance companies. Article 82a(1) provides that "[i]nsurance companies as defined in the Insurance Supervision Act which exclusively engage in captive insurance ("Eigenversicherung") shall pay a capital tax of 0.1% on the company's own capital. For the capital exceeding 50 million the tax rate is reduced to 0.075% and the capital in excess of 100 million to 0.05%".

19 Under Article 82a(2) of the Tax Act, insurance companies which engage in captive insurance and ordinary insurance activities for third parties are liable to regular capital and income tax, according to Articles 73 to 81 of the Tax Act, for that part of their activities which concern third party insurance. By virtue of Article 88d(3) of the Tax Act, shares or units of captive insurance companies are exempt from the coupon tax.

20 According to point 7 of Article 11(1) of the Insurance Supervision Act, a "captive reinsurance undertaking" means "a reinsurance

undertaking owned either by an undertaking in the financial sector other than an insurance undertaking or a group of insurance undertakings within the meaning of Article 7 or by an undertaking not in the financial sector, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which it is a member". Article 6(1) of the same Act stipulates that self-insurance (captive) may be provided as direct insurance or reinsurance. Under Article 6(2), insurance companies may provide both self-insurance and insurance of third parties. According to Article 6(3), supervision may be exempt on an individual basis, in accordance with Article 2(2) of the Act.

21 Articles 17 and 28m of the Ordinance on the Insurance Supervision Act (Verordnung zum Gesetz betreffend die Aufsicht über Versicherungsunternehmen) set out minimum requirements for the capital of captive insurance companies. According to Article 17(2) of the Ordinance, the minimum guarantee fund for captive insurance undertakings must amount to EUR 2.3 million. If the insurance undertaking covers all or some of the risks included in insurance classes 10 to 15, then the minimum guarantee fund must amount to EUR 3.5 million. According to Article 28m(2), if the captive insurance company in question is a captive reinsurance undertaking, the minimum guarantee fund must amount to EUR 3.2 million. Under the same Article, the supervisory authority may, in the case of captive reinsurance undertakings, permit a reduction of the minimum guarantee fund to an amount of EUR 1.1 million.

III FACTS AND PRE-LITIGATION PROCEDURE

22 By a letter of 14 March 2007, ESA requested certain information from the Liechtenstein authorities concerning various tax derogations for particular forms of companies under the Tax Act in order to assess the compatibility of those tax rules with the State aid provisions of the EEA Agreement, in particular Article 61 thereof. In the letter, the Liechtenstein authorities

were requested to explain the tax treatment of captive insurance companies under Article 82a of the Tax Act indicating, inter alia, why they paid a lower rate of capital tax of 0.1% or less compared to other companies which paid capital tax of 0.2%, in accordance with Article 76 of the Tax Act. Further, ESA inquired whether captive insurance companies also paid profit, property and income tax in Liechtenstein and sought information on the timing of the introduction of Article 82a.

23 The Liechtenstein authorities replied by letter of 30 May 2007. They stated that the preferential taxation of foreign insurance companies provided for in Article 82a of the Tax Act had been introduced in order to establish and develop the captive insurance sector as a new field of economic activity in Liechtenstein. According to the letter, the primary aim of this measure was the diversification of the Liechtenstein economy in general and of the insurance sector in particular. The authorities also stated that captive insurance companies which only carried on intra-group risk insurance (*Eigenversicherung)* were not subject to the profit tax. However, if, in addition to intra-group risk insurance, captive insurance companies also carried on insurance with third parties, under Article 82a(2) of the Tax Act, they were subject to profit tax on the element that derived from the insurance with third parties. Further, captive insurance companies were not subject to income and property tax.

24 Following an exchange of correspondence and meetings between ESA and the representatives of the Liechtenstein authorities, by Decision No 620/08/COL of 24 September 2008, ESA initiated the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 with regard to the taxation of captive insurance companies. This decision was published in the Official Journal of the European Union and the EEA Supplement thereto (OJ 2009 C 72, p. 50 and EEA Supplement No 17 of 26 March 2009, p. 1). That publication was annulled and replaced in OJ 2009 C 75, p. 45.

25 In that decision, ESA called on interested parties to submit comments and received 12 such comments. By letter of

22 July 2009, ESA forwarded those comments to the Liechtenstein authorities which responded by letter of 2 October 2009.

26 By Decision No 97/10/COL of 24 March 2010 ("the Decision"), ESA found that the tax provisions on captive insurance companies constituted State aid incompatible with Article 61(1) EEA. ESA found that the granting of a full or partial tax exemption involved a loss of tax revenues for the State which was equivalent to consumption of state resources in the form of fiscal expenditure. Accordingly, the special tax rules applicable to captive insurance companies were granted through state resources.

27 In its Decision, ESA concluded that activities carried out by captive insurance companies in providing insurance or reinsurance services to their associated companies constituted an economic activity. On that basis, the captive reinsurance companies qualified as undertakings within the meaning of Article 61(1) EEA.

28 ESA noted that, according to the case-law of the Court of Justice of the European Union ("ECJ"), the notion of undertaking within the meaning of Article 87(1) of the EC Treaty, now Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU"), which corresponds to Article 61(1) EEA, encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed. Moreover, any activity consisting in offering goods or services on a given market is an economic activity. In this regard, ESA found that providing insurance is a service, which in principle is an economic activity, and that captive insurance companies offer such services for a premium on a given market.

29 ESA took the view that this conclusion was not altered by the fact that the clients of captive insurance companies were restricted to undertakings of the same group to which they belonged. As the undertakings of the group had chosen to purchase insurance from another company within the group, instead of a third-party insurance company, the service provided by the captive insurance was an alternative to purchasing insurance from a third party. On

ESA's analysis, captive insurance companies provided commercial services to private undertakings. Therefore, any assistance provided to them by the state through tax exemptions had to be viewed in that context.

30 ESA stated, moreover, that the tax provisions in question had conferred a selective advantage upon certain undertakings. According to ESA, qualification for a lower rate of taxation than was normally due, or an exemption from paying taxes in general, conferred an advantage on the eligible companies. Those companies were granted an advantage because their operating costs were reduced in comparison with others that were in a similar factual and legal position. Furthermore, by exempting shares or parts of captive insurance companies from coupon tax, the Liechtenstein legislation also made it more attractive to invest in captive insurance companies than in other undertakings. Investors in captive insurance companies were, therefore, granted an advantage.

31 On ESA's assessment, under the Liechtenstein tax provisions, captive insurance companies received a selective advantage compared to those entities which paid the full income, capital and coupon taxes in Liechtenstein. In ESA's view, the tax reductions and exemptions accorded to captive insurance companies were designed to attract a mobile and tax sensitive service sector to Liechtenstein. Therefore, there was no reason to conclude that captive insurance companies were in a different legal and factual position to those other parties. In that regard, ESA observed that the tax measures in question were only available and applicable to undertakings that had sufficient resources to form a captive insurance company. Further, ESA held that the measures could not be justified by the logic of the tax system and that they distorted competition.

32 In its Decision, ESA rejected the view that the measures were existing aid. Instead, it qualified those measures as new aid and found that the Principality of Liechtenstein had not complied with its obligations under Article 1(3) of Part I of Protocol 3 to notify.

33 Finally, ESA determined that although, in the light of Commission practice, beneficiaries might have entertained legitimate expectations that the tax measures did not constitute State aid when they were introduced, all beneficiaries should have been aware by the date of publication of the decision to open a formal investigation into the similar tax measures in the Åland Islands on 6 November 2001, at the latest, that the measures were likely to involve incompatible State aid. Therefore, the Liechtenstein authorities were ordered to take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 of the Decision and unlawfully made available to those parties from 6 November 2001 to 31 December 2009.

34 The operative part of the contested Decision, in its relevant points, reads as follows:

Article 1

The aid measures which the Liechtenstein authorities have implemented in favour of captive insurance companies under [82a and 88)(3)] of the Tax Act implemented on 18 December 1997 constitute unlawful State aid within the meaning of Article 61(1) of the EEA Agreement, which is not compatible with the functioning of the EEA Agreement.

Article 2

1. Liechtenstein shall repeal the measures referred to in Article 1 such that they do not apply from the fiscal year 2010 (inclusive) onwards.

2. The Liechtenstein authorities shall inform the Authority of the legislative steps which will be taken to abolish the measure by 30 June 2010.

Article 3

1. The Liechtenstein authorities shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to them, from 6 November 2001 to 31 December 2009.

2. The amount of aid to be recovered should be calculated by assessing the income, capital and coupon tax liabilities of captive insurance companies had specific rules not applied to them, less the amounts of capital tax already paid by the beneficiaries.

3. The sums to be recovered shall bear interest from the date on which the tax reductions were applied to the given undertaking until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL, as amended by Authority's Decision No 789/08/COL of 17 December 2008, on the implementing provisions referred to under Article 27 of Part II of Protocol 3.

Article 4

Recovery of the aid referred to in Article 1 shall be effected without delay, and in any event by 30 September 2010; and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of the decision.

...

IV PROCEDURE AND FORMS OF ORDER SOUGHT

35 By an application lodged at the Registry of the Court on 21 May 2010 as Case E-4/10, the Principality of Liechtenstein brought an action under the first paragraph of Article 36 of the SCA for annulment of the contested Decision.

36 By an application lodged at the Registry of the Court on 16 June 2010 as Case E-6/10, Reassur, a limited liability company registered in Vaduz, Liechtenstein, likewise brought an action for the annulment of the contested Decision. Reassur is the captive insurance company of the Schindler Group and is exclusively engaged in reinsuring certain types of risks of companies belonging to that group.

37 By an application lodged on 9 July 2010 as Case E-7/10, Swisscom, also a limited liability company registered in Vaduz,

Liechtenstein, brought an action for annulment of the same Decision. Swisscom is a wholly owned subsidiary of Swisscom AG and has carried out captive insurance operations in Liechtenstein exclusively for the Swisscom Group since its establishment in 1997.

38 By a decision of 16 July 2010, pursuant to Article 39 of the Rules of Procedure, and, having received observations from the parties, the Court joined the three cases for the purposes of the written and oral procedures.

39 The Principality of Liechtenstein and Swisscom jointly claim that the Court should:

(i) annul the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act;

(ii) in the alternative, declare void Articles 3 and 4 of the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010, to the extent that they order the recovery of the aid referred to in Article 1 of that Decision; and

(iii) order the EFTA Surveillance Authority to pay the costs of the proceedings.

40 The claim of Reassur is identical to points (i) and (iii) of the claims filed by the other applicants, cited above. Furthermore, Reassur claims that the Court should:

in the alternative, annul Article 3 of the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act, at least insofar as it orders recovery for the period prior to 31 March 2009.

41 ESA submitted a defence in Cases E-4/10, E-6/10 and E-7/10, registered at the Court on 13 September 2010, in which it claims that the Court should:

(i) dismiss the applications as unfounded; and

(ii) order the applicants to pay the costs.

42 The reply from Reassur in Case E-6/10 was registered at the Court on 9 November 2010. The reply from the Principality of Liechtenstein in Case E-4/10 was registered at the Court on 11 November 2010 and the reply from Swisscom in Case E-7/10 was registered at the Court on 12 November 2010. A rejoinder from ESA was registered at the Court on 17 December 2010.

43 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Kingdom of Norway and the Commission submitted written observations, registered at the Court on 17 November 2010.

44 By letter of 7 March 2011, the Court requested additional information from the parties. The Principality of Liechtenstein was asked to provide further information on the provisions regarding captive insurance companies in national law, inter alia, on the registration of such companies and their treatment for taxation purposes. The Court also requested information from Reassur and Swisscom on the risks covered by the companies and their business operations, while ESA was asked to provide the Court with information on how it became aware of the disputed tax measures. On 8 March 2011, the Court also requested ESA to submit two further documents. The parties replied to the Court's request on 9 March 2011.

45 The parties presented oral argument and replied to questions put to them by the Court at the hearing on 10 March 2011 in Luxembourg.

46 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

47 The applicants submit four main pleas in law. According to the first plea, ESA applied Article 61(1) EEA incorrectly. The second plea alleges that ESA erred in classifying the measures in question as "new aid". By their third plea, the applicants allege that ESA violated general principles of EEA law, such as

the principles of legitimate expectations, legal certainty, equal treatment and homogeneity. Finally, the fourth plea alleges that ESA failed to provide sufficient reasoning, as required by Article 16 of the SCA, for its Decision of 24 March 2010.

V THE FIRST MAIN PLEA, ALLEGING INCORRECT APPLICATION OF ARTICLE 61(1) EEA

48 The first plea alleges that ESA applied Article 61(1) EEA incorrectly in relation to captive insurance companies. The applicants contend that the contested tax provisions do not distort competition by favouring certain undertakings or the production of certain goods for the purposes of Article 61(1) EEA. Moreover, they submit that captive insurance companies do not qualify as "undertakings" within the meaning of Article 61(1) EEA and that the contested tax measures do not confer a selective advantage. In addition, the contested tax provisions are said to have no effect on intra-EEA trade.

Notion of an undertaking

Arguments of the parties

49 The applicants submit that captive insurance companies do not qualify as undertakings within the meaning of Article 61(1) EEA as they only provide in-house services and, hence, are not active on the free market for insurance. They contend that only operations which are available on the free and open insurance market can be classified as an "economic activity" conferring the status of undertakings within the meaning of Article 61(1) EEA. In that regard, the Principality of Liechtenstein submits that an entity which does not exercise its activity on a market in competition with other market players cannot be considered to carry out an economic activity within the meaning of the competition rules. The applicants also contend that ESA's findings in this regard are not compatible with its own decision practice.

50 ESA, supported by the Commission, contests this argument. In ESA's view, the concept of an "undertaking" has been defined in the case-law of the ECJ as every entity engaged in an economic

activity, regardless of the legal status of the entity and the way in which it is financed. ESA argues that the pursuit of an "economic activity" is the decisive factor in determining whether an entity is an "undertaking". According to settled case-law of the ECJ, "economic activity" means "any activity consisting in offering goods and services on a given market", thus presupposing the assumption of risk for the purpose of remuneration.

51 ESA also contends that an important distinction must be made between activities that are truly carried out in-house, i.e. by a department within a company, and services which are provided by a separate legal person, even if it is wholly owned by the recipient of the services. ESA argues that in the latter case, the companies concerned have established a formal structure in which risk is transferred to a company within the group which provides insurance services for arm's length remuneration as an alternative to purchasing insurance on the open market. According to ESA, one reason for adopting that structure is to ensure that the economic activity concerned and the profit are subject to different treatment for tax purposes and that the captive insurance companies can be located in a different tax jurisdiction and taxed at a lower rate. These arguments are essentially supported by the Commission.

52 ESA also disputes the assertions that some of the services covered by the Liechtenstein tax measures are not available on the open insurance market and maintains that no evidence has been adduced by the applicants to establish this point. The Commission argues that the applicants' objection concerning the availability of the services is not valid, as it does not demonstrate that there is not a business activity and a flow of services from one distinct legal person to another.

Findings of the Court

53 Under EEA competition rules, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed (see Article 1 of Protocol 22 to the EEA Agreement, Cases E-8/00

Landsorganisasjonen i Norge [2002] EFTA Ct. Rep. 114, paragraph 62, and E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 78).

54 According to settled case-law of the ECJ, any activity consisting in offering goods or services on a given market is an "economic activity" (compare, in particular, Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75, and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 22).

55 In the contested Decision, ESA found that providing insurance was a service, which, in principle, was an economic activity, and that captive insurance companies offered such services for a premium on a given market. In ESA's view, the fact that captive insurance companies met demand for insurance from certain undertakings was sufficient to conclude that they offered their services on a market. By establishing a captive, the insurance of those risks was, according to ESA, "captive" to one company of the group, which meant that other insurance companies active in the market could not compete for that insurance.

56 As regards the arguments of the applicants relating to the activity of captive insurance companies in the free insurance market, from the documents submitted to the Court, it is impossible to conclude that the facts on which ESA based its findings were inaccurately stated or that there has been any manifest error of assessment or a misuse of powers in this regard. On the contrary, it is apparent from the case-file that captive insurance companies are, at least to some extent, exercising economic activities on the market, even if some of their services are not available, or not available at a reasonable price, on the insurance market.

57 With respect to the applicants' arguments regarding the availability of commercial insurance for the risks insured and the absence of an activity on a market in competition with other market players, it should be borne in mind that, as the present case concerns a State aid scheme, it was legitimate for ESA to confine itself to examining the general characteristics of

the scheme at issue, without being required to examine each particular case in which it applies (see, for comparison, Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671). Therefore, ESA is not required to examine each particular case in which the regime applies (see, to that effect, Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24, and the case-law cited therein).

58 For the purposes of applying Article 61(1) EEA to an aid scheme, it is sufficient that the scheme benefits certain undertakings, a finding not called into question by the fact that it may also benefit entities which are not undertakings (compare Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraphs 91 and 92).

59 It follows that ESA could legitimately confine itself to showing that, although it might be the case that certain risks could not be insured in the market, or not at a reasonable price, captive insurance companies in Liechtenstein did not exclusively provide services not available from commercial insurers (see page 16 of the contested decision).

60 In the light of the foregoing, the argument that captive insurance companies do not constitute "undertakings" within the meaning of Article 61(1) EEA must be dismissed as unfounded.

Selectivity

Arguments of the parties

61 In case the Court upholds ESA's finding that captive insurance companies, or part of their activities, qualify as "undertakings", the applicants argue that the contested tax provisions are not selective measures favouring certain undertakings or the provision of certain goods within the meaning of Article 61(1) EEA. Accordingly, the applicants contend that ESA's findings on this issue are erroneous.

62 The Principality of Liechtenstein argues that in order to constitute State aid, a measure must be selective by favouring certain companies. Liechtenstein and Swisscom further submit that tax measures are only selective if they unreasonably discriminate

between situations that are legally and factually comparable in light of objectives set by the tax system. In Swisscom's view, the fact that undertakings are treated differently does not automatically imply that they are favoured for the purposes of the State aid assessment. Therefore, in order to determine whether a measure is selective, it has to be examined, within the context of the particular national system, whether the measure constitutes an advantage for certain undertakings in comparison with others that are in a comparable legal and factual situation.

63 The applicants claim that since captive insurance companies are legally and factually in a different situation to insurance companies that are unrelated, the Liechtenstein tax scheme is not selective. They also maintain that, for those purposes, captive insurance companies have to be distinguished from other companies on account of their intra-group relations.

64 In that regard, the Principality of Liechtenstein argues that the reasoning in the Commission's decisions in the *Groepsrentebox* and *Hungarian Tax Scheme* cases applies equally to the taxation of captive insurance companies under the Tax Act, as there is no reason why intra-group insurance transactions should be taxed differently from intra-group financial credit or debt transactions. Additionally, Reassur submits that as regards the types of risks covered, choice of risks and entities to be insured the position of captive insurance companies differs sufficiently from other insurance companies to justify the difference in regulatory framework.

65 The applicants also submit that the Liechtenstein tax measures apply to all captive insurance companies regardless of their size. Therefore, any legal entity, irrespective of the sector of activity or size of operation, can qualify for the tax measures through ownership of a captive insurance company through which it insures its own risks. The Liechtenstein tax measures are not materially selective, as they merely reflect the reality of group structures. According to the Principality of Liechtenstein and Reassur, the Commission has recognised the "economic reality of group structures" as insufficient to categorise a tax measure

selective. Moreover, according to the applicants, the contested Liechtenstein provisions differ from the aid scheme implemented by Finland for captive insurance companies in the Åland Islands case, as they are not regionally specific, do not require foreign ownership or a minimum level of economic strength or capitalisation.

66 ESA contends that the measures in question are indeed materially selective. In ESA's view, the beneficiary undertakings are in the same legal and factual situation as those which pay the full income, capital and coupon taxes in Liechtenstein. In contrast, captive insurance companies in Liechtenstein receive a selective advantage. The Commission supports ESA's assessment and submits further that in analysing the selective character of a tax measure, only the differences that are relevant to the objective of the tax system in question can be taken into account. Therefore, the elements cited by the applicants as justifying the difference are irrelevant.

67 In the Commission's view, the fact that the tax measures apply to all captive insurance companies regardless of size, or that the requirements for captive insurance companies are horizontal in nature, is equally irrelevant. What is crucial is that other types of companies which are in the same factual and legal situation cannot benefit from the same tax advantages.

68 ESA also disputes the assertion made by the applicants that creating a captive insurance company is an option open to any undertaking. ESA notes that while it was an essential part of the Commission's reasoning in its decisions in the *Groepsrentebox* and *Hungarian Tax Scheme* cases, cited by the applicants, that the action which leads to the beneficial tax treatment is open to any undertaking, the option of forming a captive insurance company is not.

Findings of the Court

69 The Court recalls that the definition of aid is more general than that of a subsidy. The concept of aid not only includes positive

benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (compare, inter alia, Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 29, and the case-law cited).

70 A measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, constitutes State aid within the meaning of Article 61(1) EEA (see, for the purposes of Article 107(1) TFEU, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and *Air Liquide Industries Belgium*, cited above, paragraph 30).

71 The wording of Article 61(1) EEA requires that a measure must favour certain undertakings or the production of certain goods in order to be classified as State aid. The selective application of a measure therefore constitutes one of the criteria inherent in the notion of State aid (see Case E-6/98 *Norway* v *ESA* [1999] EFTA Ct. Rep., p. 74, paragraph 33, and Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* [2005] EFTA Ct. Rep., p. 117, paragraph 77).

72 When applying this criterion, it is necessary to determine whether the measure in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity (compare Cases C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 24, C-200/97 *Ecotrade* [1998] ECR I-7907, paragraphs 40-41, and *Belgium* v *Commission*, cited above, paragraph 26). It must be noted, however, that aid in the form of a general scheme may concern a whole economic sector and still be covered by Article 61(1) EEA (compare Cases C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraph 36, and *Belgium* v *Commission*, cited above, paragraph 33).

73 In this regard, it has to be examined whether the Liechtenstein tax provisions are selective in their nature by exempting captive insurance companies in full or in part from the duty to pay certain taxes. If necessary, it must also be examined whether those measures can be justified by the nature and overall structure of the Liechtenstein tax system, as the Principality of Liechtenstein submits.

74 The assessment whether tax provisions "favour certain undertakings or the production of certain goods" under a particular statutory scheme must be conducted on the basis of a comparison with other undertakings which are in a comparable legal and factual situation in the light of the objective pursued by the measure in question (compare, to that effect, Cases C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68, and C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40). In the case of tax measures, the determination of the reference framework has particular importance for this assessment, since the very existence of an advantage may be established only when compared with "normal" taxation, i.e. the tax rate in force in the geographical area constituting the reference framework (compare Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 56).

75 The contested Decision concerns the tax provisions which the Liechtenstein authorities implemented in favour of captive insurance companies and the effect of these provisions during the period 6 November 2001 to 31 December 2009. Under those provisions, captive insurance companies were fully exempt from the payment of income and coupon tax, and partially from the payment of capital tax.

76 The tax provisions in question accorded an economic advantage to undertakings active in the captive insurance sector, relieving them from some of the costs which they would otherwise have incurred. They did not benefit undertakings in any other economic sector. Rather, they applied exclusively to the insurance sector, benefitting only those companies which conducted captive insurance operations on behalf of their parent company or companies.

77 The tax provisions also departed from the ordinary tax scheme in granting a tax relief to captive insurance companies to which they would not have been entitled under the normal application of that scheme. Undertakings in other sectors carrying out similar operations, or undertakings in the insurance sector which did not carry out operations such as those referred to in the contested tax provisions, were not entitled to the same treatment (see, mutatis mutandis, Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 50).

78 The applicants assert that the option of forming a captive insurance company is open to any undertaking. The fact remains, however, that only captive insurance companies benefitted from the tax measure. That a certain kind of economic activity may in theory be pursued by any economic actor does not place it outside of the ambit of the State aid rules. It is evident from the answers provided by the Principality of Liechtenstein to the Court's questions on the national law governing the registration of captive insurance companies that the establishment of such a company is limited to those who can provide it with the minimum guarantee fund of EUR 2.3 million, for captive insurance undertakings, and EUR 3.2 million for captive reinsurance undertakings with the possibility of reduction to an amount of at least EUR 1.1 million, subject to the permission of the relevant supervisory authority (see Article 17(2) of the Ordinance on the Insurance Supervision Act).

79 It follows, as ESA correctly held in the contested Decision, that the reductions in the tax rates at issue were selective and not general measures.

On the justification of the measures by the nature and general scheme of the Liechtenstein tax system

80 In light of the above, it has to be examined whether the tax measures at issue may be justified by the nature or the general scheme of the Liechtenstein tax system, a matter which is for the EEA State concerned to demonstrate (see Case *Norway* v *ESA*, paragraph 38, and Joined Cases *Fesil and Finnfjord and Others*, paragraph 83, both cited above).

Arguments of the parties

81 The applicants submit that the contested tax provisions are justified by the nature and general scheme of the Liechtenstein tax system. They maintain that captive insurance companies are essentially an in-house self-insurance vehicle which covers its liabilities with its own resources. Further, insurance coverage with a company's own financial reserve has constantly been treated differently for tax purposes in Liechtenstein and other countries. It is argued that the contested tax provisions merely follow that principle.

82 As regards justification, the applicants also contend that the specific nature of captive insurances is recognised by secondary EEA and EU law. The EU Reinsurance Directive acknowledges that captive insurance undertakings do not cover risks deriving from the external direct insurance or reinsurance business of an insurance or reinsurance undertaking belonging to the group. Furthermore, Swisscom submits that Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (OJ 2009 L 335, p. 1) provides for specific adaptations for captive insurance companies on minimum capital requirements. Swisscom argues that the definition and treatment provided for in those directives supports the conclusion that captive insurance can be distinguished from the traditional type of insurance business.

83 ESA and the Commission disagree with those submissions. The Commission notes that, according to case-law, a measure which creates an exception to the application of the general tax system with regard to State aid may be justified by the nature and overall structure of the tax system if the State in question can show that it results directly from the basic or guiding principles of its tax system. As justification based on those grounds constitutes an exception to the prohibition of State aid, it must be interpreted strictly.

84 ESA further contends that the exemption for captive insurance companies is not in line with the logic of the tax system, as claimed by the Liechtenstein authorities. The logic of the tax system is to gain revenue from capital and income generated by an economic activity. ESA maintains that the disputed tax measures are not specific taxes on insurance companies or similar companies where a differentiation resulting from the purpose of the tax would have been conceivable.

85 ESA, supported by the Commission, also contests the arguments of the applicants regarding how a company covering risk out of its own resources is treated differently for tax purposes and the apparent differences between the contested tax measures and the measures at stake in the Åland Islands case.

86 In ESA's opinion, those factors, as well as the different treatment of captives under EU and EEA law, do not explain why the exemption for captive insurance companies is consistent with the logic of the tax system. The Commission further claims that, according to the Liechtenstein authorities, the tax measures in question were introduced in order to establish and develop the captive insurance sector as a new field of economic activity in Liechtenstein. It follows that the advantageous treatment granted to captive insurance companies does not result from the basic or guiding principles of the Liechtenstein tax system, but from the desire of the Liechtenstein authorities to foster this activity in the country.

Findings of the Court

87 A measure which creates an exception to the application of the general national tax system can be justified by the nature and overall structure of the tax system, if the EEA State concerned can demonstrate that it follows directly from its basic or guiding principles. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (see, for comparison,

Cases *Portugal* v *Commission*, cited above, paragraph 81, and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 144).

88 The Principality of Liechtenstein has not shown that the contested provisions entail an adaptation of a general scheme particular to the functioning or effectiveness of the tax system. On the contrary, it is apparent from the case-file that the provisions were expressly adopted by the national authorities as a means of attracting certain undertakings to take up activities in Liechtenstein and improving the competitiveness of such undertakings.

89 Accordingly, it has not been demonstrated that the measures at issue are justified by the nature and overall structure of the Liechtenstein tax system. Therefore, ESA was correct to state in the contested Decision that the difference between the charges resulting from the tax reductions on revenue in question is not justified by the nature or the overall structure of the Liechtenstein tax system.

Distortion of competition and effect on intra EEA-trade

Arguments of the parties

90 In case the Court finds that the contested tax provisions conferred selective advantages on insurance companies, the applicants contend that those provisions did not have an effect on EEA trade or result in a distortion of competition. They submit that as captive insurance companies neither compete for market share in the open insurance market nor deal with risks that are normally insurable on the open market, as commercial insurers do, their activities have no effect on EEA trade. Hence, there can be no distortion of competition within the meaning of Article 61(1) EEA. Moreover, Reassur submits that ESA failed to assess the contested tax provisions in this regard, thereby violating its obligation to fully investigate the facts and, thus, committing a manifest error of law.

91 ESA argues that it is irrelevant whether the activities of all captive insurance companies may have an effect on EEA trade or distort competition. The measures under assessment in the contested Decision constitute an aid scheme, which, according to settled case-law of the ECJ, is not subject to the same form of examination as individual grants of aid. ESA contends that it follows from case-law that the Commission may confine itself to examining the general characteristics of an aid scheme without being required to examine each particular case to which it applies.

92 The Commission supports ESA's view, adding that a finding that the scheme in question does not constitute State aid may only be made where all possible cases of its application raise no State aid concerns. According to the Commission, in the present case, such a finding would only be possible if no captive insurance operation had the capacity to distort competition and have an effect on trade.

93 In response to this argument, the applicants contend that, given the limited number of beneficiaries of the alleged aid scheme, ESA was not, as a matter of principle, entitled to rely on this less strict standard of assessment. Moreover, they argue that the coverage of risks which are not insurable on the market constitutes an essential characteristic of captive insurance and, thus, of the alleged aid scheme in question. Therefore, even if ESA had been entitled to rely on this less strict standard of assessment, it would have been obliged to investigate further and determine the extent to which captives cover otherwise uninsurable risks and, consequently, the extent to which the contested tax measures do not constitute State aid within the meaning of Article 61(1) EEA. According to the applicants, in the absence of the further investigation and determination needed, ESA has not even satisfied the less strict standard of assessment on which it relies.

Findings of the Court

94 With regard to the argument that ESA erred in concluding that there is an effect on trade between EEA States and a distortion of competition, the Court must consider whether the aid in question is capable of strengthening the position of an undertaking as compared to other undertakings competing in EEA trade.

95 In this context, it must be recalled that ESA is not required to establish that such aid has an appreciable effect on trade between EEA States and that competition is actually being distorted, but only to examine whether such aid is liable to affect trade and distort competition (see Joined Cases *Fesil and Finnfjord and Others*, paragraph 93, and, for comparison, Case C-66/02 *Italy v Commission*, paragraph 111, *Unicredito Italiano*, paragraph 54, and *Air Liquide Industries Belgium*, paragraph 34, all cited above).

96 In the present case, it is not disputed that some of the captive insurance companies are, at least for some of their services, in competition with other insurance undertakings. The advantage conferred on the captive insurance companies by the Liechtenstein tax measures in question strengthened their financial situation and, consequently, was likely to improve their competitive position to the detriment of potential competitors in other EEA States.

97 In the light of those circumstances, the Court holds that ESA sufficiently established that the tax measures at issue in the present proceedings were liable to affect trade and distort competition within the meaning of Article 61(1) EEA. Consequently, ESA was not under an obligation to carry out a market analysis (see Joined Cases *Fesil and Finnfjord and Others*, cited above, paragraph 94).

98 Having regard to the foregoing, the Court concludes that ESA has shown that competition was distorted and intra-EEA trade was liable to be affected by the tax measures at issue.

99 It follows from all of the foregoing considerations that the first plea must be rejected.

VI THE SECOND MAIN PLEA, ALLEGING INCORRECT CLASSIFICATION OF THE MEASURES AS ''NEW AID''

Existing aid or new aid

Arguments of the parties

100 If the Court upholds ESA's conclusion that the contested tax provisions constitute State aid within the meaning of Article 61(1) EEA, the applicants contend that the provisions qualify as "existing" aid under Article 1(b)(i) and/or Article 1(b)(v) of Part II of Protocol 3 to the SCA.

101 The applicants argue that the contested tax provisions did not constitute State aid when they were introduced, but became aid as a result of the evolution of EEA law and without being altered by Liechtenstein. Therefore, Article 1(b)(v) of Part II of Protocol 3 is applicable to the disputed provisions, either directly or by analogy. According to that Article, aid is deemed to be existing aid if it can be established that it did not constitute aid at the time it was put into effect, but subsequently became aid due to the evolution of the EEA and without having been altered by the EFTA State.

102 The applicants submit that prior to the introduction of the measures in 1997, with effect from 1998, the Commission had made its view known on numerous occasions, such as in the *Belgian Co-ordination Centres* case, that comparable measures relating to intra-group activities did not constitute State aid. The applicants contend that this view started to change in 1998, following the publication of the Council's Code of Conduct for business taxation and the subsequent Commission notice on the application of the State aid rules to measures relating to direct business taxation. However, the Commission did not publicly assert that the Belgian co-ordination centres scheme might constitute State aid before June 2002, when its decision to open a formal investigation on that matter was published in the Official Journal.

103 Reassur and Swisscom submit that, following the 1998 policy change, the Commission reconsidered its position on the Belgian co-ordination centres scheme. However, having regard to its change of interpretation and enforcement of the State aid rules with regard to business taxation, the Commission found that the scheme in question qualified as "existing aid" pursuant to Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the Application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1). It did so because it could be shown that it was not aid at the time of entry into force, but was classified as aid at a later stage as a result of developments in the common market. Reassur and Swisscom submit that this approach has subsequently been accepted by the ECJ and followed by the General Court and that the Commission has also followed it ever since its decision to reconsider its position on the Belgian co-ordination centres schemes.

104 Furthermore, Reassur specifically argues that no substantial amendment to the taxation of its business took place prior to the date the EEA Agreement came into force. In that regard, Reassur indicates that it has been engaged in insuring risks of companies belonging to the Schindler group in Liechtenstein since 1989, initially in the legal form of an *Anstalt* (institute) and later as an *Aktiengesellschaft* (joint stock company). Reassur maintains that, originally, in its form as an institute, it was subject to capital tax at a rate of 0.1%. When the contested tax provisions were introduced, the tax rates applicable to institutes were extended to captive insurance companies. Consequently, the taxation of Schindler's insurance captive has remained unchanged.

105 Based on this, Reassur argues that the rules on taxation of captive insurance already existed before the EEA Agreement came into force in Liechtenstein. Therefore, and as these rules have not been substantially amended ever since, they should be qualified as "existing aid" in accordance with Article 1(b)(i) of Part II of Protocol 3 to the SCA. Reassur submits that amendments to "existing aid" do not per se qualify as "alterations of existing aid" rendering it "new aid". Only substantial changes affecting the

"core" of the advantage can have this effect. Moreover, changes which appear prima facie to be significant are not sufficient for a scheme to qualify as "new aid". Nor does a mere change in the legal form of the eligible beneficiaries, such as the change in Reassur's case from an institute to a company, result in a different conclusion.

106 ESA submits that the contested tax provisions were introduced in December 1997, after the entry into force of the EEA Agreement in Liechtenstein. Hence, the measures must be classified as new aid, in accordance with Article 1(c) of Part II of Protocol 3.

107 In relation to the argument advanced by the applicants, namely, that the contested tax provisions only became State aid as a result of the "evolution of the common market", ESA, supported by the Commission, submits that this concept must be understood as a change in the economic and legal framework of the sector concerned by the measure in question, and that it does not cover the situation where the Commission alters its appraisal.

108 ESA, supported by the Commission, further contends that the references made by the applicants to the practice of the Commission are irrelevant for the purposes of determining whether a measure should be classified as new or existing aid. This turns on the interpretation of Article 61(1) EEA, or, mutatis mutandis, Article 107(1) TFEU, neither of which is subject to the discretion of ESA or the Commission.

109 ESA also specifically contests the relevance of the Commission Decision on the *Hungarian Tax Scheme*, referred to by the applicants, for the purposes of the present case. That decision only deals with a particular pre-accession context, whereas the measures in Liechtenstein were introduced well after the EEA Agreement had entered into force.

110 Reassur argues that the measures must be regarded as existing aid on the basis that Schindler's insurance captive is said to have been active and subject to favourable tax treatment since 1989. In this regard, ESA submits that contentions that a different entity

may have had tax concessions before the enactment of a new aid scheme are incapable of turning the new aid scheme into existing aid. In that regard, ESA argues that the classification of the measure as new or existing aid must be made at the level of the measure itself and not at the level of possible individual beneficiaries under the scheme.

Findings of the Court

111 Whether the contested tax provisions constituted "existing aid" not subject to recovery, depends upon the interpretation of the provisions of Protocol 3 to the SCA, which governs the procedure and the powers of ESA in the field of State aid. The Protocol corresponds to Article 108 TFEU and Council Regulation No 659/1999. Part II of Protocol 3 essentially replicates the Regulation.

112 The purpose of Protocol 3 is to enable ESA to examine and keep under constant review aid granted by the States or through State resources. The Protocol makes provision for separate procedures of investigation, depending on whether the aid concerned is existing or new aid.

113 With respect to existing aid, Article 1(1) of Part I of Protocol 3 gives ESA the power to keep under constant review the aid systems existing in the EEA States, in cooperation with these States. In the context of that review, it is ESA's task to propose to the EEA States any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

114 Paragraph 2 of the same Article provides that if ESA finds, after having given notice to the parties concerned to submit their comments, that aid is not compatible with the EEA Agreement, or that such aid is being misused, it shall decide that the EEA State concerned must abolish or alter such aid within a period of time to be determined by ESA (see, for comparison, Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 23). As far as existing aid is concerned, the initiative, therefore, lies with ESA.

115 As for new aid, Article 1(3) of Part I of Protocol 3 provides that ESA is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. ESA then proceeds to an initial examination of the planned aid. If, at the end of that examination, it considers that any such plan is not compatible with the EEA Agreement, it must initiate the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3.

116 In such a case, the final sentence of Article 1(3) of Part I of Protocol 3 prohibits the EEA State concerned from putting the proposed measures into effect until the procedure has resulted in a final decision. New aid is therefore subject to preventive control by ESA, and in principle may not be granted until ESA has declared it compatible with the EEA Agreement (see for comparison Case C-47/91 *Italy* v *Commission*, cited above, paragraph 24).

117 The notion of "existing aid" is defined in Article 1(b)(i) of Part II of Protocol 3 as "all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement".

118 The determination whether a measure constitutes aid and, having regard to the different regimes governing recovery, whether aid is new or existing cannot depend upon a subjective assessment by ESA. The mere fact that for an admittedly long period ESA does not open an investigation into a State measure cannot in itself confer on that measure the objective nature of existing aid, that is, if indeed it constitutes aid (see, for comparison, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraphs 45 to 47). Any uncertainty which may have existed in that regard may at most be regarded as having given rise to a legitimate expectation on the part of the recipients so as to prevent recovery of the aid granted in the past (see, to that effect, *Fesil and Finnfjord and Others*, paragraph 148, and *Government of Gibraltar* v *Commission*, paragraph 129, both cited above).

119 Accordingly, the question whether a State measure qualifies as existing aid or as new aid must be resolved without reference to the time which has elapsed since the measure was introduced and independently of any previous administrative practice of ESA.

120 In the case at hand, the contested provisions were introduced into the Tax Act in 1997, with effect from 1 January 1998. Therefore, they were enacted after Liechtenstein's accession to the EEA Agreement. Consequently, the measures cannot be regarded as "existing aid" within the meaning of Article 1(b)(i) of Part II of Protocol 3.

121 The applicants refer to the Commission's practice regarding the taxation of intra-group activities in the *Belgian Co-ordination Centres* cases and the judgment of the General Court in Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06 *Ireland and Others* v *Commission* [2007] ECR II-172. However, the factual and legal situation in those cases differs considerably from the one in the present case. Therefore, those rulings cannot serve as precedents for classifying the contested tax provisions in the present dispute as existing aid.

122 Moreover, contrary to the argument advanced by Reassur, it is irrelevant whether the group to which Reassur belongs (Schindler) has operated an insurance captive which has received favourable tax treatment in Liechtenstein since 1989. Whether a measure constitutes new or existing aid must be made by reference to the provisions providing for the aid and not at the level of the beneficiaries (compare Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 28). However, there is nothing in the case-file to suggest that the introduction of the special tax measures for captive insurance undertakings was a non-substantial alteration of a pre-existing tax scheme for captive insurance activity, or, for that matter, that any previous aid scheme for captive insurance activity existed. Apart from its claim that Schindler's captive insurance institute was subject to the same tax treatment, Reassur submitted no information concerning the legal basis, nature or functioning of the alleged

pre-existing tax scheme. Therefore, it must be held that the aid measure was introduced in 1997.

123 It follows that the pleas of the applicants asserting that the contested tax provisions constitute "existing aid" within the meaning of Protocol 3 must be rejected.

VII THE THIRD MAIN PLEA, ALLEGING VIOLATION OF GENERAL PRINCIPLES OF EEA LAW

Legitimate expectations

Arguments of the parties

124 The applicants claim that by ordering the recovery of the alleged aid from 6 November 2001 ESA has violated the principle of legitimate expectations. The applicants specifically contest ESA's view that their legitimate expectations ceased to exist with the Commission's decision to open a formal State aid investigation regarding the scheme for captive insurance companies in the Åland Islands case.

125 In that regard, the applicants argue that the assessment of business taxation in EU State aid law has been subject to a high degree of uncertainty and that ESA is, in fact, according a much lower standard of protection for legitimate expectations in relation to economic operators under the EEA Agreement than applied by the Commission under EU law. The applicants contend that the decision to open the formal investigation only provides for a preliminary assessment and never expresses a final opinion on the State aid measures under assessment. Consequently, in cases where it assessed intra-group tax schemes, the Commission never ordered the recovery of unlawful State aid from the day of the opening of the formal investigation, and certainly not in cases where the opening decision concerned an unrelated third-party case.

126 The Principality of Liechtenstein submits that in all cases concerning intra-group tax schemes, the period for which legitimate expectations are protected extends to the date of the

final decision. Reassur asserts that although the Commission has considered legitimate expectations to cease on the day of the opening decision in individual State aid cases, this has always concerned the opening of the formal investigation procedure concerning a specific measure, and not a parallel case regarding a similar aid measure. The Principality of Liechtenstein and Reassur also argue that the Åland Islands case differs substantially from the present case and, as a result, does not affect the legitimate expectations of the applicants. In that regard, the applicants submit that the contested tax measures in those two cases were different, in that the Åland Islands scheme was regionally specific and a captive insurance company had to be initially owned by a foreign entity in order to benefit from the Finnish scheme.

127 Further, the applicants contend that since the full text of the Commission's decision was only available in Finnish, it is difficult to see how captive insurance companies in Liechtenstein could have been adequately informed about their potential repayment obligations.

128 ESA submits that, according to ECJ case-law, the right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which an institution of the European Union, by giving that person precise assurances, has led him to entertain well-founded expectations. Such assurances, in whatever form they are given, constitute precise, unconditional and consistent information.

129 ESA argues that information containing such assurances is rare in the field of State aid. In principle, undertakings to which aid has been granted may not entertain legitimate expectations, unless that aid has been granted in accordance with the notification procedure laid down in Article 1(3) of Part I of Protocol 3.

130 In ESA's view, in exceptional cases, an undertaking may rely on the principle of protection of legitimate expectations, despite no specific assurance being given. That applies where an undertaking can be sufficiently certain, as a result of ESA's or, arguably, the

Commission's, behaviour or actions, that the tax exemption they benefited from did not constitute State aid within the meaning of Article 61(1) EEA.

131 However, ESA claims that this does not apply in the case at hand. When the EEA Agreement entered into force in Liechtenstein in 1995, the relevant *acquis communautaire* clearly indicated that exemption from any tax that would otherwise be applicable to an undertaking was likely to constitute State aid within the meaning of Article 61(1) EEA. ESA maintains, moreover, that this position was confirmed shortly afterwards by its decisions on tax measures in Finland and Norway, and that the issue of tax competition became highly relevant as a result of the publication of the Commission notice on State aid and business taxation in 1998.

132 ESA observes that it has given the applicants the benefit of doubt in relation to their legitimate expectations concerning the lawfulness of the contested tax provisions for the period from their enactment to 6 November 2001. At that time, however, when the Commission published its decision to open a formal investigation into tax measures applicable to captive insurance companies in Finland (the Åland Islands), at the latest, their expectations must have come to an end. That decision was taken as a part of a large-scale State aid investigation into business taxation schemes concerning fifteen tax exemption measures across twelve Member States.

133 According to ESA, a meaningful summary in English of the decision to open the formal investigation procedure into tax exemptions for captive insurance companies was published on 6 November 2001 in the Official Journal. That summary describes the measure "as a tax advantage when compared to the normal rate of corporation tax" applicable to "captive insurance companies, satisfying certain conditions". Those conditions required the captive insurance company to be located in the Åland Islands, be owned by a foreign proprietor, and limit its activities to providing insurance services to its owner.

134 In ESA's view, the publication of 6 November 2001 was sufficiently clear and precise to warn any prudent operator that the Liechtenstein captive insurance scheme was likely to be characterised as operating aid. Since such aid would only be declared compatible in exceptional circumstances and could not normally be exempted from the general prohibition on State aid, its recovery from the beneficiaries would be a likely outcome. ESA submits further that the differences, highlighted by the applicants, between the Åland Islands scheme and the contested tax provisions in the case at hand are not relevant.

135 The Commission supports ESA's view. It contends that following the adoption of a decision to initiate the procedure under Article 108(2) TFEU, there is, at the very latest, a significant element of doubt as to the legality of a measure. Accordingly, no prudent operator could entertain a legitimate expectation that a measure such as the one at issue did not constitute State aid.

136 According to the Kingdom of Norway, any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectations. Consequently, it follows from settled Commission practice, implicitly upheld by the ECJ, that beneficiaries under a scheme in one Member State may derive legitimate expectations capable of preventing recovery of aid granted, from, inter alia, a Commission decision finding that a similar scheme in another Member State does not constitute State aid.

137 Norway accepts, in principle, ESA's premise that Commission decisions may negate legitimate expectations concerning the compatibility with State aid rules of similar measures in other Member States, in the same vein as such decisions may give rise to legitimate expectations in the first place. However, Norway takes the view that this likewise dictates that there must be a certain symmetry between the circumstances which gave rise to the justified hopes and those which are capable of disrupting them.

138 Norway observes that in cases where the Commission has acknowledged that the beneficiaries had legitimate expectations based on its practice, it does not consider the decision to open a formal investigation to negate the legitimate expectations held by the beneficiaries. Accordingly, it follows, a fortiori, that a decision to open a formal investigation procedure relating to another Member State, in particular concerning national rules, may not negate legitimate expectations based on previous practice. Hence, legitimate expectations in the case at hand may at the earliest have been countered by the Commission's final decision in the Åland Islands case on 5 December 2002.

139 Further, the Kingdom of Norway argues that Commission practice also indicates that the relevant date on which legitimate expectations may be regarded as exhausted under such circumstances is the date of adoption of the final decision where the scheme to which the beneficiaries belong is classified as unlawful aid. In that respect, Norway refers to the numerous cases opened by the Commission on the same date as the Åland Islands case on 11 July 2001. In all those cases the Commission found that the relevant beneficiaries entertained legitimate expectations until the adoption of the final decision in the specific case and, thus, barring any recovery of State aid granted before that date.

140 Accordingly, Norway submits that, having regard to the Commission's practice and to ensure an uniform approach to the issue across the European Economic Area, it appears that the legitimate expectations of the beneficiaries prevented recovery of State aid granted before ESA's final decision on 24 March 2010. All the same, Norway does not exclude the possibility that legitimate expectations may have been negated at an earlier date, such as when the beneficiaries of State aid were informed that previous practice has been revised. Therefore, in the alternative, it argues that legitimate expectations prevented recovery of State aid granted before 24 September 2008, when ESA decided to open a formal investigation of the contested tax provisions.

Findings of the Court

141 The abolition, by means of recovery, of State aid which has been unlawfully granted is the logical consequence of a finding that it is unlawful. The aim of obliging the State concerned to abolish aid found by ESA to be incompatible with the EEA agreement is to restore the previous situation (see, to that effect, *Fesil and Finnfjord and Others*, cited above, paragraph 152, and, for comparison, Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 99, and the case-law cited therein).

142 By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (compare Cases C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22, and C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 75). It also follows from that function of repayment of aid that, as a general rule, ESA will not, save in exceptional circumstances, exceed the bounds of its discretion, as recognised by case-law, if it asks the EEA State in question to recover the sums granted by way of unlawful aid, since it is only restoring the previous situation (see, to that effect, *Fesil and Finnfjord and Others*, paragraph 170, and the case-law cited).

143 As regards the right of Reassur and Swisscom to rely on the principle of legitimate expectations and the compatibility of ESA's decision with that principle, it has repeatedly been held by the Union Courts that this principle extends to any economic operator in a situation where a European Union institution has caused him to entertain expectations which are justified. However, a person may not plead infringement of that principle unless he has been given precise assurances by that institution. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a measure likely to affect his interests, he cannot plead that principle if the measure is adopted (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147, and the case-law cited, Cases C-519/07 P *Commission* v *Koninklijke FrieslandCampina* [2009] ECR I-8495, paragraph 84,

and C-67/09 P *Nuova Agricast and Cofra* v *Commission*, not yet reported, paragraph 71).

144 In the contested Decision, recovery of the aid was ordered from 6 November 2001 onwards, that is, from the date when the Commission's decision to open the formal investigation regarding the tax measures in favour of captive insurance companies in the Åland Islands was published in the Official Journal.

145 The applicants specifically submit, in their written and oral pleadings, that, as a result of the Commission's practice in regard to special taxation schemes for intra-group measures, they were led to entertain legitimate expectations as concerns the advantages conferred by the Liechtenstein tax provisions. However, the case-file contains no indication to the effect that Reassur or Swisscom were given any assurances that the tax provisions on captive insurance companies were in accordance with EEA rules on State aid.

146 In response to the applicants' submissions, it must be observed, first of all, that the Commission decisions referred to by the applicants, as forming the basis for legitimate expectations, all concern derogations from the general principle, set out in Article 61(1) EEA and Article 107(1) TFEU, that State aid is incompatible with the internal market of the European Economic Area.

147 Given that such exceptions to the general principle are to be interpreted strictly (see Case C-277/00 *Germany* v *Commission*, cited above, paragraph 20, and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 79), no prudent and alert economic operator could have inferred from those decisions that the scheme for the taxation of captive insurance companies in Liechtenstein would be regarded as compatible with the State aid rules of the EEA Agreement or, for that matter, have reached the broader conclusion that the scheme need not be notified to ESA. Even if there may have been some uncertainty regarding the exact scope of the State aid rules prior to the publication of the Commission's notice on State aid and business taxation in 1998, the Court recalls that

it was already established at the time of the introduction of the contested measures that the alleged fiscal or social nature of a measure does not suffice to shield it from the application of the State aid rules (see Case *Italy* v *Commission*, cited above, paragraph 13).

148 Further, in light of the mandatory nature of the review of State aid by ESA under Article 63 EEA and Protocol 3, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful, unless it has been granted in compliance with the procedure laid down in that Article. Moreover, a diligent economic operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to ESA, so that it is unlawful under Article 1(3) of Part I of Protocol 3, the recipient of the aid cannot as a rule have a legitimate expectation that its grant is lawful (see, for comparison, in relation to Article 88(3) EC, now Article 108(3) TFEU, Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraphs 44 and 45, and the case-law cited, and *Unicredito Italiano*, cited above, paragraph 104).

149 In the case at hand, the publication on 6 November 2001 of the Commission decision of 11 July 2001 to open the formal procedure as regards the tax measures in favour of captive insurance companies in the Åland Islands informed potential beneficiaries of similar measures in the EEA States of the risk attached to any aid in breach of Article 61(1) EEA, in that recovery might be ordered. After publication, there was clearly a situation of uncertainty as to the legality of the measure. Beneficiaries were made aware of the possibility that the aid might be considered to infringe Article 61(1) EEA and recovery could be sought. In that case, they should either not accept the advantages or make provision for possible subsequent financial consequences in accordance with general accounting practices (see Joined Cases *Fesil and Finnfjord and Others,* paragraph 172).

150 It follows that the plea based on infringement of the principle of protection of legitimate expectations must be rejected.

Legal certainty, homogeneity and equal treatment

Arguments of the parties

151 The Principality of Liechtenstein and Swisscom submit that the recovery of the alleged aid from 6 November 2001 would be in violation of the principles of legal certainty, homogeneity and equal treatment. They contend that the fundamental requirement of legal certainty is to ensure that situations and legal relationships governed by EEA law remain foreseeable. That principle requires that every EEA measure having legal effects must be clear and precise, and must be brought to the notice of the persons concerned in such a way that they can ascertain exactly the time at which the measure comes into being. In the applicants' view, the requirement must be observed all the more strictly in the case of a measure liable to have financial consequences so that those concerned may know precisely the extent of the obligations which it imposes on them.

152 Further, it is argued that in order for an aid to be subject to recovery, the alleged national aid measures have to be identified in advance with a degree of clarity and specificity which is necessary to sufficiently inform private operators. It is the position of the Principality of Liechtenstein and Swisscom that a decision to open a formal State aid investigation in a third country can never serve to identify an alleged national aid measure with sufficient clarity and specificity.

153 On the issue of homogeneity and equal treatment, the Principality of Liechtenstein and Swisscom argue that the Decision breaches these principles because the Commission has not ordered recovery of aid in similar cases. They submit that when the Commission has assessed national intra-group schemes, it has always done so individually and never linked them to decisions initiating formal proceedings in other cases. They contend, moreover, that this approach has been confirmed by the Union Courts.

154 ESA, with the support of the Commission, submits that this part of the plea is unfounded. In the only similar decision dealing with captive insurance (the Åland Islands case) the issue of recovery of the incompatible aid was clearly contemplated. Although no recovery was ordered, since no aid had actually been granted after the scheme entered into force, there can be no doubt that the Commission would have ordered recovery if the aid had been granted. Furthermore, ESA contests the substance of the approach described by the applicants as having been confirmed by the Union Courts. In that regard, ESA notes that in the cases referred to, the Commission had indeed made certain explicit statements to the applicants concerned. However, that is not the case in these proceedings.

155 The Commission submits that its practice in other cases cannot affect the legality of the contested Decision. As already indicated, the elimination of unlawful State aid by means of its recovery is the logical consequence of a finding that it is unlawful. The Commission further contends that ESA enjoys no discretion in ordering recovery.

Findings of the Court

156 Legal certainty is a fundamental principle of EEA law, which may be invoked not only by individuals and economic operators, but also by EEA States (see Joined Cases *Fesil and Finnfjord and Others*, cited above, paragraph 163). In particular, this principle requires rules involving negative consequences for individuals to be clear and precise and their application predictable for those subject to them (see, for comparison, Case C-226/08 *Stadt Papenburg* [2010] ECR I-0000, paragraph 45, and, to the same effect, Cases C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 79).

157 With respect to the argument of the applicants that ESA infringed the principle of legal certainty by adopting the date of publication of the Commission's decision in the Åland Islands case as the date from which the aid was recoverable, the Court finds that the

same considerations must apply to the position of the applicants in this regard as was noted in paragraphs 147-149 above concerning the existence of legitimate expectations.

158 Accordingly, neither the EEA State in question nor the recipients involved can plead the principle of legal certainty in these circumstances in order to prevent recovery of the aid, since the risk of recovery was foreseeable.

159 The Principality of Liechtenstein and Swisscom also claim that ESA infringed the principles of equal treatment and homogeneity to the extent that it did not take account of the practice of the Commission in its application of the principle of legitimate expectations. In that regard, the Principality of Liechtenstein submits that the Commission has not ordered the recovery of aid in similar cases.

160 The Court notes that it is clear from settled case-law of the Union Courts that compliance with the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, paragraph 72, and the case-law cited therein).

161 The applicants in the present case have not established that the situation pertaining to the aid schemes at issue is comparable to the situations pertaining in the decisions to which they make reference, where the Commission considered that recovery of aid should not be ordered.

162 In the decisions referred to by the applicants concerning, inter alia, aid schemes, the non-recovery of aid was justified by circumstances capable of giving rise to a legitimate expectation that the schemes were lawful. That was taken into account by the Commission, with particular consideration given to the fact that declarations of the absence of aid had been expressly made in other decisions concerning measures analogous to the schemes examined in the decisions in question, and, consequently, that justified non-recovery of the aid.

163 In the case at hand, the situation is different as the applicants could not entertain any legitimate expectations based on decisions by the Commission or ESA concerning measures analogous to the Liechtenstein tax provisions on captive insurance companies. On the contrary, it must be observed that, at the very latest, from 6 November 2001 onwards, when the Commission's decision to open the formal investigation regarding the tax measures in favour of captive insurance companies in the Åland Islands was published in the Official Journal, there was clearly a situation of uncertainty as to the legality of the contested Liechtenstein tax provisions, as was noted in paragraph 149 above.

164 It follows that, with regard to the issue of recovery, the circumstances at issue in the present case are not comparable to those at issue in the decisions referred to by the applicants where the Commission did not order recovery of aid. Consequently, the applicants have not demonstrated any infringement of the principle of equal treatment.

165 In light of the foregoing, the applicants' plea based on infringement of the principle of legal certainty, equal treatment and homogeneity must be rejected.

VIII THE FOURTH MAIN PLEA, ALLEGING A FAILURE TO STATE ADEQUATE REASONS UNDER ARTICLE 16 OF THE SCA

Insufficient statement of reasons

Arguments of the parties

166 Finally, the applicants argue that the Decision lacks reasoning on a number of points. The Principality of Liechtenstein and Swisscom argue that the reasoning provided is inadequate on several issues, such as the extent to which there is a commercial market for all captive insurance companies, the selectivity of the contested tax provisions and on the recovery of the alleged State aid. In addition, Reassur argues specifically that the Decision lacks reasoning in support of ESA's assessment that

the contested tax provisions were not justified by the nature and general scheme of the Liechtenstein tax system.

167 ESA submits that the Decision contains adequate reasons within the meaning of Article 16 of the SCA. According to settled case-law, the statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review.

168 Furthermore, ESA argues that the requirements to be satisfied in that regard depend on the circumstances of each case. In particular, what matters is the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measures, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. In ESA's view, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

169 In that regard, ESA maintains that it is important to recall that it was assessing a general scheme and, thus, examined the scheme as a whole. To be considered an aid under Article 61 EEA, a measure must fulfil four criteria. First, it must accord an advantage to the beneficiaries. Second, the aid must be granted by the State or through State resources. Third, it must affect competition and trade between EEA States. Finally, the measure must be specific or selective in that it favours certain undertakings or the production of certain goods. ESA submits that all of these criteria are accounted for in its reasoning.

170 The Commission supports ESA's view, adding that the contested Decision discloses in a clear and unequivocal fashion the

reasoning followed by ESA in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. It further submits that the statement of reasons is fully in line with the case-law on the requirements relating to reasoning.

Findings of the Court

171 In relation to the argument that ESA failed to comply with its obligation under Article 16 of the SCA, the Court notes that the statement of reasons required by the Article must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review (see Cases E-2/94 *Scottish Salmon Growers* v *ESA* [1994/1995] EFTA Ct. Rep., 59, paragraph 25; *Norway* v *ESA*, cited above, paragraph 68; Joined Cases *Fesil and Finnfjord and Others*, cited above, paragraph 96).

172 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. In particular, what matters is the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 16 of the SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (compare Case *Commission* v *Ireland and Others*, cited above, paragraph 77, and the case-law cited).

173 In particular, ESA is not obliged to adopt a position on all the arguments relied on by the parties concerned. Instead, it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see, for comparison, Case T-198/01 *Technische Glaswerke Ilmenau* v

Commission [2004] ECR I-I2717, paragraphs 59 and 60, and the case-law cited).

174 In the light of those principles, it is appropriate to consider whether the contested decision contains a sufficient statement of reasons as regards the various aspects raised.

175 First, it must be examined whether the Decision provides sufficient reasons for ESA's conclusions on the extent to which there is a commercial market for all captive insurance companies. Second, the reasoning as regards the selectivity of the contested tax provisions and, third, the reasoning why ESA did not consider the tax provisions justified by the nature and the general scheme of Liechtenstein's tax system will be examined. Finally, the Court will examine the reasoning on the issue of recovery.

The first part of the fourth plea: reasons given for the extent to which there is a commercial market for all captive insurance companies

176 In chapter 1.2.1. of its Decision, ESA stated that providing insurance is a service, which in principle is an economic activity and that captive insurance companies offer insurance services for a premium on a given market. The fact that the clients of captive insurance companies are restricted only to undertakings of the same group to which they belong did not affect this conclusion.

177 ESA then went on to address the arguments submitted in the administrative procedure that captive insurance companies only provide in-house services and are not active on the commercial market. ESA observed that competition in the insurance market is impacted upon by the availability of alternatives to taking out traditional insurance products. ESA also described its view that there were three main alternatives; self-insurance, captive insurance and alternative risk transfer products. In each case, the primary reason for using a substitute for insurance was the potential for reducing costs.

178 In ESA's view, a captive insurance company enabled investment income on the premiums to be retained within the group and potentially allowed for more flexibility in the pattern of premiums.

Although these were not necessarily perfect substitutes for insurance, they posed a degree of competitive restraint on the insurance market. Captive insurance companies were, therefore, considered to be an alternative to the third party insurance available in the market.

179 ESA then stated its disagreement with the contention that the services provided by captives are not alternatives to commercial insurance, affirming its conclusion that captive insurance was a service substitutable for commercial insurance. Even if certain risks could not be insured in the market or could not be insured at what the potential purchaser considered to be a reasonable price, it did not follow that captive insurance companies exclusively provide insurance services that are not available from commercial insurers.

180 Furthermore, ESA rejected the argument that allegedly prohibitive pricing by commercial insurers meant that captive insurance companies were not engaged in economic activities in competition with those insurers. Undertakings belonging to a group had the choice to insure their obligatory and voluntary risks with a commercial insurer or create a captive insurance company. If they chose the latter option, they were, in ESA's view, foreclosing the insurance market as far as their risks were concerned.

181 ESA then concluded that competition with other insurance providers existed, therefore, at the point of formation of the captive and at each point when the client of the captive decided on the extent to which it wished to retain risk within the captive or purchase insurance or reinsurance on the open market.

Findings of the Court

182 The contested Decision contains, in the light of the requirements described in paragraphs 171-173 above, reasoning that is sufficient to support ESA's findings on the extent of the commercial market for all captive insurance companies. Consequently, this part of the applicants' plea must be rejected.

The second part of the fourth plea: the selectivity of the contested tax provisions

183 In relation to ESA's statement of reasons with regard to the selectivity of the contested tax provisions, it must be observed that, in its Decision, ESA set out, first, thereby adopting the approach of the Commission in the Åland Islands case, that captive insurance companies benefitting from lower taxation than would normally apply to companies gained a selective advantage because this favoured only captive insurance companies as the prime beneficiaries of the tax relief. ESA asserted that this was, in itself, sufficient to make the measures selective.

184 ESA concluded that the undertakings in the same legal and factual position in this case were those which paid the full income, capital and coupon taxes in Liechtenstein. In comparison to those undertakings, captive insurance companies in Liechtenstein received a selective advantage. ESA went on to note that, unlike many recent complex fiscal aid cases, the objectives of the measures in question were straightforward. While the standard rate taxes generate revenue for the state, the reduction and exemption applicable to captive insurance companies were, on the Liechtenstein authorities' own admission, designed to attract a mobile and tax sensitive service sector to the Principality of Liechtenstein. In turn, captive insurance companies were created and normally located apart from the rest of their group, at least in part, in order to benefit from lower taxation on profits generated by a formalised form of self-insurance.

Findings of the Court

185 In the light of the foregoing, the Court concludes that the contested Decision contains a sufficient statement of reasons for the finding that a selective advantage was conferred on captive insurance companies in Liechtenstein. Therefore, this part of the plea must be rejected.

The third part of the fourth plea: why the contested tax provisions were not considered justified by the nature or general scheme of the Liechtenstein tax system

186 In its Decision, ESA asserted that the Liechtenstein authorities had stated that the tax concession established by the contested provisions was introduced in order to establish and develop the captive insurance sector as a new field of economic activity in Liechtenstein. In ESA's view, that clearly constituted an economic and political purpose not inherent to a revenue tax. Therefore, the measure did not fall within the logic of the tax system.

187 ESA acknowledged that valid reasons might exist to differentiate between captive insurance companies and other insurance companies, for example, in so far as internal market regulatory requirements to ensure retention of a certain level of capital are concerned. However, it failed to see how such requirements could justify a difference in taxation of capital.

Findings of the Court

188 Although the statement of reasons by ESA in the contested Decision is brief on this issue, it does contain the crucial arguments setting out why ESA does not accept that the tax measures in question are justified by the nature and the general scheme of the Liechtenstein tax system, and, in particular, makes appropriate reference to the case-law of the Court and of the Union Courts. In the light of this fact, ESA's statement of reasons must be considered as sufficient on this point.

The fourth part of the fourth plea: the reasoning on recovery

189 In its Decision, ESA set out, first of all, that the fundamental legal principles of legitimate expectations and legal certainty could be invoked by beneficiaries of aid to challenge an order for recovery of unlawfully granted State aid. In its view, however, the principles only applied in exceptional circumstances. An undertaking could normally not entertain legitimate expectations that aid was lawful, unless it had been granted in accordance with the procedure for notifying the aid to ESA or the Commission.

190 In its Decision, ESA accepted that there might have been some degree of confusion regarding taxation of intra-group activities following the Commission's decisions on the Belgian co-ordination centres scheme and as a result of a number of other similar schemes operating in EU Member States. ESA also accepted that there were certain similarities between the case of the coordination centres and that of the taxation of captive insurance companies. Therefore, captive insurance companies in Liechtenstein might have been entitled to expect that taxation of the intra-group insurance service which they provided could be taxed differently without this involving State aid.

191 ESA went on to state its view that, in the wider EEA context, it was possible that beneficiaries in the EFTA States might have relied on the actions of the Commission or on the case-law of the ECJ. It also acknowledged the approach taken by the Commission in the early 2000s on the issue of legitimate expectations when disallowing similar tax measures.

192 Therefore, in view of the Commission's practice and to ensure a uniform approach to this issue across the EEA, ESA concluded that beneficiaries might have had legitimate expectations that the tax measures did not constitute State aid when they were introduced.

193 In its Decision, ESA stated, however, that such expectations could not have continued indefinitely, given the developments in the State aid assessment of tax measures during that period. The Commission opened the formal investigation procedure into tax exemptions in favour of captive insurance companies in Åland, Finland, on 11 July 2001, communicating its doubts that the measures could be regarded as compatible with the State aid rules. That investigation resulted from the notification of the measure by the Finnish authorities on 15 July 1998, some 7 months after implementation of the Liechtenstein measures.

194 Given that the Liechtenstein tax measures were substantively the same as those proposed for captive insurance companies based in the Åland Islands, ESA considered that all beneficiaries should

have been aware by the date of publication of the decision to open a formal investigation into the similar tax measures in Åland on 6 November 2001, at the latest, that the measures were likely to involve incompatible State aid. In ESA's view, the clear doubts expressed by the Commission concerning the compatibility of specific tax exemptions in favour of captive insurance companies negated any legitimate expectations captive insurance companies benefitting from the Liechtenstein tax exemptions may have entertained.

Findings of the Court

195 ESA's statement of reasons on the issue of recovery enables the applicants and the Court to ascertain the reasons why ESA reached the conclusion that the recovery of the aid in question was not barred by the principle of legitimate expectations. Consequently, the applicants' argument concerning an alleged failure to state reasons with regard to the recovery of the aid must be dismissed.

196 On all those grounds, the plea that the contested Decision is not sufficiently reasoned must be dismissed as unfounded.

197 As the Court has found all the pleas of law advanced by the applicants unfounded, the applications must be dismissed.

IX COSTS

198 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. ESA has asked for the applicants to be ordered to pay the costs. Since the latter have been unsuccessful in their applications, they must be ordered to do so. The costs incurred by the Kingdom of Norway and the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications.**

2. **Orders the applicants to pay the costs of the proceedings.**

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Delivered in open court in Luxembourg on 10 May 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President

REPORT FOR THE HEARING

in joined Cases E-4/10, E-6/10, E-7/10

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the cases between

The Principality of Liechtenstein (Case E-4/10),

Reassur Aktiengesellschaft (Case E-6/10),

Swisscom RE Aktiengesellschaft (Case E-7/10)

and

EFTA Surveillance Authority

seeking the annulment of the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010. In the alternative, the applicants seek the annulment of Articles 3 and 4 of the decision to the extent that they order the recovery of the aid referred to in Article 1 of the decision.

I INTRODUCTION

1. In this case, it is at dispute as to whether the special provisions of Liechtenstein law regarding the taxation of captive insurance companies constitute State aid under Article 61(1) of the EEA Agreement. It is also disputed to what extent legitimate expectations entertained by the beneficiaries of the alleged State aid prevent the recovery of State aid granted prior to the final decision of the EFTA Surveillance Authority ("ESA") on 24 March 2010. Further, the applicants argue that ESA's Decision infringes the principles of legal certainty, homogeneity and equal treatment, and that it lacks adequate reasoning.

II FACTS AND PROCEDURE

2. According to the provisions of the Liechtenstein Tax Act (Gesetz über die Landes- und Gemeindesteuern, "the Tax Act"), insurance companies, which engage exclusively in captive insurance under the Insurance Supervision Act (Gesetz vom 6. Dezember

1995 betreffend die Aufsicht über Versicherungsunternehmen (Versicherungsaufsichtsgesetz, "the Insurance Supervision Act"), are subject to special tax provisions.

3. The tax provisions applicable to these insurance companies ("captive insurance companies") were introduced in the Tax Act in 1997 with effect from 1 January 1998 onwards. According to these provisions, captive insurance companies pay a capital tax of 1 ‰ on their own capital. For capital exceeding 50 million CHF the tax rate is reduced to ¾ ‰ and for capital in excess of 100 million to ½ ‰. In addition to paying lower amounts of capital tax, captive insurance companies are also exempt from the duty to pay coupon tax.

4. In general the notion of captive insurance company encompasses a subsidiary company formed to insure or reinsure the risks of its parent or associated group companies (see, for comparison the definition in Article 2(b) of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC, as well as Directives 98/78/EC and 2002/83/EC)[1].

5. By letter, dated 14 March 2007, ESA sent a request for information to the Liechtenstein authorities, regarding various tax derogations for certain forms of companies under the Tax Act. The Liechtenstein authorities replied by letter, dated 30 May 2007.

6. Following an exchange of correspondence and meetings between ESA and Liechtenstein representatives, ESA decided, on 24 September 2008, to initiate the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") with regard to the taxation of captive insurance companies according to the

[1] OJ 2005 L 323/1, point 2 of Annex IX to the EEA Agreement.

Tax Act. This decision was published in the Official Journal of the European Union and the EEA Supplement.[2] In the decision, ESA called on interested parties to submit comments and subsequently received such comments from twelve interested parties. By a letter dated 22 July 2009 ESA forwarded these comments to the Liechtenstein authorities, which responded by a letter dated 2 October 2009.

7. By Decision No 97/10/COL of 24 March 2010 ("the Decision"), ESA found that an aid scheme granting a favourable tax regime in favour of captive insurance companies constituted unlawful State aid which is incompatible with the EEA Agreement ("EEA"). ESA also ordered the Principality of Liechtenstein to repeal the measures and to recover the aid already granted.

8. In its Decision, ESA declared that the special provisions regarding captive insurance companies implemented by Articles 82a and 88d(3) of the Tax Act constitute State aid within the meaning of Article 61(1) EEA, see Article 1 of the Decision. According to Article 2(1) of the Decision, moreover, Liechtenstein shall repeal these measures so as they do not apply from the fiscal year 2010 (inclusive) onwards and inform ESA of the legislative steps which will be taken to abolish the measures by 30 June 2010, see Article 2(2) of the Decision. Under Article 3(1) of the Decision, Liechtenstein authorities shall take all necessary measures to recover from the beneficiaries the aid unlawfully made available to them from 6 November 2001 to 31 December 2009.

9. According to Article 3(2) of the Decision, the amount of aid to be recovered is to be calculated by assessing the income, capital and coupon tax liabilities that captive insurance companies would have had if specific rules had not applied to them, less the amounts of capital tax already paid by the beneficiaries. Further, the sums to be recovered shall bear interest from the date on which the tax reductions were applied to the given undertaking

[2] Decision of the EFTA Surveillance Authority No 620/08/COL of 24 September 2008 was published in OJ 2009 C 72, p. 50 and EEA Supplement No 17 of 26 March 2009, p. 1. That publication was annulled and replaced in OJ 2009 C 75, p. 45.

until their actual recovery (Article 3(3) of the Decision). Pursuant to Article 3(4) the interest shall be calculated on a compound basis in accordance with Article 9 in ESA's Decision No 789/08/COL of 17 December 2008, on the implementing provisions referred to under Article 27 of Part II of Protocol 3.

10. Article 4 of the Decision states that the Principality of Liechtenstein shall effect the recovery of the aid referred to in Article 1 without delay, and in any event by 30 September 2010. This recovery shall be effected in accordance with the procedures of national law, provided they allow the immediate and effective execution of the decision.

11. Case E-4/10 was registered at the Court on 21 May 2010, pursuant to an application by the Principality of Liechtenstein, bringing an action under Article 36(1) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") for full or partial annulment of the contested Decision.

12. Case E-6/10 Reassur Aktiengesellschaft ("Reassur") was registered at the Court on 16 June 2010 and Case E-7/10 Swisscom Re Aktiengesellschaft ("Swisscom") on 9 July 2010, both limited liability companies registered in Vaduz, Liechtenstein, pursuant to applications under Article 36(2) SCA. Reassur is the captive insurance company of the Schindler Group and has been exclusively engaged in insuring certain types of risks of companies belonging to that group. Swisscom is a wholly-owned subsidiary of Swisscom AG and has carried out captive insurance operations in Liechtenstein exclusively for the Swisscom Group since its establishment in 1997.

13. By a decision of 16 July 2010, pursuant to Article 39 of the Rules of Procedure, and, having received observations from the parties, the Court joined the three cases for the purposes of the written and oral procedures.

14. ESA submitted Statements of Defence in Cases E-4/10, E-6/10 and E-7/10, which were registered at the Court on 13 September

2010. The Reply from Reassur in Case E-6/10 was registered at the Court on 9 November 2010. The Reply from the Principality of Liechtenstein in Case E-4/10 was registered at the Court on 11 November 2010 and the Reply from Swisscom in Case E-7/10 was registered at the Court on 12 November 2010. A Rejoinder from ESA was registered at the Court on 17 December 2010.

III FORM OF ORDER SOUGHT BY THE PARTIES

15. The Principality of Liechtenstein and Swisscom jointly claim that the Court should:

(1) annul the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act;

(2) in the alternative, declare void Articles 3 and 4 of the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010, to the extent that they order the recovery of the aid referred to in Article 1 of that Decision; and

(3) order the EFTA Surveillance Authority to pay the costs of the proceedings

16. The claim of Reassur is identical to points (1) and (3) of the claims filed by the other applicants, cited above. Furthermore, Reassur requests that the Court:

2. in the alternative: annuls Article 3 [of the EFTA Surveillance Authority's] decision No 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act at least insofar as it orders recovery for the period prior to 31 March 2009.

17. ESA contends that the Court should:

(1) dismiss the Applications as unfounded;

(2) order the Applicants to pay the costs.

18. The Commission submits that the applications should be dismissed and the costs of the proceedings be borne by the applicants. The Kingdom of Norway supports the position of

the applicants in relation to the recovery period of the alleged State aid, submitting that their legitimate expectations prevented recovery of State aid granted until ESA's final Decision on 24 March 2010, or, alternatively, 24 September 2008, the date on which ESA decided to open its formal investigation procedure.

IV LEGAL BACKGROUND

EEA law

19. Article 61 EEA reads as follows:

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Contracting Parties, be incompatible with the functioning of this Agreement.

...

20. Article 62 EEA reads as follows:

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;

(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

21. Article 5 SCA reads as follows:

1. The EFTA Surveillance Authority shall, in accordance with the provisions of this Agreement and the provisions of the EEA Agreement and in order to ensure the proper functioning of the EEA Agreement:

(a) ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement and this Agreement;

(b) ensure the application of the rules of the EEA Agreement on competition;

(c) monitor the application of the EEA Agreement by the other Contracting Parties to that Agreement.

2. To this end, the EFTA Surveillance Authority shall:

(a) take decisions and other measures in cases provided for in this Agreement and in the EEA Agreement;

(b) formulate recommendations, deliver opinions and issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the present Agreement expressly so provides or if the EFTA Surveillance Authority considers it necessary;

(c) carry out cooperation, exchange of information and consultations with the Commission of the European Communities as provided for in this Agreement and the EEA Agreement;

(d) carry out the functions which, through the application of Protocol 1 to the EEA Agreement, follow from the acts referred to in the Annexes to that Agreement, as specified in Protocol 1 to the present Agreement.

22. Article 16 SCA reads as follows:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

23. Article 24 SCA reads as follows:

The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give

effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States.

In application of Article 5(2)(b), the EFTA Surveillance Authority shall, in particular, upon the entry into force of this Agreement, adopt acts corresponding to those listed in Annex I.

24. The first and second paragraphs of Article 36 SCA read as follows:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

...

25. Article 1 in Part I of Protocol 3 to SCA, as amended by the Agreements amending Protocol 3 thereto, signed in Brussels on 21 March 1994, 6 March 1998 and 10 December 2001 ("Protocol 3") reads as follows:

1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide

that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.

...

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

26. Article 1 in Part II of Protocol 3 reads as follows:

For the purpose of this Chapter:

(a) 'aid' shall mean any measure fulfilling all the criteria laid down in Article 61(1) of the EEA Agreement;

(b) 'existing aid' shall mean:

(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the EFTA Surveillance Authority or, by common accord as laid down in Part I, Article 1 (2) subparagraph 3, by the EFTA States;

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Chapter or prior to this Chapter but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15 of this Chapter;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not

constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) 'new aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) 'aid scheme' shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

...

(f) 'unlawful aid' shall mean new aid put into effect in contravention of Article 1(3) in Part I;

...

27. Article 14(1) in Part II of Protocol 3 reads as follows:

Recovery of aid

1. Where negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The EFTA Surveillance Authority shall not require recovery of the aid if this would be contrary to a general principle of EEA law.

...

28. Article 17 in Part II of Protocol 3 reads as follows:

Cooperation pursuant to Article 1(1) in Part I

1. The EFTA Surveillance Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) in Part I.

2. Where the EFTA Surveillance Authority considers that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give the EFTA State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the EFTA Surveillance Authority may extend this period.

29. Article 18 in Part II of Protocol 3 reads as follows:

Proposal for appropriate measures

Where the EFTA Surveillance Authority, in the light of the information submitted by the EFTA State pursuant to Article 17 of this Chapter, concludes that the existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme,

or

(b) introduction of procedural requirements,

or

(c) abolition of the aid scheme.

30. Article 19 in Part II of Protocol 3 reads as follows:

Legal consequences of a proposal for appropriate measures

1. Where the EFTA State concerned accepts the proposed measures and informs the EFTA Surveillance Authority thereof, the EFTA Surveillance Authority shall record that finding and inform the EFTA

State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures.

2. Where the EFTA State concerned does not accept the proposed measures and the EFTA Surveillance Authority, having taken into account the arguments of the EFTA State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4) of this Chapter. Articles 6, 7 and 9 of this Chapter shall apply mutatis mutandis.

The EU Reinsurance Directive

31. In Article 2(b) of Directive 2005/68/EC, of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, ("the EU Reinsurance Directive") a "captive reinsurance undertaking" is defined as "a reinsurance undertaking owned either by a financial undertaking other than an insurance or a reinsurance undertaking or a group of insurance or reinsurance undertakings to which Directive 98/78/EC applies, or by a non-financial undertaking, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which the captive reinsurance undertaking is a member."

National law[3]

32. The Liechtenstein Tax Act[4] comprises two kinds of taxes relating to legal entities (*Die Gesellschaftssteuern*), a business income tax (*Ertragssteuer*) and a capital tax (*Kapitalsteuer*). The legal entities liable to pay income in Liechtenstein are listed in Article

[3] Translations of national provisions are unofficial and are based on translations contained in the documents of the case.

[4] The case before the Court is based on the Liechtenstein Tax Act of 1961, as amended with effect of 1 January 1998 ("the Tax Act"). In the meantime it has been replaced by the Liechtenstein Tax Act of 23 September 2010, entering into force 1 January 2011.

73, points a) to f), of the Act, among which foreign companies operating a branch in Liechtenstein are made subject to the income and capital tax under Article 73(e).

33. According to Article 77(1) of the Tax Act, business income tax is assessed on the entire annual net income, which is defined as the entire revenues minus company expenditures, including write-offs and other provisions. Under Article 79(2) of the Tax Act, the income tax rate depends on the ratio of net income to taxable capital and lies between the minimum level of 7.5% and maximum level of 15%. This tax rate may be increased by certain percentage points, depending on the relation between dividends and taxable capital, as described in Article 79(3) of the Tax Act.

34. Under Article 76(1) the basis for the capital tax is the paid-up capital stock, joint stock, share capital, or initial capital as well as the reserves of the company constituting company equity. According to Article 76(1), the capital tax is assessed at the end of the company's business year, with the tax rate of 2‰, according to Article 79(1) of the Tax Act.

35. Section 5 of the Tax Act contains provisions regarding the so-called coupon tax, which is levied on coupons under Article 88a(1) of the Tax Act. The subjects of the tax are further defined in Article 88b to Article 88e. Pursuant to Article 88a(1) coupon tax is levied on the coupons of securities (or documents equal to securities) issued by "a national". According to Article 88a(2) "national" covers any person who has the place of residence, domicile or statutory seat in Liechtenstein, and undertakings that are registered in the public register of Liechtenstein.

36. The coupon tax applies to companies the capital of which is divided into shares, see Article 88d(1)(a). According to Article 88h(1) it is levied at the rate of 4% on any distribution of dividends or profit shares (including distributions in the form of shares), see points (a) and (b) of Article 88h(1).

37. According to Article 88i(1) of the Tax Act the person liable to pay for a coupon is liable to pay the tax. Article 88k(1) of the Tax Act

stipulates that the sum paid out for a coupon must be reduced by the amount of the tax levied on such coupons.

38. By virtue of the Act of 18 December 1997 on the amendment of the Liechtenstein Tax Act, the Liechtenstein authorities introduced special tax rules applicable to captive insurance companies. Articles 82a and 88d(3) were introduced into the Tax Act with effect from 1998 onward. These Articles are among the special tax provisions (*Besondere Gesellschaftssteuern*) listed in Section 4.B of the Tax Act for certain company forms such as insurance companies, holding companies, domiciliary companies and investment undertakings.

39. Article 82a of the Tax Act refers to captive insurance companies. Pursuant to point 1 of that Article, "*[i]nsurance companies under the terms of the definition of the Insurance Supervision Act, which exclusively engage in captive insurance (Eigenversicherung), pay a capital tax of 1‰ on the company's own capital, cf. Article 82a(1) of the Tax Act. For the capital exceeding 50 million the tax rate is reduced to ¾ ‰ and for the capital in excess of 100 million to ½ ‰.*"

40. Liechtenstein tax law considers captive insurance not to constitute commercial activity. Accordingly, it is not subject to business income tax. However, under Article 82a(2) of the Tax Act, insurance companies which engage in captive insurance and ordinary insurance activities for third parties, according to sections 73 to 81 of the Tax Act, are nevertheless liable to regular capital and income tax for that part of their activities which concerns third party insurance. By virtue of Article 88d(3) of the Tax Act, shares or parts of captive insurance companies are exempted from payment of the coupon tax.

V WRITTEN PROCEDURE BEFORE THE COURT

41. Written arguments have been received from the parties:

- the Principality of Liechtenstein, represented by Dr. Andrea Entner-Koch, Director, EEA Coordination Unit, acting as Agent;
- Reassur, represented by Dr Ulrich Soltész and Philipp Melcher, Rechtsanwälte;

– Swisscom, represented by Dr Michael Sánchez Rydelski, Rechtsanwalt;

– ESA, represented by Xavier Lewis, Director, and Bjørnar Alterskjær, Deputy Director, Department of Legal & Executive Affairs, acting as Agents.

42. 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 Kingdom of Norway, represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs) and Mads Tollefsen, Adviser, Ministry of Foreign Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Richard Lyal, legal advisor, and Carlos Urraca Caviedes, member of its Legal Service, acting as Agents.

VI SUMMARY OF THE PLEAS IN LAW AND ARGUMENTS

43. The Principality of Liechtenstein, Reassur and Swisscom, the applicants in cases E-4/10, E-6/10 and E-7/10, firstly plead that ESA did not apply Article 61(1) EEA correctly against captive insurance companies. They jointly argue that the contested tax provisions do not distort competition by favouring certain undertakings or the protection of certain goods under Article 61(1) EEA. In this regard, it is submitted that captive insurance companies do not qualify as "undertakings" within the meaning of Article 61(1) and that the contested tax measures do not confer a selective advantage. The applicants further argue that the tax measures have no effect on intra-EEA trade and that they do not distort competition under Article 61(1).

44. Secondly, the applicants claim that ESA erred in classifying its measures, in its order for recovery of the aid, as "existing aid" within the meaning of Article 1 (b) (v) Part II of Protocol 3 SCA. They contend that by its Decision, ESA has violated the principles of legitimate expectations, legal certainty and of homogeneity and equal treatment, all general principles of EEA law. It is also

contended that the Decision lacks reasoning and does therefore not accord with Article 16 SCA.

Assessment under Article 61(1) EEA

The definition of "undertaking" within the meaning of Article 61(1)

45. In response to the argument that ESA applied Article 61(1) EEA erroneously, the applicants claim that the contested provisions of the Liechtenstein Tax Act do not constitute State aid within the meaning of Article 61(1) EEA.

46. Firstly, the applicants contest ESA's finding that captive insurance companies qualify as undertakings within the meaning of Article 61(1). In this regard, it is submitted that captive insurance companies are not active on the free insurance market, as they only provide in-house services. The applicants argue that these companies insure risks for which coverage on the free insurance market does not always exist. Swisscom submits that two risk groups it is covering cannot be insured on the open market. To this effect, Swisscom submitted to ESA during the formal investigation a confirmation from Swiss Re. Secondly, only operations which are available on the free and open insurance market can be classified as an economic activity which confers the status of undertaking in the sense of Article 61(1) EEA, captive insurance companies do not qualify as "undertakings" within the meaning of that Article.[5] In this regard the Principality of Liechtenstein submits that an entity which does not exercise its activity on a market in competition with other market players cannot be considered to carry out an economic activity within the meaning of the competition rules. The applicants also contend

[5] As to the definition of "undertaking" and "economic activity" the Principality of Liechtenstein and Swisscom refer to Case C-35/96 *Commission* v *Italian Republic* [1998] ECR I-3851 and to Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289.

that ESA's findings in this regard are not compatible with its own decision practice.[6]

47. ESA, supported by the Commission, contests that argument. In the view of ESA and the Commission the concept of "undertaking" has been defined in the case-law of the Court of Justice of the European Union ("the ECJ") as "every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed."[7] ESA submits that in this respect, "economic activity" is the definitive factor in determining whether an entity is an "undertaking". Further, there is settled case-law, that "economic activity" means "any activity consisting in offering goods and services on a given market",[8] which thus presupposes the assumption of risk for the purpose of remuneration.[9]

48. Concerning the submissions that the insurance services in question are only provided in-house, ESA, with the support of the Commission, contends that there is an important distinction to be made between activities that are truly carried in-house, *i.e.* by a department within company and services which are provided by a separate legal person, even if it is wholly owned by the recipient of the services. In the latter case, the companies concerned have established a formal structure in which risk is transferred to a company within the group, which provides insurance services for arm's length remuneration as an alternative to purchasing insurance on the open market. It is maintained that this is in part done in order to ensure that the economic activity concerned and the profit are treated differently for tax purposes and that

6 Reference is made to EFTA Surveillance Authority Decision No 349/07/COL of 18 July 2007 concerning the Norwegian Road Administration Møre and Romsdal District Office, OJ 2007 C 310/07, p. 30.

7 The EFTA Surveillance Authority and the Commission refer to Case C-41/90 *Klaus Höfner* [1991] ECR I-1979, paragraph 21. The Commission also refers to C-35/96 *Commission* v *Italy,* cited above, paragraph 36.

8 Reference is made to C-35/96 *Commission* v *Italy*, cited above, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others* [2000] ECR I-6451, *Cassa di Risparmio di Firenze and Others*, cited above, paragraph 108.

9 The EFTA Surveillance Authority refers to Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others* [2000] ECR I-6451, and C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

the captive insurance companies can be located in a different tax jurisdiction and taxed at a lower rate.

49. ESA and the Commission also dispute the argument that some of the services covered by the Liechtenstein tax measures are not available on the open insurance market. ESA maintains that no evidence has been adduced by the applicants to establish this point, while the Commission argues that the argument put forward by the applicants is not a valid objection, as it does not demonstrate that there is not a business activity and flow of services from one distinct legal person to another.

Selectivity of measures

50. In case the Court concurs with ESA's opinion that captive insurance companies, or part of their activities, have to be classified as "undertakings", the applicants argue that contested tax provisions are not selective measures which favour certain undertakings or the provision of certain goods within the meaning of Article 61(1) EEA. Accordingly, ESA's findings on this issue are erroneous.

51. The Principality of Liechtenstein argues that in order to constitute State aid, a measure must be selective by favouring certain companies.[10] Liechtenstein and Swisscom further submit that tax measures are only selective if they unreasonably discriminate between situations that are legally and factually comparable in light of objectives set by the tax system.[11] In Swisscom's view, the fact that undertakings are treated differently does not automatically imply that they are favoured for the purposes of the State aid assessment.[12] In order to determine whether a measure is selective, it has to be examined, within the context of the particular national system, whether it constitutes an advantage

[10] The Principality of Liechtenstein refers to Case E-6/98 *Norway* v *ESA* [1999] EFTA Ct. Rep., p. 76, paragraph 33; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* v *ESA* [2005] EFTA Ct. Rep., p. 121, paragraph 77.

[11] Swisscom refers to Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

[12] Swisscom refers to Case C-53/00 *Ferring* [2001] ECR I-9067.

for certain undertakings in comparison with others that are in a comparable legal and factual situation.[13]

52. The applicants claim that since captive insurance companies are in a legally and factually different situation from insurance companies that are unrelated, the Liechtenstein tax scheme is not selective. They also maintain that for these purposes, captive insurance companies have to be distinguished from other companies on account of their intra-group relations.

53. In this regard, the Principality of Liechtenstein argues that the reasoning in the Commission's decisions in the *Groepsrentebox*[14] and *Hungarian Tax Scheme* cases[15] applies equally to the taxation of captive insurance companies under the Tax Act, as there is no reason why intra-group insurance transactions should be taxed differently from intra-group financial credit or debt transactions. Additionally, Reassur submits there is a justifiable difference between captive insurances and other undertakings, with regard to the types of risks covered, choice of risks and entities to be insured and the difference in regulatory framework. Such arguments were also submitted by Swisscom.

54. The applicants also submit that the Liechtenstein tax measures apply generally to all undertakings, since any legal entity, irrespective of the sector of activity or size of the operation, can qualify for the tax measures through ownership of a captive insurance company through which it insures its own risks. In this regard, the Liechtenstein tax measures are not materially selective, as they merely reflect the reality of group structures. According to the applicants, the Commission has recognized the

[13] Swisscom refers to Cases C-409/00 *Spain* v *Commission* [2003] ECR I-1487; C-88/03 *Portugal* v *Commission* [2006] ECR I-7115; C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747.

[14] The Principality of Liechtenstein refers to Commission Decision of 8 July 2009 on the Groepsrentebox Scheme which the Netherlands is planning to implement No C4/2007 (ex N 465/2006), OJ 2009 L 288, p. 26.

[15] The Principality of Liechtenstein refers to Commission Decision of 28 October 2009 on state aid No C10/2007 (ex NN13/2007) implemented by Hungary for tax deductions for intra-group interest.

"economic reality of group structures" as not being sufficient to declare a tax measure selective.[16] It is also argued that the contested tax provisions differ from the aid scheme implemented by Finland for captive insurance companies in the Åland Islands case,[17] as they are not regionally specific; do not require foreign ownership or a minimum level of economic strength nor capitalisation.

55. ESA contends that the measures in question are indeed materially selective. In ESA's view, the undertakings are in the same legal and factual situation as those who pay the full income, capital and coupon taxes in Liechtenstein. In comparison, captive insurance companies in Liechtenstein receive a selective advantage. The Commission supports this position and further submits that when analysing the selective character of a tax measure, only the differences that are relevant to the objective of the tax system in question can be taken into account. Therefore, the elements cited as justifiable elements of difference by the applicants are irrelevant.

56. The Commission also takes the view that the fact that tax measures apply to all captive insurance companies regardless of size, or that the requirements for captive insurance companies are horizontal in nature, is equally irrelevant. What matters is that other types of companies, which are in the same factual and legal situation, cannot benefit from the same tax advantages.

57. ESA also disputes the assertion made by the applicants that creating a captive insurance company is an option that is open to any undertaking.[18] ESA notes that while it was an essential part of the Commission's reasoning in its decisions concerning

[16] Reference is made to Commission Decision of 22 September 2004, State aid N 354/2004 – Ireland Company Holding Regime, OJ 2005 C 131, p. 10.

[17] Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies (2002/937/EC), OJ 2002 L 329, p. 22.

[18] See also Commission Decision of 28 October 2009 on state aid implemented by Hungary for tax deductions for intra-group interest, cited above.

the *Groepsrentebox*[19] and *Hungarian State aid* cases,[20] cited by the applicants, that the action which leads to the beneficial tax treatment is open to any undertaking, the option of forming a captive insurance company is not.

Measures are justified by the nature and general scheme of the Liechtenstein tax system

58. In the event that the Court takes the view that the contested tax provisions at stake are to be classified as materially selective, the applicants submit that they are not State aid since they are justified by the nature and general scheme of the Liechtenstein tax system.

59. On this point, the applicants maintain that captive insurance companies are essentially an in-house self-insurance vehicle which covers its liabilities with its own resources. Further, insurance coverage with a company's own financial reserve has constantly been treated differently for tax purposes in Liechtenstein and other countries. It is argued that the contested tax provisions merely follow that principle.

60. As regards justification, the applicants also contend that the specific nature of captive insurances is recognised by the secondary EEA and EU law. It is argued that the EU Reinsurance Directive[21] acknowledges that captive insurance undertakings do not cover risks deriving from the external direct insurance or reinsurance business of an insurance or reinsurance undertaking belonging to the group.[22] Furthermore, Swisscom submits that the Solvency II Directive provides for specific adaptations for captive insurance companies on minimum capital requirements.[23] Swisscom argues that it can be derived from the definition and

19 Commission Decision of 8 July 2009 on the Groepsrentebox Scheme, cited above.
20 Commission Decision of 28 October 2009 on state aid implemented by Hungary for tax deductions for intra-group interest, cited above.
21 Directive 2005/68/EC of the European Parliament and of the Council on reinsurance, cited above.
22 Reference is made to recital 11 to the EU Reinsurance Directive, cited above.
23 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), OJ 2009 L 335, p.1.

treatment of these Directives that captive insurance can be distinguished from the traditional type of insurance business.

61. ESA and the Commission disagree with the applicants on these submissions. The Commission notes that according to case-law, a measure which creates an exception to the application of the general tax system with regard to State aid may be justified by the nature and overall structure of the tax system if the state in question can show that a measure results directly from the basic or guiding principles of its tax system.[24] As a justification based on these grounds constitutes an exception to the principle that State aid is prohibited, the Commission submits it must be interpreted strictly.[25]

62. ESA further contends that the exemption for captive insurance companies is not in line with the logic of the tax system as presented by the Liechtenstein authorities. In ESA's view, the logic of the tax system is to gain revenue from capital and income generated by an economic activity. ESA maintains that the disputed tax measures are not specific taxes for *insurance* companies or similar companies where a differentation of taxes depending on the purpose of the tax could have been envisaged.

63. ESA, supported by the Commission, also contests the arguments of the applicants regarding how a company covering risk out of its own resources is treated differently for tax purposes and the apparent differences between the contested tax measures and the measures at stake in the Åland Islands case.[26] In ESA's opinion, these factors, as well as the different treatment of captives under EU and EEA law, do not explain why the exemption for captive insurance companies is consistent with the logic of the tax system. The Commission further claims that it has already been stated by the Liechtenstein authorities that the tax measures in

[24] Reference is made to Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 81.

[25] Reference is made to Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and others* v *Commission* [2002] ECR II-1275, paragraph 250.

[26] Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies, cited above.

question were introduced in order to establish and develop the captive insurance sectors as a new field of economic activity in Liechtenstein. It follows that the advantageous treatment granted to captive insurance companies does not result from the basic or guiding principles of the Liechtenstein tax system, but from the desire of the Liechtenstein authorties to foster this activity in their territory.

Effect on EEA-trade and distortion of competition

64. Should the Court find that the contested tax provisions bestowed selective advantages on insurance companies, the applicants contend that nevertheless the provisions do not have an effect on EEA-trade or lead to a distortion of competition. It is submitted that since captive insurance companies do not compete for market share on the open insurance market, nor deal with risks that are normally insurable on the open market, as commercial insurers do, they have no effect on EEA-trade. Hence, there can be no distortion of competition within the meaning of Article 61(1) EEA. Moreover, Reassur submits that ESA has failed to assess the contested tax provisions in this regard, thereby violating its obligation to fully investigate the facts, committing a manifest error of law and not meeting its obligation arising from Article 16 SCA to state the reasons upon which its Decision is based.

65. ESA argues that it is irrelevant that all captive insurance companies may have an effect on EEA-trade or distort competition. It is submitted that the measures under assessment in ESA's Decision constitute an aid scheme, which, according to the settled case law of the Courts of the European Union, is subject to different form of examination than individual grants of aid. In the case of an aid scheme, it has been established that the Commission may confine itself to examining the general

characteristics of the scheme in question without being required to examine each particular case to which it applies.[27]

66. The Commission supports ESA's view, adding that a finding that the scheme in question does not constitute State aid may only be made, if all possible cases of its application raise no State aid concerns. It is submitted that such a finding would only be possible in the present case if no captive insurance operation could distort competition and have an effect on trade.

67. In response to this argument, the applicants contend that, given the limited number of beneficiaries of the alleged aid scheme, ESA was not, as a matter of principle, entitled to rely on this less strict standard of assessment. They moreover argue that the coverage of risks which are not insurable on the market constitutes an essential characteristic of captive insurance and thus of the alleged aid scheme in question. Therefore, even if ESA could have relied on this less strict standard of assessment, it would have been obliged to further investigate into and determine the extent to which captives cover otherwise uninsurable risks and, consequently, the extent to which the contested tax measures do not amount to State aid within the meaning of Article 61(1) EEA. In the absence of the required further investigation and determination, ESA, according to the applicants, has not even met the less strict standard of assessment relied upon.

Existing aid or new aid and recovery

68. In the event that the Court upholds ESA's conclusion that the contested tax provisions do constitute State aid within the meaning of Article 61(1) EEA, the applicants contend that the

[27] The EFTA Surveillance Authority refers to Cases 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18; C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 48 and C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24, and the judgment of the General Court in Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 102. The Commission refers to Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava,* cited above, paragraph 143 and 199.

provisions qualify as "existing" aid under Article 1(b)(i) and/or Article 1(b)(v) of Part II of Protocol 3 SCA.

69. In this respect, the applicants jointly argue that the contested tax provisions did not constitute State aid when they were introduced, but became aid as a result of the evolution of EEA law and without being altered by Liechtenstein. Therefore, Article 1(b)(v) in Part II of Protocol 3 SCA, is applicable to the disputed provisions, either directly or by analogy. According to that Article, aid is deemed to be an existing aid if it can be established that it did not constitute an aid at the time it was put into effect, but subsequently became aid due to the evolution of the EEA and without having been altered by the EFTA State.

70. The applicants submit that prior to the introduction of the measures in 1998, the Commission had made its view known on numerous occasions that comparable measures relating to intra-group activities did not constitute State aid, such as in the *Belgian Co-ordination Centres* case.[28] The applicants contend that this view started to change in 1998, following the publication of the Council's Code of Conduct for business taxation[29] and the subsequent Commission notice on the application of the State aid rules to measures relating to direct business taxation.[30] However, the Commission did not publicly assert that Belgian co-ordination centres might constitute State aid before June 2002, when its decision to open a formal investigation on that matter was published in the Official Journal.[31]

71. Reassur and Swisscom submit that following the change adopted by the Commission in its interpretation and enforcement of the State aid rules with regard to business taxation, the Commission reconsidered its position on the Belgian co-ordination centres

[28] The applicants refer to the view expressed by the Commission in its answers to the European Parliament (Written Question No 1735/90 (OJ 1991 C 63, p. 37) on the Belgian scheme for co-ordination centres and similar schemes in other Member States.

[29] Resolution on Code of Conduct for business taxation, Annex I to the Council Conclusions of the Ecofin Council meeting on 1 December 1997 concerning taxation policy, OJ 1998 C 2, p. 1.

[30] OJ 1998 C 384, p. 3.

[31] OJ 2002 C 147, p. 2.

scheme. However, in light of the change to its interpretation, the Commission held that the scheme in question qualified as "existing aid" pursuant to Article 1(b)(v) of the Procedural Regulation,[32] because it could be shown that it was not aid at the time of entry into force, but was classed as aid at a later stage as a result of developments in the common market.[33] Reassur and Swisscom submit that this approach has subsequently been accepted by the ECJ and followed by the General Court,[34] and that the Commission has also followed this approach ever since its Decision to reconsider its position on the Belgian co-ordination schemes.[35]

72. Furthermore, Reassur specifically argues that there has not been any substantial amendment to the taxation of its business that took place prior to the date the EEA Agreement came into force. In this regard, Reassur submits that it has been engaged in insuring risks of companies belonging to the Schindler group in Liechtenstein since 1989, initially with the legal form of an *Anstalt* (institute) but later that of an *Aktiengesellschaft* (joint stock company). Reassur maintains that it was originally subject to capital tax in the amount of 1‰ in its form as an institute. When the contested tax provisions were introduced, the tax rates applicable to institutes were extended to captive insurance companies. Consequently, the taxation of Schindler's insurance captive has remained unchanged.

73. Based on this, Reassur argues that the rules on taxation of captive insurance were in force before the EEA Agreement came into force in Liechtenstein. Therefore, and since these rules have not been substantially amended ever since, they should be

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32 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 089, p.1.

33 Reference is made to Commission Decision of 17 February 2003 No 2003/755/EC on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ 2003 L 282, p. 25, paragraph 70.

34 Reference is made to Joined Cases C-182, and C-217/03 *Belgium and Forum 187 ASBL* v *Commission* [2006] ECR I-5479 and Joined Cases T-50, 56, 60, 62, 69/06 *Ireland et al* v *Commission* [2007] ECR II-172*, paragraphs 55 et seq.

35 Reference is made to Commission Decision of 28 October 2009 on state aid implemented by Hungary for tax deductions for intra-group interest.

qualified as "existing aid" according to Article 1(b)(i) Part II of Protocol 3 SCA. Reassur submits that amendments to "existing aid" do not *per se* qualify as "alterations of existing aid" which render it "new aid". In this respect, only substantial changes affecting the "core" of the advantage can have this effect.[36] Moreover, changes, which appear *prima facie* to be significant, are not sufficient for a scheme to qualify as "new aid".[37] A mere change in legal form of the eligible beneficiaries, such as Reassur's from institutes to companies, does not lead to a different conclusion.[38]

74. ESA submits that the contested tax provisions were introduced in December 1997, after the EEA Agreement entered into force. Hence, it is to be classified as new aid, according to Article 1(c), see Article 1(b) of Part II of Protocol 3 SCA.

75. On the argument put forth by the applicants, that the contested tax provisions have only become State aid as a result of the "evolution of the common market", ESA submits that this concept is to be understood as a change in the economic and legal framework of the sector concerned by the measure in question, and that it does not cover the situation where the Commission alters its appraisal.[39] The Commission supports this argument.

76. As regards the references the applicants have made to the practice of the Commission, ESA and the Commission submit that they are not relevant regarding the question whether a measure is to be classified as new or existing. In the view of ESA and the

[36] Reassur refers to Case C-44/93 *Namur-Les Assurances du Credit SA* v *Office National du Ducroire and Belgium* [1994] ECR I-3829, paragraph 22 et seq; Opinion of Advocate General Lenz, point 77; Opinion of Advocate General Fenelly in Joined Cases 15/98 and C-105/99 *Italy et al* v *Commission* [2000] ECR I-8855, points 62 et seq., and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111, and Commission Decision No E 3/2005 of 24 April 2007, Financing of public service broadcasters in Germany, OJ 2007 C 185, p. 1.

[37] Reassur refers to Commission Decision C(2009)9963 final of 15 December 2009, State aid No E 2/2005 and N 642/2009 – the Netherlands Existing and special project aid to housing corporations, paragraph 25 et seq.

[38] Reassur refers to Commission Decision 2000/C 146/03, Aid No E 10/2000, State guarantees for public credit institutions in Germany, OJ 2002 C 146, p. 6.

[39] The Commission refers to Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission*, paragraph 71, cited above.

Commission, this is a question of the interpretation of Article 61(1) EEA (or, *mutatis mutandis,* Article 107(1) of the Treaty on the Functioning of the European Union, "TFEU"), which is neither subject to ESA's nor the Commission's discretion.[40]

77. ESA also specifically submits that the Commission Decision regarding the *Hungarian Tax Scheme*, referred to by the applicants, is irrelevant, as it only deals with a particular pre-accession context, whereas the measures in Liechtenstein were introduced well after the entry into force of the EEA Agreement. Regarding the arguments submitted by Reassur that the measures must be regarded as existing aid, as Schindler's insurance captive has apparently been active and subject to favourable tax treatment since 1989, ESA is of the opinion that the allegation that a different individual company may have had tax concessions before the enactment of a new aid scheme does not turn the new aid scheme into existing aid.[41] In this regard, ESA contends that the classification of whether a measure is new or existing must be made at the level of the measure and not the level of possible individual beneficiaries under the scheme.

Legitimate expectations

78. The applicants claim that by ordering the recovery of the alleged aid as from 6 November 2001, ESA has violated the principle of legitimate expectations. The applicants specifically contest ESA's view that their legitimate expectations ceased to exist with the Commission's Decision to open a formal State aid investigation regarding the scheme for captive insurance companies in the *Åland Islands* case.

79. In this regard, the applicants argue that the assessment of business taxation in EU State aid law has been subject to a high degree of uncertainty and that ESA is, in fact, according a

[40] The EFTA Surveillance Authority refers to Case C-295/97 *Piaggio* [1999] ECR I-3753, paragraphs 45 to 48, Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava et al* v *Commission* [2002] ECR II-4259, paragraphs 80 and 84, and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission,* cited above, paragraph 121.

[41] The EFTA Surveillance Authority refers to *Adria Wien*, cited above, paragraph 41.

much lower standard of protection of legitimate expectations for economic operators under the EEA Agreement than applied by the Commission. The applicants contend that the decision to open the formal investigation only provides for a preliminary assessment and never expresses a final opinion on the State aid measures under assessment. Consequently, the Commission has never ordered the recovery of unlawful State aid in cases where it assessed intra-group tax schemes from the day of the opening of the formal investigation, and certainly not, when the opening decision concerned a third unrelated case, as ESA has now done.

80. The Principality of Liechtenstein specifically submits that in all cases concerning intra-group tax scheme, the time for the protection of legitimate expectations included the period until the day of the final decision. Reassur submits that although the Commission has considered legitimate expectations to cease at the day of the opening decision in individual State aid cases, this has always concerned the opening of the formal investigation procedure concerning a specific measure, and not a parallel case regarding a similar aid measure. The applicants also argue that the Åland Islands case differs so substantially from the present case that it cannot affect the legitimate expectations of the applicants. In this regard, the applicants submit, *inter alia*, that the contested tax measures in these two cases were different, in that the Åland Islands scheme was regionally specific and that a captive insurance company had to be owned by a foreign owner initially in order to benefit from the Finnish scheme.

81. Further, the applicants contend that since the full text of the Commission's decision was available only in Finnish, it is difficult to see how captive insurance companies in Liechtenstein could have been adequately informed about their potential repayment obligations.

82. ESA submits that according to the case law of the ECJ, the right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which an institution of the European Union, by giving that person precise

assurances, has led him to entertain well-founded expectations. Such assurances, in whatever form they are given, constitute precise, unconditional and consistent information. [42]

83. ESA argues that information containing such assurances is rare in the field of State aids, and, in principle, undertakings to which aid has been granted may not entertain legitimate expectations, unless that aid has been granted in accordance with the notification procedure laid down in Article 1(3) in Part I of Protocol 3 to the SCA.[43]

84. In ESA's view, an undertaking may exceptionally rely on the principle of the protection of legitimate expectations, despite no specific assurance being given. This applies if any of the beneficiary applicants can reasonably be sufficiently certain, as a result of ESA's or, arguably, the Commission's, behaviour or actions, that the tax exemption they benefited from was not State aid within the meaning of Article 61(1) EEA.

85. However, ESA claims that this does not apply in the context of this particular case. In this respect, it is argued that when the EEA Agreement entered into force in Liechtenstein in 1995, the clear *acquis communautaire* was that exemption from tax that would otherwise be applicable to an undertaking was likely to constitute State aid within the meaning of Article 61(1) EEA. ESA, moreover, maintains that this position was confirmed shortly afterwards by ESA's decisions on tax measures in Finland and Norway, and that the issue of tax competition became highly relevant by the publication of the Commission's notice on State aid and business taxation in 1998.

86. ESA submits that it has given the applicants the benefit of doubt as regards their legitimate expectations on the lawfulness of the contested tax provisions during the period from which

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[42] The EFTA Surveillance Authority refers to Case C-537/08 P *Kahla Thüringen Porzellan GmbH,* judgment of 16 December 2010, not yet reported, paragraph 63, and the case law cited therein.

[43] The EFTA Surveillance Authority refers to Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14.

they were enacted until publication on 6 November 2001 of the Commission's decision to open a formal investigation into tax measures applicable to captive insurance companies in Finland (the Åland Islands). The decision in question was taken as a part of a large-scale State aid investigation into business taxation schemes concerning fifteen tax exemption measures across twelve Member States.

87. It is further submitted that the meaningful summary of the decision to open the formal investigation procedure into tax exemptions for captive insurance companies was published on 6 November 2001.[44] According to ESA, the summary describes the measure "as a tax advantage when compared to the normal rate of corporation tax" applicable to "captive insurance companies, satisfying certain conditions". The conditions required the captive insurance company to be located in the Åland Islands, be owned by a foreign proprietor, and limit its activities to providing insurance services to its owner.

88. In ESA's view, the publication of 6 November 2001 was sufficiently clear and precise to warn any prudent operator that the Liechtenstein captive insurance scheme was likely to be characterised as operating aid. Since such aid would only be declared compatible in exceptional circumstances and could not normally be exempted from the general prohibition of State aid, its recovery from the beneficiaries would be a likely outcome. ESA further submits that the differences between the Åland Islands scheme, as alleged by the applicants, and the contested tax provisions in the case at hand, are not relevant.

89. The Commission supports ESA's view. Following the adoption of a decision to initiate the procedure under Article 108(2) TFEU, there is at least a significant element of doubt as to the legality of a measure. Accordingly, no prudent operator could entertain a

[44] Reference is made to the Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, concerning measure C 55/2001 (ex NN 98/2000) – Åland Islands captive insurance, OJ 2001 L 309, p. 4.

legitimate expectation that a measure, such as the one at issue in the proceedings would not constitute State aid.

90. According to the Norwegian Government, any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectations.[45] It argues that it follows from settled Commission practice,[46] which has implicitly been upheld by the ECJ,[47] that beneficiaries under a scheme in one Member State may derive legitimate expectations capable of preventing recovery of aid granted, from, *inter alia*, a Commission decision finding that a similar scheme in another Member State does not constitute State aid.

91. The Norwegian Government accepts, in principle, ESA's premise that Commission decisions may negate legitimate expectations concerning the compatibility with State aid rules of similar measures in other Member States, in the same vein as such decisions may give rise to legitimate expectations in the first place. However, it takes the view that this point likewise dictates that there must be a certain symmetry between the circumstances which gave rise to the justified hopes and those which are capable of disrupting them.

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45 Reference is made to Case 265/85 *Van den Bergh and Jurgens* v *Commission* [1987] ECR 1155, paragraph 55.

46 Reference is made to Commission Decision No 2001/168/ECSC of 31 October 2000 on Spain´s corporation tax laws, OJ 2001 L 60, p. 57 paragraph 27; Commission Decision 2003/81/EC of 22 August on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya C 48/2001 (ex NN 43/2000), OJ 2003 L 31, p. 26; Commission Decision 2003/512/EC of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres, OJ 2003 L 177, p. 17; Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme C 49/2001 (ex NN 46/2000) – Coordination Centres – implemented by Luxembourg, OJ 2003 L 170, p. 20; Commission Decision 2003/438/EC of 16 October 2002 on the aid scheme C 50/2001 (ex NN 47/2000) – Finance companies – implemented by Luxembourg, OJ 2003 L 153, p. 40; Commission Decision 2003/883/EC of 11 December 2002 concerning State aid scheme C 46/2001 – Central corporate treasuries (Centrales de trésorerie) implemented by France, OJ 2003 L 330, p. 23; Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities, OJ 2003 L 180, p. 52; Commission Decision 2003/601/EC of 17 February 2003 on aid scheme C 54/2001 (ex NN55/2000) Ireland – Foreign Income, OJ 2003 L 204, p. 51.

47 Reference is made to Case C-519/07 *Commission* v *KFC* [2009] ECR I-8495.

92. It is submitted that in cases where the Commission has acknowledged that the beneficiaries have had legitimate expectations based on its practice, the Commission does not consider that the decision to open a formal investigation negates the legitimate expectations held by the beneficiaries.[48] In the view of the Government, it follows *a fortiori* that a decision to open a formal investigation procedure based in another Member State, particularly concerning national rules, may not negate legitimate expectations based on previous practice. Hence, legitimate expectations in the case at hand may at earliest have been interrupted by the Commission's final decision in the *Åland Islands* case, on 5 December 2002.

93. Further, the Government of Norway argues that Commission practice also indicates that the relevant date on which legitimate expectations may be deprived under such circumstances is the adoption of the final decision where the scheme to which the beneficiaries belong is classified as unlawful aid. In this respect, the Government refers to the numerous cases opened by the Commission on the same date as the *Åland Islands* case on 11 July 2001,[49] in all of which the Commission found that the relevant beneficiaries entertained legitimate expectations until the final decision in the concrete case, thus barring any recovery of State aid granted until this date.

94. Accordingly, the Government of Norway submits, that in view of the Commission's practice, and to ensure an uniform approach

[48] Reference is made to Commission Decision No 2001/168/ECSC of 31 October 2000 on Spain´s corporation tax laws, paragraph 27, cited above.

[49] Reference is made to Commission Decision 2003/81/EC of 22 August 2002 on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya; Commission Decision 2003/512/EC of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres; Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme C 49/2001 – Coordination Centres – implemented by Luxembourg; Commission Decision 2003/438/EC of 16 October 2002 on the aid scheme C 50/2001 – Finance Companies – implemented by Luxembourg; Commission Decision 2003/883/EC of 11 December 2002 concerning State aid scheme C 46/2011 Central corporate treasuries implemented by France; Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities; Commission Decision 2003/601/EC of 17 February 2003 on aid scheme C 54/2001 Ireland – Foreign Income, all cited above.

to the issue across the European Economic Area, it seems that the legitimate expectations of the benficiaries prevented recovery of State aid granted until ESA's final decision on 24 March 2010. Nevertheless, the Government does not exclude that legitimate expectations may be negated at an earlier point, such as when the beneficiaries of State aid have been informed that previous practice has been revised. In the alternative, it is therefore submitted that legitimate expectations prevented recovery of State aid granted until 24 September 2008, when ESA decided to open a formal investigation of the contested tax provisions. Finally, the Government of Norway points out that legitimate expectations might not only warrant the abstention of a recovery order, but also the need for a transitional period. In this respect, the Government submits that the Commission has in several cases considered and acknowledged the need for a reasonable transitional period on the basis of legitimate expectations.[50]

Legal certainty, homogeneity and equal treatment

95. The Principality of Liechtenstein and Swisscom also submit that the recovery of the alleged aid as from 6 November 2001 would be in violation of the principles of legal certainty, homogeneity and equal treatment.

96. In relation to legal certainty, the Principality of Liechtenstein and Swisscom contend that the fundamental requirement of legal certainty is to ensure that situations and legal relationships governed by EEA law remain foreseeable.[51] This principle requires that every EEA measure having legal effects must be clear and precise, and must be brought to the notice of the persons concerned in such a way that they can ascertain exactly the time at which the measure comes into being and starts having legal

[50] Reference is made to Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities, cited above and Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, cited above, paragraphs 117 to 120.

[51] Reference is made to Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, paragraph 29.

effects. In the applicants' view, the requirement must be observed all the more strictly in case of a measure liable to have financial consequences so that those concerned may know precisely the extent of the obligations which it imposes on them.[52]

97. Further, it is argued that in order for an aid to be subject to recovery, the alleged national aid measures have to be identified in advance with a degree of clarity and specificity which is necessary to sufficiently inform private operators.[53] It is the position of the Principality of Liechtenstein and Swisscom, that a decision to open a formal State aid investigation in a third country can never serve to identify an alleged national aid measure clearly and specifically enough.

98. On the issue of homogeneity and equal treatment, the Principality of Liechtenstein and Swisscom argue that the Decision breaches these principles because the Commission has not ordered recovery of aid in similar cases. It is submitted that when the Commission has assessed national intra-group schemes, it has always done so individually and never linked them to decisions on initiating formal proceedings in others cases. Moreover, it is argued that this approach has been confirmed by the Union Courts.[54]

99. ESA, with the support of the Commission, submits that this part of the plea is unfounded. ESA argues that in the only similar decision dealing with captive insurance (the *Åland Islands* case) the issue of recovery of the incompatible aid was clearly contemplated. Although no recovery was ordered, as no aid had actually been granted since the scheme entered into force, there can be no doubt that the Commission would have ordered recovery if the aid had been granted. Furthermore, ESA contests the approach the applicants describe as confirmed by the Union Courts. In this regard, ESA argues that in the cases referred to,

52 Reference is made to Case T-115/94 *Opel Austria* [1997] ECR II-39, paragraph 124.
53 Reference is made to Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord*, cited above, paragraphs 121 et seq and 163.
54 Reference is made to Case T-348/03 *Koninklijke Friesland Foods NV* v *Commission* [2007] ECR II-101; Case C-519/07 P *Commission Friesland Foods NV* [2009] ECR, not yet reported.

the Commission had indeed made certain explicit statements to applicants concerned.[55] This is, however, not the case in these proceedings.

100. The Commission submits that its practice in other cases cannot affect the legality of the Decision contested in the case at hand. As already indicated, the elimination of unlawful State aid by means of its recovery is the logical consequence of a finding that it is unlawful. The Commission further contends that ESA enjoys no discretion in ordering recovery.

Lack of reasoning

101. The applicants finally argue that the Decision lacks reasoning on a number of points. In this respect, the Government of Liechtenstein and Swisscom argue that the reasoning provided is inadequate on several issues, such as to what extent there is a commercial market for all captive insurance companies, selectivity of the contested tax provisions and on the recovery of the alleged State aid. In addition, Reassur argues specifically that the Decision lacks reasoning on ESA's assessment as to why the contested tax provisions were not considered justified by the nature or general scheme of Liechtenstein's tax system.

102. ESA submits that the Decision contains adequate reasons within the meaning of Article 16 SCA. It contends that according to settled case-law, the statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. Further, the requirements to be satisfied in this regard depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measures, or other

[55] Reference is made to *Koninklijke Friesland Foods NV* [2007], cited above, paragraphs 129 to 131.

parties to whom it is of direct and individual concern, may have in obtaining explanations. ESA argues that it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. [56]

103. In this regard, ESA maintains that it is important to recall that it was assessing a general scheme and thus assessed the scheme as a whole. To be considered an aid under Article 61 EEA, a measure must fulfil four criteria: it must afford an advantage to the beneficiaries, through the State or State resources, and affect competition and trade between EEA States. Finally, the measure must be specific or selective in that it favours certain undertakings or the production of certain goods. ESA submits that all of these criteria are accounted for in its reasoning.

104. The Commission supports ESA's view, adding that the contested Decision discloses in a clear and unequivocal fashion the reasoning followed by ESA in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. It further submits that the statement of reasons is fully in line with case-law regarding the requirements on reasoning.

Thorgeir Örlygsson
Judge-Rapporteur

[56] Reference is made to Case T-257/04 *Republic of Poland* v *Commission* [2009] ECR II-1545, paragraphs 214 and 215.

Case E-12/10

EFTA Surveillance Authority
v
Iceland

CASE E-12/10

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfill its obligations - Freedom to provide services - Directive 96/71/EC - Posting of workers - Minimum rates of pay - Leave with pay in the event of illness or accident - Insurance against accidents)

Summary of the Judgment

1. Article 3 (1) of Directive 96/71/EC, concerning the posting of workers in the framework of the provision of services, sets out an exhaustive list of terms and conditions of employment that host EEA States are entitled to require undertakings established in other EEA States to observe when they post workers to their territory, including "minimum rates of pay, including overtime rates".

2. The concept of minimum rates of pay is defined by the national law and/or practice of the EEA State to whose territory the worker is posted. Accordingly, that content may be freely defined by the EEA States, in compliance with the EEA Agreement and the general principles of EEA law.

3. As Article 3(1)(c) of the Directive is intended to limit the possibility of the EEA States intervening as regards pay to matters relating to minimum rates of pay, an entitlement to sickness pay which is not set at a minimum rate i.e. neither as a flat rate of minimum compensation, nor calculated on the basis of a minimum wage, does not fall within the notion of "the minimum rates of pay".

4. Imposing an obligation on the undertakings posting workers to Iceland to take out accident insurance for their employees concerns the terms and conditions of employment. However, an obligation to take out accident insurance falls outside the

matters listed in Article 3(1) of the Directive.

5. Under the first indent of Article 3(10) of the Directive, EEA States have the right to apply, in compliance with the EEA Agreement, in a non–discriminatory manner, to undertakings which post workers to their territory terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1), where public policy provisions are at stake. The notion of public policy in the EEA context, particularly when it is cited as justification for a derogation from a fundamental freedom, must be interpreted strictly, and its scope cannot be determined unilaterally by each EEA State without any control by the EEA institutions. Accordingly, a public policy provision may be relied upon only if there is a genuine and sufficiently serious threat to a fundamental interest of society.

6. By maintaining in force Articles 5 and 7 of Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

JUDGMENT OF THE COURT

28 June 2011

(Failure by a Contracting Party to fulfil its obligations – Freedom to provide services – Directive 96/71/EC – Posting of workers – Minimum rates of pay – Leave with pay in the event of illness or accident – Insurance against accidents)

In Case E-12/10,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal & Executive Affairs, Brussels, Belgium,

applicant,

v

Iceland, represented by Bjarnveig Eiríksdóttir, Attorney at Law, and Dóra Sif Tynes, Attorney at Law, acting as Agents, and Íris Lind Sæmundsdóttir, Legal Officer at the Ministry for Foreign Affairs, acting as Co-Agent,

defendant,

APPLICATION for a declaration that by maintaining in force Articles 5 and 7 of Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 36 of the EEA Agreement and Article 3 of the Act referred to at point 30 of Annex XVIII to the EEA Agreement, i.e. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson and Per Christiansen (Judge-Rapporteur), Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of:

– the Republic of Finland, represented by Henriikka Leppo, Legal Counsellor, acting as Agent;

– the Kingdom of Norway, represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Johan Enegren, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the EFTA Surveillance Authority ("ESA"), represented by its agents Xavier Lewis and Ólafur Jóhannes Einarsson; the defendant, represented by its agents Bjarnveig Eiríksdóttir and Dóra Sif Tynes; the Kingdom of Norway, represented by its agents Pål Wennerås and Janne Tysnes Kaasin; and the European Commission, represented by its agent Michel van Beek, at the hearing on 30 March 2011,

gives the following

JUDGMENT

I INTRODUCTION

1 By application lodged at the Court Registry on 18 August 2010, ESA brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") for a declaration that Iceland has failed to fulfil its obligations under Article 36 of the EEA Agreement and Article 3 of the Act referred

to at point 30 of Annex XVIII to the EEA Agreement. The Act referred to is Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, as adapted to the EEA Agreement by Protocol 1 thereto ("Directive 96/71", "the Directive" or "PWD").

2 In essence, the Case C-oncerns what requirements the EEA States are permitted to impose as regards the employment conditions of workers posted to their territory and whether the requirements set out in the Icelandic Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment ("the Posting Act") are compatible with Article 36 EEA and Article 3 of the PWD.

3 As regards those terms and conditions, the parties particularly disagree as to whether a right to payment for sick leave under the Posting Act qualifies as a constituent element of "minimum rates of pay" as provided for in point (c) of the first subparagraph of Article 3(1) of the Directive. At issue also is whether Iceland is permitted to impose rules on sick pay and an obligation on undertakings to take out accident insurance for posted workers on grounds of public policy.

II LEGAL BACKGROUND

European law

4 Article 36(1) EEA reads:

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 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.

5 Article 14 of the European Convention on Human Rights ("ECHR") – *Prohibition of discrimination* – reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

6 Article 1 of Protocol 1 to the ECHR – *Protection of property* – reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

...

7 Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community ("Regulation No 1408/71"), as amended, is referred to in point 1 of Annex VI to the EEA Agreement. Regulation No 1408/71 is adapted to the EEA Agreement by way of Protocol 1 thereto and the adaptations contained in Annex VI. Article 4 of Regulation No 1408/71 – *matters covered* – reads:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

...

8 Decision 37/98 of 30 April 1998 of the EEA Joint Committee amended Annex XVIII to the EEA Agreement by adding Directive 96/71 at point 30 of that Annex. The preamble to Directive 96/71 reads:

...

(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;

(6) Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; whereas it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

...

(12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means;

(13) Whereas the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; whereas such coordination can be achieved only by means of Community law;

...

(21) Whereas Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community lays down the provisions applicable with regard to social security benefits and contributions;

...

9 Article 3 of the PWD – *Terms and conditions of employment* – as amended by the adaptation contained at point 30 in Annex XVIII to the EEA Agreement reads:

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– *by law, regulation or administrative provision, and/or*

– *by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:*

  (a) maximum work periods and minimum rest periods;

  (b) minimum paid annual holidays;

  (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

  (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

  (e) health, safety and hygiene at work;

  (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

  (g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

...

8. 'Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

...

10. This Directive shall not preclude the application by Member States, in compliance with the EEA Agreement, to national

undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

– *terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,*

– *terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.*

National law

10 Article 1 of the Posting Act – *Scope* – reads:

This Act applies to undertakings that are established in other Member States of the European Economic Area ... which post their workers temporarily in Iceland in connection with the provision of services ...

11 Article 3 of the Posting Act – *Definitions* – reads:

For the purposes of this Act, the following terms are defined as follows:

1. Undertaking: Undertaking is an individual, company or other party that runs a business operation and is established in another Member State of the European Economic Area ... and provides services in Iceland under the Agreement on the European Economic Area ...

...

3. Worker: A worker who normally works outside Iceland, but is posted temporarily in Iceland on the account of an undertaking (cf. item 1) in connection with the provision of its services.

12 Article 4 of the Posting Act – *Terms and condition of employment* – reads:

In the event of the posting of workers in Iceland in the sense of this Act, the following legislation, and regulations issued thereunder, shall apply to their conditions of employment, irrespective of the foreign legislation covering other aspects of the employment relationship between the worker and the relevant undertaking:

1. *Article 1 of the Working Terms and Pension Rights Insurance Act, No. 55/1980, with subsequent amendments, regarding minimum wages and other wage-related issues, overtime payments, the right to vacation pay, maximum working hours and minimum rest periods.*
2. *The Act on Working Environment, Health and Safety in the Workplace, No. 46/1980, with subsequent amendments.*
3. *The Holiday Allowance Act, No. 30/1987, with subsequent amendments.*
4. *Article 4 of the Vessel Inspection Act, No. 47/2003.*
5. *Section VI of the Air Traffic Act, 60/1998.*
6. *Articles 11, 29 and 30 of the Maternity, Paternity and Parental Leave Act, No. 95/2000.*
7. *The Act on the Equal Status and Equal Rights of Women and Men, No. 96/2000, and also other legal provisions proscribing discrimination.*

The first paragraph of this Article shall apply without prejudice to more favourable terms and condition of employment for worker according to his employment contract with the relevant undertaking, or a collective agreement or legislation in the state in which he normally works.

Payments that relate specifically to the employment shall be calculated as part of the worker's minimum wages. ...

13 Article 5 of the Posting Act – *Entitlement to wages in the event of illness and accidents* – reads:

Worker shall be entitled to receive wages in the event of illness and accidents while he works in Iceland in connection with the provision of services.

Worker shall acquire entitlements through his work in Iceland for the same undertaking such that for each month worked during the first twelve months, two days shall be paid at regular wages. If the worker works for more than one year in Iceland, the acquisition of accumulation of entitlement to wages in the event of illness and wage payments shall be in accordance with Article 5 of the Act

No. 19/1979, Respecting Workers' Right to Advance Notice of Termination of Employment and to Wage on Account of Absence through Illness or Accidents.

Entitlement to wages in the event of illness is an aggregate entitlement during each twelve-month period, irrespective of the type of illness.

If worker is absent from work as a result of an accident that occurs at work, or on his direct route to or from work, and also if he falls ill with an occupational disease, he shall retain his daytime wages for three months in addition to their entitlement under the second paragraph of this Article.

...

If worker receives wages during absence resulting from illness or accidents in accordance with his employment contracts, collective agreements or the laws of his home country, he shall be paid the difference in wages if his entitlement under this provision is more to his advantage.

If the undertaking so requests, the worker shall submit to it a medical certificate regarding the illness or accident demonstrating that he has been unfit for work due to the illness or accident. The undertaking shall pay for the medical certificate and the cost of obtaining it, providing that it is notified of the illness the first day of absence due to illness.

The provisions of this Article shall apply without prejudice to more advantageous entitlements that the worker may have according to his employment contract with the relevant undertaking or according to a collective agreement or legislation in the state where he normally works.

14 The first, seventh and ninth paragraphs of Article 7 of the Posting Act – *Accident insurance covering death, permanent injury and temporary loss of working capacity* – read:

Worker who works in Iceland for a period of two continuous weeks or longer shall be insured at work against death, permanent injury and the temporary loss of working capacity. The insurance shall cover

accidents that occur at work and on a normal route between the worker's workplace and the dwelling place in Iceland, and shall take effect when two weeks' continuous working period in Iceland have been completed.

...

Compensation shall not be paid to worker under this provision if he receives compensation for his injury from legally-prescribed accident insurance ... . If the employer is liable to pay compensation to a worker who is insured against accidents under this provision, then compensation and per diem allowances that may be paid to the worker shall be deductible in full from the compensation that the undertaking may be required to pay. Per diem allowances shall be paid to the undertaking as long as it pays the worker wages in respect of the accident.

...

This provision shall apply without prejudice to more advantageous insurance cover that the worker may have according to his employment contract with the relevant undertaking, a collective agreement or legislation in the state where he normally works.

15 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III FACTS AND PRE-LITIGATION PROCEDURE

16 Following a meeting in Reykjavík on 24 and 25 May 2007, ESA informed the Icelandic Government that it intended to examine in light of EEA law the recently enacted Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment ("the Posting Act"). By letter of 5 February 2008, Iceland replied with information on various issues in the Act.

17 By letter of 18 April 2008, ESA invited Iceland to provide further

information concerning the terms and conditions of employment applicable to posted workers. By letter of 22 May 2008, Iceland provided ESA with the information requested.

18 On 11 March 2009, ESA sent a letter of formal notice to Iceland for failure to ensure compliance with Article 36 EEA and Article 3 of Directive 96/71/EC. Iceland neither submitted observations in response to the letter of formal notice within the time limit prescribed nor requested an extension of the period in which to reply.

19 The letter of formal notice was discussed at meetings in Reykjavík on 3 and 4 June 2009. In a follow-up letter, Iceland was invited to provide ESA with additional information on the framework applicable to sickness pay provided for in law and in collective agreements. Iceland was also invited to comment on the comparison between the term "pay" mentioned in Article 3(1)(c) of the PWD and the concept used in Article 5 of the Posting Act. Iceland did not reply to the letter.

20 On 25 November 2009, ESA delivered a reasoned opinion. By letter of 16 February 2010, Iceland stated that following consultation with the social partners the Government would submit a bill to Parliament amending the Posting Act taking account of the comments made by ESA. The intention was for the bill to be submitted to Parliament in February or March 2010.

21 By letter of 16 March 2010, Iceland informed ESA that a bill had been prepared to amend the Posting Act in order to comply with ESA's conclusion that the obligation imposed on undertakings to register and provide information (Articles 8, 10 and 11 of the Act) was incompatible with EEA law. However, as regards Articles 5 and 7 of the Posting Act, which ESA had also concluded were incompatible with EEA law, Iceland disputed ESA's conclusions. On 15 June 2010, the Icelandic Parliament adopted Act No 96/2010 amending the Posting Act.

22 On 16 June 2010, ESA decided to refer the matter regarding Articles 5 and 7 of the Posting Act to the Court in accordance

with Article 31 of the Surveillance and Court Agreement. As for Articles 8, 10 and 11 of the Posting Act, the amending Act was considered sufficient to comply with ESA's reasoned opinion of 25 November 2009.

IV ARGUMENTS OF THE PARTIES

The applicant

23 ESA argues that Articles 5 and 7 of the Posting Act are contrary to Article 36 EEA and Article 3 PWD, and that the restrictions cannot be justified under the exception for public policy.

24 In ESA's view, Article 3(1) of the PWD sets out an exhaustive list of the matters in respect of which the EEA States may give priority to the rules in force in the host EEA State. Accordingly, employment terms and conditions which a host State seeks to impose falling outside the scope of the Article are, in principle, incompatible with the Directive and Article 36 EEA.

25 Although ESA acknowledges that the definition of the concept of "minimum rates of pay", referred to in Article 3(1)(c) of the PWD, is, in principle, a matter for the EEA States, it contends that their competence in that regard is subject nonetheless to compliance with the EEA Agreement and general principles of EEA law. ESA asserts that the margin of discretion left to the EEA States cannot be interpreted so widely as to permit the EEA States to impose on posting undertakings terms and conditions of employment not listed in Article 3(1) of the PWD.

26 ESA considers it inherent in the concept of "minimum rates of pay" that it constitutes remuneration for work actually performed by the posted worker under his employment contract. According to ESA, Article 5 of the Posting Act concerns the right to payment for sick leave, which does not fall within the concept of "minimum rates of pay" mentioned in Article 3(1)(c) of the PWD. In its view, in contrast to remuneration for work carried out, the right to sickness pay arises only on condition that a certain event takes place, namely, that a worker falls sick and is unable to perform his duties under the employment contract. Thus, according to

ESA, the entitlement provided for in Article 5 falls within the ambit of Regulation No 1408/71 on the application of social security schemes to employed persons and their families. From ESA's perspective, it appears illogical if similar rights can be classified both as sickness benefits and minimum rates of pay under EEA law.

27 Furthermore, ESA fails to see how the definition of "pay" established in Article 157(2) TFEU and related ECJ case-law is relevant to the interpretation of Article 3(1)(c) of the PWD, as the legal bases and purposes of the two sets of rules are different and there is no further link between them. Moreover, ESA cannot see how it follows from using a monthly rate as a benchmark for the minimum wage that a worker is necessarily entitled to payment for the full month if he has been absent due to illness. Finally, in ESA's view, it is irrelevant for the purposes of the present case whether wages, as monetary claims, are protected by Article 72 of the Icelandic Constitution on the right to property.

28 As regards Article 7 of the Posting Act, ESA considers it evident from the wording of Article 3(1) of the PWD that it does not encompass such requirements as those provided for in Article 7, which consequently fall outside the nucleus of mandatory rules for minimum protection to be observed in the host country by undertakings posting workers there.

29 ESA submits that Articles 5 and 7 of the Posting Act cannot be justified under the public policy exception established in Article 3(10) of the PWD. ESA argues that the exception must be interpreted strictly. Public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. ESA fails to see how there can be a genuine and sufficiently serious threat to Icelandic society if workers posted to Iceland are subject to their home state rules in respect of these rights.

30 ESA contends further that Articles 5 and 7 of the Posting Act constitute a restriction on the freedom to provide services

provided for in Article 36 EEA. In its view, to insist that undertakings established in other EEA States comply with requirements on matters not listed in Article 3(1) of the PWD is liable to make it less attractive or more difficult to carry out work in the host State and, thus, constitutes a restriction on the freedom to provide services. According to ESA, such a restriction is only justifiable under the exception for public policy provisions established in Article 3(10) of the PWD, which, as noted earlier, in its view, is not applicable in the case at hand.

The defendant

31 Iceland contends that Articles 5 and 7 of the Posting Act are neither contrary to Article 36 EEA nor Article 3(1) of the PWD. In the alternative, Iceland argues that the provisions are justified under the exception for public policy established in Article 3(10) of the PWD.

32 In relation to Article 5 of the Posting Act, Iceland submits that the entitlement to wages in case of illness or accident is included in the term "minimum rates of pay" in Article 3(1)(c) of the PWD and inherent in the concept of "minimum rates of pay" in Icelandic labour law. Iceland argues that the concept of "minimum rates of pay" or "minimum wage" is not harmonised for the purposes of Directive 96/71 and, subject to compliance with the EEA Agreement and general principles of EEA law, that nothing prevents Iceland from including entitlement to wages in case of illness or accident as part of a minimum wage determined on a monthly basis. Notwithstanding a worker's inability to render services to his employer during the period of sickness, Iceland argues that what defines this entitlement is the direct contractual relationship between employer and worker. Moreover, Iceland argues that it is inherent in the determination of minimum wages on a monthly rather than an hourly basis that the worker's right to absence from work due to illness or accident is included in the calculation. In Iceland's view, entitlement to maintenance of wages in the event of illness or accidents provided for by Icelandic labour law constitutes "pay" and not

a "social security benefit". The right provided for by Article 5 of the Posting Act thus falls outside the scope of Regulation No 1408/71.

33 Turning to Article 7 of the Posting Act, Iceland submits that the insurance cover provided for under that Article is a rule of national tort and insurance law, as such falling outside the ambit of Directive 96/71.

34 If the Court holds Articles 5 and 7 of the Posting Act to be contrary to Article 3 of the PWD, Iceland argues, in the alternative, that the provisions are justified under the public policy exception established in Article 3(10) of the PWD. It submits that the requirements at issue are established in collective agreements which are legally protected and from which there can be no exemptions. The objective of the legislation is to provide worker protection; a recognised objective under EEA law. Iceland considers the provisions to be imperative requirements. As regards Article 5 of the Posting Act, it asserts that this provision is intended to secure the value of minimum wages and other wages for posted workers, which is considered imperative for the protection of workers and crucial to the social order in Iceland. In its view, the requirements concerned are suitable and necessary in order to secure the objective pursued and are non-discriminatory.

35 In relation to Article 36 EEA, Iceland argues that in the event that the Court holds Articles 5 and 7 of the Posting Act to constitute a restriction on the freedom to provide services, the question of justification is not limited to the exemption provided for in Article 3(10) of the PWD. Iceland submits that the Directive does not prevent recourse to overriding requirements in the general interest as grounds of justification. Iceland argues that various objectives in the public interest may constitute a legitimate aim and that these include the objectives referred to in the discussion of Article 3(10) of the PWD. In this connection, too, it submits that the requirements of suitability, necessity and proportionality are fulfilled.

The Republic of Finland

36 The Republic of Finland supports Iceland in its contention that Articles 5 and 7 of the Posting Act fall within the concept of "minimum rates of pay" in Article 3(1)(c) PWD. It argues that the concept of "pay" under Article 157 TFEU, on equal treatment of male and female workers as part of EU social policy, is broad and covers the continued payment of wages to an employee in the event of illness. In the view of the Republic of Finland, there is no reason to interpret the concept of "pay" more narrowly in Directive 96/71 than in the context of social policy since a main purpose of the Directive is to strike the balance between the TFEU provisions guaranteeing free movement of services and social policy. In the same vein as Iceland, it argues that where the wage is defined as monthly pay, the rates of pay include all breaks, days off and holidays, that is, justified absences from work. Thus, absence from work does not necessarily constitute a reason for a cessation in the payment of wages.

The Kingdom of Norway

37 The Kingdom of Norway agrees with the submissions made by Iceland on the compatibility with EEA law of Articles 5 and 7 of the Posting Act. It claims that benefits and contributions falling within the scope of Regulation No 1408/71 are not only excluded from the scope of Article 3(1) of the PWD but fall outside the scope of the Directive in its entirety. Therefore, it argues, if Article 5 of the Posting Act is deemed to constitute social security legislation for the purposes of Regulation No 1408/71, then ESA's application must be dismissed in so far as Article 5 is concerned. In any event, it contends that Article 3(1)(c) of the PWD must be assessed with reference to whether the benefits represent consideration which the worker receives in respect of his employment from his employer. In its view, Article 5 of the Posting Act makes the right to wages in the event of illness and the amount thereof entirely conditional on the work carried out by the posted worker. Consequently, the Kingdom of Norway argues that the wages in question are exclusively borne out of and represent consideration for work carried out by the worker.

The Commission

38 The Commission supports ESA in contending that Articles 5 and 7 of the Posting Act are incompatible with Article 3(1) of the PWD. It stresses that allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the EEA State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker and the consideration which he receives in return cannot, under the provisions of that Directive, be treated as being elements of that kind. In the Commission's view, the entitlements provided for in Article 5 of the Posting Act do not in all respects appear to relate directly to work performed and thus alter the relationship between the service provided by the worker and the consideration which he receives in return. Consequently, the Commission contends that the entitlements in question do not qualify as constituent elements of the notion of minimum rates of pay.

V FINDINGS OF THE COURT

Preliminary remarks on the PWD

39 At the outset, the Court notes that it follows from recital 13 in the preamble to the PWD that the laws of the EEA States must be coordinated in order to lay down a nucleus of rules for minimum protection to be observed in the host country by employers who post workers there, whatever the law applicable to the employment relationship.

40 The PWD thus expressly defines – through the matters referred to in points (a) to (g) of the first subparagraph of Article 3(1) – the degree of protection for workers that host EEA States are entitled to require undertakings established in other EEA States to observe when they post workers to their territory. An interpretation permitting EEA States to extend the terms and conditions prescribed by that provision would amount to depriving the Directive of its effectiveness (see, for comparison, Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 80). Accordingly, Article 3(1) must be interpreted as setting out an exhaustive list of the

matters in respect of which the EEA States may give priority to the rules in force in the host EEA State (see, for comparison, Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 26).

41 In other words, the level of protection which must be guaranteed to workers posted to the territory of the host EEA State is limited, in principle, to that provided for in points (a) to (g) of the first subparagraph of Article 3(1) of the PWD (see, for comparison, *Laval un Partneri*, cited above, paragraph 81). This applies unless, pursuant to the law or to collective agreements in the EEA State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.

42 However, under the first indent of Article 3(10) of the PWD, EEA States have the right to apply, in compliance with the EEA Agreement, in a non-discriminatory manner, to undertakings which post workers to their territory terms and conditions of employment on matters other than those referred to in the first subparagraph of Article 3(1), where public policy provisions are at stake.

Article 5 of the Posting Act

43 The parties dispute whether the rights established in Article 5 of the Posting Act fall within the scope of Article 3(1)(c) of the PWD. In the first and second paragraph of Article 5 of the Posting Act, it is stated that in the event of illness, a worker posted to Iceland shall be entitled to two days' paid leave for every month worked during the first twelve months of his posting. In addition, the fourth paragraph of Article 5 of the Posting Act stipulates that a worker shall retain his daytime wages for three months, if he is absent from work as a result of an accident that occurs at work, or on his direct route to or from work, and also if he falls ill with an occupational disease. After the first twelve months of work in Iceland, Article 5 of the Labourers' Rights Act No 19/1979 is said to apply to posted workers on the same basis as to national workers.

44 The "minimum rates of pay, including overtime rates" are, according to Article 3(1)(c) PWD, included in the terms and conditions of employment laid down in the host EEA State which undertakings posting workers to the State must guarantee to their workers.

45 The PWD does not harmonise the material content of the mandatory rules for minimum protection. As stated in the second subparagraph of Article 3(1), the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted. Accordingly, that content may be freely defined by the EEA States, in compliance with the EEA Agreement and the general principles of EEA law (compare *Laval un Partneri*, cited above, paragraph 60, and the case-law cited).

46 The options of the EEA States to define what constitutes "minimum rates of pay" are, however, not unlimited. In the case at hand, the sickness pay provided for in Article 5 of the Posting Act is not set at a minimum rate, i.e. neither as a flat rate of minimum compensation, nor calculated on the basis of a minimum wage, where this applies. On the contrary, the sickness pay to which a worker is entitled corresponds to the regular wage the worker receives under his employment contract.

47 Article 3(1)(c) of the PWD does not authorise a host EEA State to impose its system for determining all wages on undertakings which post workers to its territory. As Article 3(1)(c) of the Directive is intended to limit the possibility of the EEA States intervening as regards pay to matters relating to minimum rates of pay, an entitlement to sickness pay which is not set at a minimum rate does not fall within the notion of "the minimum rates of pay" within the meaning of Article 3(1)(c) of the PWD (see, for comparison, *Commission* v *Luxembourg*, cited above, paragraph 47).

48 As regards Iceland's submission that wages, as monetary claims, are protected by Article 72 of the Icelandic Constitution on the right to property, those considerations cannot be decisive

when assessing whether payment in the event of absence due to sickness falls within the scope of "minimum rates of pay" for the purposes of Article 3(1)(c) of the PWD. The same applies with respect to Iceland's submission regarding the definition of wages in ILO Convention No 95 on the Protection of Wages.

49 Against this background, the Court finds that Article 5 of the Posting Act is incompatible with Directive 96/71, unless it can be justified under the exception for public policy laid down in Article 3(10) of the Directive, see paragraph 55 et seq. below.

50 For the sake of completeness, the Court adds that for the purposes of this case, it is unnecessary to decide whether Article 5 of the Posting Act constitutes a sickness benefit within the meaning of Regulation No 1408/71. Since it has been established that Article 5 of the Posting Act imposes employment conditions outside the matters exhaustively listed in Article 3(1) of the PWD, it is, in principle, incompatible with the PWD, regardless of whether it falls within the scope of Regulation No 1408/71.

Article 7 of the Posting Act

51 Iceland does not contend that Article 7 of the Posting Act falls within the scope of the matters referred to in points (a) to (g) of the first subparagraph of Article 3(1) of the PWD. Rather, Iceland argues that Article 7, which imposes on the employer an obligation to take out accident insurance for posted workers, constitutes a rule of national tort and insurance law and, as such, falls outside the ambit of the PWD.

52 The Court cannot accept this reasoning. As noted in paragraph 41 above, points (a) to (g) of the first subparagraph of Article 3(1) of the PWD lay down in an exhaustive list the matters of protection for workers of undertakings established in other EEA States who are posted to the territory of the host EEA State which the latter State is entitled to require those undertakings to observe. It is evident that imposing an obligation on the undertakings posting workers to Iceland to take out accident

insurance for their employees concerns the terms and conditions of employment and, consequently, is a matter to which Article 3 of the PWD applies and, hence, covered by the coordination of national mandatory rules. It is of no importance whether under national law the rule is classified as a rule of tort or insurance law.

53 Furthermore, it is evident, and not contested by Iceland, that an obligation to take out accident insurance falls outside the matters listed in Article 3(1) of the PWD.

54 For these reasons, the Court finds that Article 7 of the Posting Act is incompatible with Directive 96/71, unless it can be justified under the exception for public policy laid down in Article 3(10) of the Directive.

Exception for public policy

55 On the issue of whether the provisions in Articles 5 and 7 of the Posting Act may be justified under the exception for public policy, the Court finds that no significant difference exists between these two provisions. Accordingly, they are dealt with jointly.

56 The first indent of Article 3(10) of the PWD constitutes a derogation from the principle that the matters with respect to which the host EEA State may apply its legislation to undertakings which post workers to its territory are set out in an exhaustive list in the first subparagraph of Article 3(1) thereof (compare *Commission* v *Luxembourg*, cited above, paragraph 31). The public policy exception is, more fundamentally, a derogation from the principle of freedom to provide services. While the EEA States are still, in principle, free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the EEA context, particularly when it is cited as justification for a derogation from a fundamental freedom, must be interpreted strictly, so that its scope cannot be determined unilaterally by each EEA State without any control by the EEA institutions. It follows that a public policy provision may be relied upon only if there is a genuine and sufficiently serious threat to

a fundamental interest of society (see, with respect to Article 40 EEA, Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 42, and, in relation to Article 33 EEA, Case E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 42. See also, in a similar vein, *Commission* v *Luxembourg*, cited above, paragraph 50, and the case-law cited).

57 Moreover, the Court notes that the reasons which may be invoked by an EEA State in order to justify such a derogation must be accompanied by an appropriate analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated (see *Commission* v *Luxembourg*, cited above, paragraph 51).

58 Turning to the issue of justification in the present case, first, the Court finds Iceland's submission to the effect that Articles 5 and 7 of the Posting Act constitute public policy because they are provisions of legally protected collective agreements to have no bearing on the case. The assessment under the public policy exception established in Article 3(10) of the PWD must be the same irrespective of whether the contested provisions are set out by law or by universally applicable collective agreements or arbitration awards.

59 Second, the Court cannot accept the arguments put forward by Iceland that the requirements established by Articles 5 and 7 of the Posting Act must be considered imperative for the protection of workers and crucial to the social order in Iceland. According to information submitted to the Court, in 2010 only 9 persons were registered as posted workers in Iceland. Although the number of posted workers was higher in 2006 and 2007, the Court cannot see how the requirements stipulated in Articles 5 and 7 of the Posting Act can be regarded as crucial to Iceland's social order.

60 Third, it is true that provisions of the EEA Agreement are to be interpreted in the light of fundamental rights, see Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, paragraph 23, and the case law cited, and that the provisions of the European Convention of Human Rights and the judgments of the European Court of

Human Rights are important sources for determining the scope of these rights. However, the Court is not convinced by Iceland's contention that provisions on the protection of property, Article 14 of the ECHR and Article 1 of Protocol 1 to the ECHR, a right also established in Articles 65 and 72 of the Icelandic Constitution, can justify Articles 5 and 7 of the Posting Act on grounds of public policy. Such a conclusion would, in effect, justify all requirements concerning monetary claims not falling within the scope of Article 3(1) and would manifestly deprive the PWD of its effectiveness.

61 Consequently, as Iceland has failed to establish that the requirements of the disputed articles of the Posting Act are necessary to counteract a genuine and sufficiently serious threat to a fundamental interest of society, justification under the exception for public policy may not be relied upon in the case at hand. For the reasons set out above, the Court holds that by maintaining in force Articles 5 and 7 of the Posting Act, Iceland has failed to fulfil its obligations under Article 3 of the PWD.

62 As a failure to fulfil obligations on the basis of the PWD has thus been established, it is unnecessary to examine the action in respect of Article 36 EEA (see, for comparison, Case C-341/02 *Commission* v *Germany* [2005] ECR I2733, paragraph 42).

VI COSTS

63 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Iceland be ordered to pay the costs and the latter has been unsuccessful, Iceland must be ordered to pay the costs. The costs incurred by the Republic of Finland, the Kingdom of Norway and the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force Articles 5 and 7 of Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.**

2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Delivered in open court in Luxembourg on 28 June 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President

REPORT FOR THE HEARING

in Case E-12/10

APPLICATION to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between the

EFTA Surveillance Authority

and

Iceland

seeking a declaration that by maintaining in force Articles 5 and 7 of Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 36 of the EEA Agreement and Article 3 of the Act referred to at point 30 of Annex XVIII to the EEA Agreement, i.e. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, as adapted to the EEA Agreement by Protocol 1 thereto.

I INTRODUCTION

1. The case concerns what requirements the EEA States are permitted to impose as regards the employment conditions of workers posted to their territory.

2. The parties disagree whether the requirements set out in Articles 5 and 7 of the Icelandic Act No 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment ("the Posting Act") are incompatible with Article 36 EEA and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services[1] ("Directive 96/71", "the Directive" or "PWD").

[1] OJ 1997 L 18, p. 1.

3. According to the first and second paragraph of Article 5 of the Posting Act, in the event of illness, a worker posted to Iceland shall be entitled to two days paid leave for every month worked during the first twelve months of his posting to Iceland. Further, under the fourth paragraph of Article 5, a worker absent from work as a result of an accident that occurs at work, or on his direct route to or from work, and also if he falls ill with an occupational disease, shall retain, in addition, his daytime wages for three months. After the first twelve months of work in Iceland, Article 5 of the Labourers' Rights Act No 19/1979 applies to posted workers on the same basis as national workers. The entitlement under the Posting Act is without prejudice to the application of more favourable terms that the worker may enjoy according to his employment contract, collective agreement or his home State legislation. On the other hand, if home State provisions provide the posted worker with treatment (employment conditions) less favourable than the entitlement under Icelandic law, Article 5 of the Posting Act requires the posting undertaking to "top up" the worker's entitlement to sick leave payments.

4. Article 7 of the Posting Act provides that posted workers working in Iceland for a period of two continuous weeks shall be insured against accidents at work (death, permanent injury and temporary loss of working capacity). The insurance must cover accidents at work and on the normal route to/from the workplace. These requirements do not apply if the relevant home State provisions provide more favourable treatment. However, if those provisions provide less favourable treatment, the posting undertaking must "top up" the amount and the extent of insurance coverage.

5. The present case turns on whether Article 3 of the PWD prevents Iceland from maintaining these rules.

II LEGAL BACKGROUND

European law

6. Article 7 EEA reads:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

...

(b) an act corresponding to an EEC Directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

7. Article 36(1) EEA reads:

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 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.

8. Article 9 of the Treaty on the Functioning of the European Union ("TFEU") reads:

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

9. Article 53(1) TFEU reads:

In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates

and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

10. Article 62 TFEU reads:

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

11. Article 157 TFEU reads:

1. *Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.*

2. *For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.*

...

12. Article 31 of the Charter of Fundamental Rights of the European Union – *Social security and social assistance* – reads:

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

13. Article 34 of the Charter of Fundamental Rights of the European Union – *Social security and social assistance* – reads:

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

...

14. Article 14 of the European Convention on Human Rights ("ECHR") – *Prohibition of discrimination* – reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

15. Article 1 of Protocol 1 to the ECHR – *Protection of property* – reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

...

16. In Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community[2] ("Regulation No 1408/71"), as amended, the definition in Article 1(j) reads:

legislation means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security ...

The term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope. ...

[2] OJ, English Special Edition 1971 (II), p. 416.

17. Article 4 of Regulation No 1408/71 – *Matters covered* – reads:

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

...

18. Article 12 of Regulation No 1408/71 – *Prevention of overlapping of benefits* – reads:

1. This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. ...

19. Article 13(2) of Regulation No 1408/71 – *General rules* – reads:

Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...

20. Article 14 of Regulation No 1408/71 – *Special rules applicable to persons, other than mariners, engaged in paid employment* – reads:

Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

1. *(a) A person employed in the territory of a Member State by a undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months ...*

(b) If the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable

circumstances, and exceeds 12 months, the legislation of the first Member State shall continue to apply until the completion of such work, provided that the competent authority of the Member State in whose territory the person concerned is posted or the body designated by that authority gives its consent; ...

21. The preamble to Directive 96/71 reads:

...

(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;

(6) Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; whereas it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

...

(12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means;

(13) Whereas the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; whereas such coordination can be achieved only by means of Community law;

...

(21) Whereas Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community lays

down the provisions applicable with regard to social security benefits and contributions;

...

22. Article 3 of the PWD – *Terms and conditions of employment* – as amended by the adaptation contained at point 30 in Annex XVIII to the EEA Agreement reads:

1. *Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:*

– *by law, regulation or administrative provision, and/or*

– *by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:*

  (a) maximum work periods and minimum rest periods;

  (b) minimum paid annual holidays;

  (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

  (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

  (e) health, safety and hygiene at work;

  (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

  (g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

...

8. 'Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

...

10. This Directive shall not preclude the application by Member States, in compliance with the EEA Agreement, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

– *terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,*

– *terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.*

23. Article 6 of the PWD – *Jurisdiction* – reads:

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted...

National law

24. Article 65 of the Icelandic Constitution reads:

Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status.

Men and women shall enjoy equal rights in all respects.

25. Article 72 of the Icelandic Constitution reads:

The right of private ownership shall be inviolate. No one may be obliged to surrender his property unless required by public interests. Such a measure shall be provided for by law, and full compensation shall be paid.

The right of foreign parties to own real property interests or shares in business enterprises in Iceland may be limited by law.

26. The Labourers' Rights Act No 19/1979 provides in Article 5 that all workers who have been employed by the same employer for a period of at least one year shall remain entitled to a month's wages in case of absence from work due to illness or accident.

27. The Act also provides in Article 6 for an entitlement to wages in case of absence from work due to illness or accident in the first year of employment. During the first year of service with the same employer, in cases of illness and accidents, workers shall not be required to forfeit any of their wages, in whatever form these may be paid, at the rate of two days' wages for each month of service.

28. The latter entitlement is the corollary of the minimum requirements stipulated by universally applicable collective agreements.

29. Article 1 of Act No 55/1980 on Working Terms and Pension Rights Insurance reads:

Wages, and other working terms agreed between the social partners shall be considered minimum terms, independent of sex, nationality or term of appointment, for all wage earners in the relevant occupation within the area covered by the collective agreement. Contracts made between individual wage earners and employers on poorer working terms than those specified in the general collective agreement shall be void.

30. Article 1 of the Posting Act – *Scope* – reads:

This Act applies to undertakings that are established in other Member States of the European Economic Area... which post their workers temporarily in Iceland in connection with the provision of services ...

31. Article 3 of the Posting Act – *Definitions* – reads:

For the purposes of this Act, the following terms are defined as follows:

1. Undertaking: Undertaking is an individual, company or other party that runs a business operation and is established in another Member State of the European Economic Area... and provides services in Iceland under the Agreement on the European Economic Area... .

...

3. Worker: A worker who normally works outside Iceland, but is posted temporarily in Iceland on the account of an undertaking (cf. item 1) in connection with the provision of its services.

32. Article 4 of the Posting Act – *Terms and condition of employment* – reads:

In the event of the posting of workers in Iceland in the sense of this Act, the following legislation, and regulations issued thereunder, shall apply to their conditions of employment, irrespective of the foreign legislation covering other aspects of the employment relationship between the worker and the relevant undertaking:

1. *Article 1 of the Working Terms and Pension Rights Insurance Act, No. 55/1980, with subsequent amendments, regarding minimum wages and other wage-related issues, overtime payments, the right to vacation pay, maximum working hours and minimum rest periods.*
2. *The Act on Working Environment, Health and Safety in the Workplace, No. 46/1980, with subsequent amendments.*
3. *The Holiday Allowance Act, No. 30/1987, with subsequent amendments.*
4. *Article 4 of the Vessel Inspection Act, No. 47/2003.*
5. *Section VI of the Air Traffic Act, 60/1998.*
6. *Articles 11, 29 and 30 of the Maternity, Paternity and Parental Leave Act, No. 95/2000.*
7. *The Act on the Equal Status and Equal Rights of Women and Men, No. 96/2000, and also other legal provisions proscribing discrimination.*

The first paragraph of this Article shall apply without prejudice to more favourable terms and condition of employment for worker according to his employment contract with the relevant undertaking, or a collective agreement or legislation in the state in which he normally works.

Payments that relate specifically to the employment shall be calculated as part of the worker's minimum wages. ...

33. Article 5 of the Posting Act – *Entitlement to wages in the event of illness and accidents* – reads:

Worker shall be entitled to receive wages in the event of illness and accidents while he works in Iceland in connection with the provision of services.

Worker shall acquire entitlements through his work in Iceland for the same undertaking such that for each month worked during the first twelve months, two days shall be paid at regular wages. If the worker works for more than one year in Iceland, the acquisition of accumulation of entitlement to wages in the event of illness and wage payments shall be in accordance with Article 5 of the Act No. 19/1979, Respecting Workers' Right to Advance Notice of Termination of Employment and to Wage on Account of Absence through Illness or Accidents.

Entitlement to wages in the event of illness is an aggregate entitlement during each twelve-month period, irrespective of the type of illness.

If worker is absent from work as a result of an accident that occurs at work, or on his direct route to or from work, and also if he falls ill with an occupational disease, he shall retain his daytime wages for three months in addition to their entitlement under the second paragraph of this Article.

...

If worker receives wages during absence resulting from illness or accidents in accordance with his employment contracts, collective agreements or the laws of his home country, he shall be paid the difference in wages if his entitlement under this provision is more to his advantage.

If the undertaking so requests, the worker shall submit to it a medical certificate regarding the illness or accident, demonstrating that he has been unfit for work due to the illness or accident. The undertaking shall pay for the medical certificate and the cost of obtaining it, providing that it is notified of the illness the first day of absence due to illness.

The provisions of this Article shall apply without prejudice to more advantageous entitlements that the worker may have according to his employment contract with the relevant undertaking or according to a collective agreement or legislation in the state where he normally works.

34. The first, seventh and ninth paragraphs Article 7 of the Posting Act – Accident insurance covering death, permanent injury and temporary loss of working capacity – read:

Worker who works in Iceland for a period of two continuous weeks or longer shall be insured at works against death, permanent injury and the temporary loss of working capacity. The insurance shall cover accident that occur at work and on a normal route between the worker's workplace and the dwelling place in Iceland, and shall take effect when two weeks' continuous working period in Iceland have been completed.

...

Compensation shall not be paid to worker under this provision if he receives compensation for his injury from legally-prescribed accident insurance ... . If the employer is liable to pay compensation to a worker who is insured against accidents under this provision, then compensation and per diem allowances that may be paid to the worker shall be deductible in full from the compensation that the undertaking may be required to pay. Per diem allowances shall be paid to the undertaking as long as it pays the worker wages in respect of the accident.

...

This provision shall apply without prejudice to more advantageous insurance cover that the worker may have according to his

employment contract with the relevant undertaking, a collective agreement or legislation in the state where he normally works.

III PRE-LITIGATION PROCEDURE

35. Following a meeting in Reykjavík on 24 and 25 May 2007, the EFTA Surveillance Authority ("ESA") sent Iceland several questions regarding the Posting Act. By letter of 5 February 2008, Iceland replied with information on various issues in the Act.

36. By letter of 18 April 2008, ESA invited Iceland to provide further information concerning the terms and conditions of employment applicable to posted workers. By letter of 22 May 2008, Iceland provided ESA with the information requested.

37. On 11 March 2009, ESA sent a letter of formal notice to Iceland for failure to ensure compliance with Article 36 EEA and Article 3 of the PWD. Iceland neither submitted observations in response to the letter of formal notice within the time limit prescribed nor requested an extension of the period in which to reply.

38. The letter of formal notice was discussed at meetings in Reykjavík on 3 and 4 June 2009. In a follow-up letter, Iceland was invited to provide ESA with additional information on the framework applicable to sickness pay provided for in law and collective agreements. Iceland was also invited to comment on the comparison between the term "pay" mentioned in Article 3(1)(c) of the PWD and the concept used in Article 5 of the Posting Act. Iceland did not reply to the letter.

39. On 25 November 2009, ESA delivered a reasoned opinion. By letter dated 16 February 2010, Iceland stated that following consultation with the social partners it was intended to submit a bill to Parliament with a view to amending the Posting Act taking account of the comments made by ESA. The intention was for the bill to be submitted to Parliament in February or March 2010.

40. By letter of 16 March 2010, Iceland informed ESA that a bill had been prepared to amend the Posting Act in order to comply with ESA's conclusion that the obligation imposed on undertakings

to register and provide information (Articles 8, 10 and 11 of the Act) was incompatible with EEA law. However, as regards Articles 5 and 7 of the Posting Act, which ESA had also concluded were incompatible with EEA law, Iceland disputed ESA's conclusions. On 15 June 2010, the Icelandic Parliament adopted Act No 96/2010 amending the Posting Act.

41. On 16 June 2010, ESA decided to refer the matter regarding Articles 5 and 7 of the Posting Act to the Court in accordance with Article 31 of the Surveillance and Court Agreement. As for Articles 8, 10 and 11 of the Posting Act, the amending Act was considered sufficient to comply with ESA's reasoned opinion of 25 November 2009.

42. On 18 August 2010, ESA lodged the application commencing the action at the Court.

IV FORMS OF ORDER SOUGHT BY THE PARTIES

43. The EFTA Surveillance Authority requests the Court to declare that:

1. By maintaining in force Articles 5 and 7 of Act No. 45/2007 on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment, Iceland has failed to fulfil its obligations arising from Article 36 of the EEA Agreement and Article 3 of the Act referred to at point 30 of Annex XVIII to the EEA Agreement, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services as adapted to the EEA Agreement by Protocol 1 thereto.

2. The Republic of Iceland bear the costs of these proceedings.

44. Iceland requests the Court to declare that:

The application is dismissed.

V WRITTEN PROCEDURE BEFORE THE COURT

45. Written arguments have been received from the parties:

- the EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal & Executive Affairs, acting as Agents; and
- Iceland, represented by Bjarnveig Eiríksdóttir, Attorney at Law, and Dóra Sif Tynes, Attorney at Law, acting as Agents, and Íris Lind Sæmundsdóttir, Legal Officer at the Ministry for Foreign Affairs, acting as Co-Agent.

46. 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 Republic of Finland, represented by Henriikka Leppo, Legal Counsellor, acting as Agent;
- the Kingdom of Norway, represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, acting as Agents; and
- the European Commission, represented by Johan Enegren, acting as Agent.

VI SUMMARY OF THE PLEAS IN LAW AND ARGUMENTS SUBMITTED

The EFTA Surveillance Authority

Preliminary remarks

47. The EFTA Surveillance Authority does not dispute the universal applicability of collective agreements under Icelandic law. However, it fails to see the relevance of that fact as the two requirements contested in this case are both imposed by legislation (Articles 5 and 7 of the Posting Act).

48. ESA does not dispute the fact that rights substantively similar to those granted to posted workers by virtue of Articles 5 and 7 of

the Posting Act constitute minimum employment rights under Icelandic labour law. However, ESA considers this irrelevant to a resolution of the dispute as the Directive permits the host EEA State to impose its own labour law requirements only in respect of the matters listed in Article 3(1)(a)–(g).

49. ESA thus stresses the importance of employment terms being included among the issues listed in Article 3(1) of the PWD. It contends that the Article sets out an exhaustive list in respect of which the Member States may give priority to the rules in force in the host Member State.[3] Accordingly, employment conditions falling outside the scope of the Article are, in principle, incompatible with the Directive and Article 36 EEA.

Article 5 of the Posting Act is incompatible with Article 3(1)(c) of the PWD

50. According to ESA, Iceland has taken the view that the right to paid sick leave in accordance with Article 5 of the Posting Act falls within the concept of "minimum rates of pay" mentioned in Article 3(1)(c) of the PWD. ESA disagrees, essentially submitting that the latter Article does not extend to sick leave.

51. ESA acknowledges that the Directive does not harmonise the material content of the mandatory rules for minimum protection and that, accordingly, this content may be defined by the EEA States, subject to compliance with the EEA Agreement and the general principles of EEA law.[4] Consequently, the definition of the concept of "minimum rates of pay", referred to in Article 3(1)(c) of the PWD, is, in principle, a matter for the EEA States and may vary from one State to another. ESA further submits that the same applies with regard to the various methods applicable in the EEA States in calculating minimum rates of pay, in using particular periods of time as a reference (month, week, hours worked) and/or the productivity of workers. ESA adds that the Commission has stated that the Member States may determine

[3] Reference is made to Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraphs 25 and 26.

[4] Reference is made to Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 60 and the case-law cited therein.

the various allowances and bonuses included in the minimum pay applicable under Directive 96/71, but that in doing so they must remain within the limits set out in case-law from the Court of Justice of the European Union ("ECJ").[5]

52. ESA notes that the Directive was adopted on the basis of Articles 53(1) and 62 TFEU and submits, consequently, that the aim was to facilitate the freedom to provide services. Accordingly, a wide interpretation of Article 3 of the PWD to the detriment of service providers would be inconsistent with the legal bases. Moreover, ESA considers such interpretation incompatible with the ECJ finding that the list in Article 3(1) of the PWD is exhaustive.

53. ESA considers it inherent in the concept of "minimum rates of pay" that it constitutes remuneration for work actually performed by the posted worker under his employment contract. Article 3(1)(c) of the PWD refers to minimum rates of pay which in ESA's understanding refers to levels of pay reflected in nominal terms. It points out that when determining the content of minimum rates of pay in the context of this provision the ECJ has stated that it is the "gross amount of wages" that must be taken into account.[6] In ESA's view, other minimum employment rights cannot be included nor can minimum rates of pay be regarded as synonymous with all rights that may have a monetary value. According to ESA, such an interpretation would allow the limitations contained in Article 3(1) of the PWD to be circumvented.

54. ESA disagrees with Iceland that its own interpretation reduces the scope of national law in defining the minimum wage simply to the stipulation of hourly rates. According to ESA, national law may define the minimum wage for example in terms of hourly or monthly rates or apply a piece rate system. However, in ESA's view, it does not follow from using a monthly rate as a benchmark for the minimum wage that a worker is necessarily entitled to payment for the full month if he has been absent due to illness. It states as an example that under Icelandic labour law a worker receiving a fixed monthly wage who has been absent from work

[5] Reference is made to SEC(2006) 439 of 4.4.2006, p. 16.
[6] Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 29.

on grounds of illness for a period exceeding his accrued rights to sickness pay will have his monthly wage reduced in accordance with more detailed rules laid down in the relevant collective agreement.

55. As ESA sees it, in contrast to remuneration for work carried out, the right to sickness pay arises only on condition that a certain event takes place, namely, that a worker falls sick and is unable to perform his duties under the employment contract. ESA observes further that under Icelandic labour law an employer may request a worker to submit a doctor's certificate to prove his eligibility for sickness pay. According to ESA, where those procedural requirements are satisfied, sickness pay comes as a replacement for loss of wages which the worker would have received if he had been able to comply with the contract.

56. With respect to the definition of "pay" established in Article 157(2) TFEU and related ECJ case-law to which Iceland refers, ESA acknowledges that, in the light of the wording and purpose of this provision on equal pay for men and women, the ECJ has adopted a wide definition of "pay".[7] However, ESA fails to see how this is relevant to the interpretation of Article 3(1)(c) of the PWD as the legal bases and purposes of the two sets of rules are different and there is no further link between them.

57. ESA asserts that the margin of discretion left to the EEA States cannot be interpreted so widely as to permit the EEA States to impose on posting undertakings terms and conditions of employment not listed in Article 3(1) of the PWD. In ESA's view, this is consistent with the interpretation of Article 3(7) of the PWD adopted by the ECJ, according to which this latter provision cannot justify the imposition of better terms than those provided for in Article 3(1) of the PWD. Consequently, it would be inconsistent with the rationale of that interpretation if the EEA States had the freedom to interpret Article 3(1) of the PWD so widely as to encompass employment rights other than those listed.

[7] Reference is made to Case C-360/90 *Bötel* [1992] ECR I-3589, paragraph 12 and the case-law cited therein.

58. ESA adds some remarks on Case C-341/02 *Commission* v *Germany*, cited above. First, ESA disagrees with Iceland that the quoted phrase "gross amount of wages" supports the view that if sickness pay is defined under national law as part of the minimum wage, that right must also be covered by Article 3(1)(c) of the PWD. According to ESA, it is clear from what the dispute concerned that this view is incorrect. In essence, the case concerned to what extent the host Member State is allowed to exclude certain types of allowances and supplements paid by the foreign undertaking as not being component elements of the minimum wage. Second, ESA finds nothing significant in the ECJ's use of the term "minimum wage" and not "minimum rates of pay" as mentioned in Article 3(1)(c) of the PWD. According to ESA, the ECJ uses the terms synonymously, a usage which might be explained by the fact that the ECJ was not asked to assess specifically whether the relevant definition under German law complied with the term "minimum rates of pay". Moreover, ESA observes that the French language version of the judgment uses the term "les taux de salaire minimal", as does the French version of the Directive, whereas the English version of the judgment uses both "minimum wages" and "minimum rates of pay".

59. Furthermore, ESA contends that the English term in the Directive, "minimum rates of pay", is synonymous with, for example, the French "les taux de salaire minimal" and the Danish "mindsteløn". In ESA's view, the key issue is that while the term covers whatever is defined by national law as the minimum wage, other employment rights cannot be covered by the term. ESA submits that it has not been presented with any language versions to undermine its contention that minimum wages (rates of pay) are reflected in nominal terms.

60. Finally, ESA details its understanding of how Article 3 of the PWD has been implemented in Icelandic law, that is, in Article 4 of the Posting Act. According to ESA, the legislative history of that provision indicates that Article 4 of the Posting Act contains the items which the Icelandic Parliament considered to come within the scope of Article 3 of the PWD. ESA submits that those items

encompass "minimum wages and other wage-related issues", including "overtime payments", corresponding to what Article 3(1)(c) of the PWD prescribes. In ESA's view, Article 5 of the Posting Act introduces as a specific employment right the right to paid sick leave, thus underlining its particular and identifiable nature, separate from the right to receive minimum rates of pay.

Article 3(1)(c) of the PWD and Regulation No 1408/71

61. In ECJ case-law on the classification of sickness leave under Regulation No 1408/71, ESA finds further support for its conclusion that the concept of minimum rates of pay under Directive 96/71 does not extend to paid sickness leave. It makes particular reference to *Paletta*,[8] in which an obligation on an employer under German law to maintain wages in the event of illness, similar – according to ESA – to the sickness leave provided for under Article 5 of the Posting Act, in particular the right to three months of daytime wages provided for in the fourth paragraph, was classified as a sickness benefit. In ESA's view, it appears illogical if similar rights can be classified as both sickness benefits and minimum rates of pay under EEA law. It notes that recital 21 in the preamble to the Directive refers to Regulation No 1408/71 stating that the Regulation lays down the provisions applicable to social security benefits and contributions. In ESA's view, that reference suggests that the Directive does not cover issues regulated under Regulation No 1408/71. ESA also considers Iceland's reference to Article 1(j) of Regulation No 1408/71 – by which provisions of existing and future collective agreements are excluded from the concept of "legislation" – to be misplaced. In ESA's view, as the contested requirement is based on law (Article 5 of the Posting Act), that argument must be dismissed as irrelevant.

[8] Case C-45/90 *Paletta* [1992] ECR I-3423. Reference is also made to Case C-332/05 *Celozzi* [2007] ECR I-563.

Article 3(1)(c) of the PWD, Icelandic labour law and Article 5 of the Posting Act

62. On the assumption, contrary to ESA's submission, that sickness pay comes within the scope of Article 3(1)(c) of the PWD in general, ESA submits that it falls to be assessed specifically whether Icelandic labour law defines such pay as being part of the minimum wage. ESA considers that not to be the case.

63. ESA submits that Iceland has failed to refer to any provision of Icelandic law stating that sickness pay is part of the minimum wage. It argues further that Article 1 of Act No 55/1980 on Working Terms and Pension Rights Insurance, adduced by Iceland, cannot be interpreted to this effect when due account is taken of its wording and purpose. ESA adds that it is incumbent on Iceland, when it advances an interpretation that is not easily discernible from the text of the Article, to adduce evidence in support of its interpretation.[9]

64. ESA thus takes the view that Icelandic law does not define sickness pay as part of a minimum wage. It submits further, illustrating this point with a specific example, that in collective agreements under Icelandic law pay is habitually defined as remuneration for work performed whereas sickness pay is regarded as a separate item distinct from pay.

65. ESA argues further that due to the distinct nature of the right to paid sick leave, the part of the workforce which does not make use of it has no right to credit for any unused sick leave, for example, in the form of a payment at the end of the employment relationship. ESA contends that this differs from the rules on wages according to which all unpaid wages must be paid at the end of the employment relationship.

66. In the light of Iceland's remarks on the English translation of the Posting Act, ESA observes that it considers the two expressions "sickness pay" and "entitlement to wages in the case of illness

[9] Reference is made to Case C-543/08 *Commission* v *Portugal*, not yet reported, paragraph 60.

and accident" to be synonymous. As ESA sees it, both expressions cover the same situation, namely, where an employer is obliged to pay an employee despite his absence from work due to sickness (or accident).

Article 3(1)(c) of the PWD and Article 72 of the Icelandic Constitution

67. ESA does not dispute Iceland's assertion that wages, as monetary claims, are protected by Article 72 of the Icelandic Constitution on the right to property. However, ESA considers this irrelevant to the case at hand, arguing that the issue is not whether wages may be regarded as constitutionally protected property rights, but whether sick leave forms part of the definition of minimum wages.

Article 3(1)(c) of the PWD and ILO Convention No 95

68. ESA considers that the reference made by Iceland to the definition of wages in ILO Convention No 95 on the Protection of Wages has no bearing on the interpretation of Article 3(1)(c) of the PWD since the Convention is concerned with other matters, such as the form and procedures in relation to the payment of wages. Even on the assumption that the Convention is relevant as a matter of EEA law, ESA considers that, given the subject matter of the Convention and its purpose, it cannot serve as a frame of reference for the concept of minimum rates of pay under Article 3(1)(c) of the PWD. ESA also adds that Iceland does not appear to be a party the Convention.

Article 7 of the Posting Act is incompatible with Article 3(1) of the PWD

69. ESA considers it evident from the wording of Article 3(1) of the PWD that it does not encompass such requirements as those provided for in Article 7 of the Posting Act, which consequently fall outside the nucleus of mandatory rules for minimum protection to be observed in the host country by companies

posting workers there.[10] In ESA's view, Article 7 of the Posting Act is therefore incompatible with the Directive.

70. In this context, ESA considers it to be irrelevant how the rule is classified under national law, for example, as a rule of tort law or insurance law.

Article 3(7) of the PWD

71. ESA reiterates its arguments to the effect that the ECJ has found that the Directive must be interpreted as laying down a nucleus of mandatory rules for minimum protection and that, to this end, Article 3(1) of the PWD must be understood as setting out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State.[11]

72. Against this background, ESA examines Article 3(7) of the PWD which provides that Article 3(1)–(6) shall not prevent the application of terms and conditions of employment that are more favourable to workers. ESA observes that in *Laval un Partneri*, cited above, the ECJ held that Article 3(7) of the PWD could not be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection and that such an interpretation would amount to depriving the Directive of its effectiveness.[12] ESA further submits that the ECJ thus concluded that the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1)(a)–(g) of the PWD unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment.[13]

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10 Reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 25 and 26.
11 Reference is made to *Laval un Partneri*, cited above, paragraph 59, and *Commission* v *Luxembourg*, cited above, paragraphs 24 to 26.
12 Reference is made to *Laval un Partneri*, cited above, paragraph 80.
13 Reference is made to *Laval un Partneri*, cited above, paragraph 81, and Case C-346/06 *Rüffert* [2008] ECR I-1989, paragraphs 33 to 36.

73. According to ESA, it follows that Member States are not entitled on the basis of Article 3(7) of the PWD to impose standards of minimum protection in areas beyond those listed in Article 3(1)(a)–(g). Therefore, Article 3(7) of the PWD cannot serve as a basis for maintaining Articles 5 and 7 of the Posting Act. ESA submits that those provisions can only be regarded as complying with Article 3 of the PWD if they fall under Article 3(10) on public policy.

Article 3(10) of the PWD – the public policy exception

74. In response to Iceland's assertion that Articles 5 and 7 of the Posting Act may be justified under the exception for public policy provisions set out in the first indent of Article 3(10) of the PWD, ESA submits, with particular reference to *Commission* v *Luxembourg*, cited above, that the exception must be interpreted strictly and that its scope cannot be determined unilaterally by the EEA States. ESA further submits that the exception also does not exempt the EEA States from complying with their obligations under the EEA Agreement and, in particular, those relating to the freedom to provide services.[14] In reply to Iceland's argument that Declaration No 10 to the Directive, referred to by the ECJ in the judgment, has not been incorporated into the EEA Agreement, ESA asserts that this is irrelevant to the present case since the ECJ held that the concept of public policy had to be understood in the context of the PWD in the same manner as in other areas of Community law. In this connection, ESA observes that the ECJ in a subsequent part of the judgment held also that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[15]

75. ESA asserts that Articles 5 and 7 of the Posting Act as a matter of principle cannot be regarded as public policy provisions and that the requirements established by the ECJ are not fulfilled. ESA submits that the ECJ has only in a very few cases accepted that Member States can rely on a public policy exception. ESA cites

[14] Paragraphs 29 to 33 of the judgment.
[15] Ibid., paragraph 50.

the judgments in *Omega*, *Van Duyn* and *Krombach* and argues that the issues raised in those cases are far removed from the requirements contained in the Posting Act.[16]

76. On ESA's understanding, Iceland also argues that the provisions of the Posting Act enjoy the status of public policy provisions because they ensure the protection of human rights, more specifically the right to property as enshrined in Article 72 of the Icelandic Constitution and Article 1 of Protocol 1 to the ECHR. However, ESA fails to see how these provisions, given their material content, can be decisive with regard to the compatibility with the Directive of Articles 5 and 7 of the Posting Act. Having regard to the judgment in *Krombach*,[17] ESA submits that, in any case, only a manifest breach of fundamental rights is relevant and that the present case suggests nothing of that kind.

77. ESA further submits that, in any case, it is incumbent upon Iceland to demonstrate that Articles 5 and 7 of the Posting Act constitute public policy provisions. According to ESA, it is for Iceland to give the necessary reasons, which must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted, and precise evidence enabling the arguments to be substantiated.[18] In any event, ESA is of the opinion that Iceland has not fulfilled these requirements.

78. ESA disagrees with Iceland's assertion that there is a general principle in EEA law under which the terms and conditions of employment of workers shall be governed by the labour legislation of the State where the work is carried out. According to ESA, the general principle is that the terms and conditions of employment of workers are governed by the law chosen by the parties and temporary employment in a different country from the one in which the work is habitually carried out does not affect the validity of that choice.

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16 Case C-36/02 *Omega* [2004] ECR I-9609, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 19, and Case C-7/98 *Krombach* [2000] ECR I-1935.

17 Cited above, paragraph 44 of the judgment.

18 Reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 51 and 52.

79. Furthermore, ESA submits that it is not the purpose of Directive 96/71 to guarantee posted workers equal treatment in respect of all employment rights in the EEA State to which they are posted by their employer. In that respect, ESA disagrees with Iceland, arguing that such equal treatment cannot be secured via a wide interpretation of the concept of public policy, which has no basis in EEA law.

80. Finally, with regard to Article 7 of the Posting Act, and in the light of submissions by Iceland, ESA argues that the objective of ensuring that employers contribute to financing of the social security system does not constitute public policy. In this respect, ESA submits that, according to settled case-law, economic aims cannot constitute grounds of public policy.[19]

Restrictions under Article 36 EEA

81. According to ESA, Article 36 EEA requires the abolition of any restriction on the freedom to provide services, which is liable to prohibit, impede or render less advantageous activities of a service provider established in another Member State, unless it pursues a legitimate objective and is suitable and proportionate.[20]

82. ESA submits that the ECJ has held that requiring undertakings established in other Member States to comply with requirements relating to matters not listed in Article 3(1) of the PWD is liable to make it less attractive or more difficult to carry out work in the host State and thus constitutes a restriction on the freedom to provide services.[21] ESA argues that this applies to Articles 5 and 7 of the Posting Act.

83. ESA acknowledges that protection of workers is a recognised overriding requirement in the general interest which may justify

[19] Reference is made to Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 11, and Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 15.

[20] Reference is made to Case E-1/03 *ESA* v *Iceland* [2003] EFTA Ct. Rep. 143, paragraph 28; Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-279/00 *Commission* v *Italy* [2002] ECR I-1425, paragraph 31.

[21] Reference is made to *Laval un Partneri*, cited above, paragraph 99.

a restriction.[22] It argues, however, that requirements outside the scope of Article 3(1) of the PWD cannot be justified under that overriding requirement as the coordination achieved by the Directive regulates exhaustively (save for Article 3(10)) the issue of minimum protection for posted workers.[23] It submits that this is in conformity with consistent ECJ case-law which prevents recourse to overriding requirements in the general interest once secondary legislation exists providing for measures necessary to ensure protection of that interest.[24]

84. In ESA's view, it follows that a restriction on the freedom to provide services entailing the imposition of terms and conditions going beyond the nucleus of mandatory protection laid down in Article 3(1) of the PWD is only justifiable under the exception for public policy provisions in Article 3(10).

85. As ESA finds the case to concern legislative measures rather than collective action by trade unions, ESA fails to see the relevance of the overriding requirement concerning the right to take collective action against social dumping mentioned by Iceland. In any event, ESA submits, Article 3 of the PWD and Article 36 EEA do not hinder workers on the Icelandic labour market from taking collective action to safeguard their own minimum rights or to ensure that the mandatory protection under Article 3(1) of the PWD is respected.

Posted workers and social security under Regulation No 1408/71

86. ESA adds some remarks in response to submissions from Iceland regarding social security. At the outset, ESA submits that Article 3 of the PWD does not provide the EEA States with authority to impose requirements on posted workers on the basis that the requirements are within the ambit of Regulation No 1408/71.

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22 Reference is made to Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36, and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33.

23 Reference is made to *Laval un Partneri*, cited above, paragraph 108.

24 Reference is made to Case C-257/05 *Commission* v *Austria* [2006] ECR I-134, paragraph 23, and Case C-389/05 *Commission* v *France* [2008] ECR I-5337, paragraph 74.

87. Further, it seems to ESA that Iceland confuses the definition of the term posted worker for the purposes of Article 36 EEA and Directive 96/71 with the definition in Article 14(1) of Regulation No 1408/71. ESA submits that the general rule under Regulation No 1408/71 is that a person's insurance benefits are defined by the legislation of the country of occupation (Article 13(2)(a) of Regulation No 1408/71) and that one of the exceptions to this rule is the posting of workers governed by Article 14(1) of Regulation No 1408/71. ESA further submits that, according to settled ECJ case-law, Article 14(1) applies to a worker who is subject to the legislation of a Member State, by reason of being employed by an undertaking in that Member State, with a view to his posting to another Member State provided that there exists a direct relationship between the undertaking and the worker during his period of posting and that the undertaking normally carries out its activities in the first Member State.[25]

88. ESA argues, therefore, that if the worker is a posted worker under Article 14(1) of Regulation No 1408/71, all rights and obligations of the home State in the field of social security remain applicable for the entire duration of the posting to the host State. On the other hand, if a foreign worker intends to register as a posted worker with the Icelandic social security system, but cannot provide documentation proving his status as a posted worker under Regulation No 1408/71, he will be covered by Article 13(2)(a) of that Regulation. ESA asserts that the consequence of that is that he will be covered by the legislation of the host State. In such a situation, EEA law permits Iceland to require the employer to pay social security contributions in accordance with Icelandic law. According to ESA, problems confronted by the national authorities in determining who is a posted worker in the meaning of Article 14(1) of Regulation No 1408/71 cannot serve as an overriding requirement in the general interest to justify the imposition on foreign service providers of the obligation to take out an accident insurance such as that prescribed by Article 7 of the Posting Act.

[25] Reference is made to Case 35/70 *Manpower* [1970] ECR 1251, paragraphs 16 to 19, and Case C-202/97 *FTS* [2000] ECR I-883, paragraphs 22, 26 and 31.

The Charter of Fundamental Rights of the European Union

89. ESA submits that Article 34 of the Charter, as referred to by Iceland, concerns the right to social security and social assistance in accordance with Community and national law. In ESA's view, its conclusion that Articles 5 and 7 of the Posting Act are incompatible with Directive 96/71 does not call into question the rights posted workers may have to social security under Regulation No 1408/71 or other instruments of EEA law. Similarly, ESA submits that nothing in the EEA Agreement prevents Iceland from granting posted workers access to benefits under its own system of social security. In any case, ESA is of the opinion that for the purposes of this case it is unnecessary to examine in detail the relationship to provisions of the Charter.

Iceland

Fundamental importance of collective agreements being declared universally applicable

90. Iceland asserts that it is pivotal to the case that collective agreements in Iceland are universally applicable. It argues that all the ECJ case-law relied on by ESA in its application, including *Laval un Partneri* and *Commission* v *Luxembourg*, cited above, concerned requirements in collective agreements that were not universally applicable and that this was a decisive element in those cases. Iceland claims that the situation in the case at hand is therefore materially different as the agreements concerned are universally applicable.

91. Iceland takes the view that the Posting Act is not the source of the disputed requirements but merely constitutes additional legal protection of requirements laid down in such agreements. It submits, therefore, that, ultimately, the case turns on the universally applicable collective agreements in Iceland, not the Posting Act.

Relevant law

92. Iceland cites a considerable number of provisions of national law and in different fields of European law, including the ECHR, the TFEU and the Charter of Fundamental Rights of the European Union, to substantiate its pleas in law. Iceland considers the case to concern not only Article 3 of the PWD as such, but also other legal issues reaching considerably further. The various provisions cited by Iceland are quoted in section II above.

Entitlement to wages in case of illness or accident – introductory remarks

93. Iceland maintains that the entitlement to wages in case of illness or accident is included in the term "minimum rates of pay" in Article 3(1)(c) of the PWD and inherent in the concept of "minimum rates of pay" in Icelandic labour law.

EEA law and the concept of "minimum rates of pay"

94. At the outset, Iceland argues that the concepts of "pay" and thus "minimum rates of pay" are not generally harmonised in EEA law. By way of example, Iceland submits that the ECJ has held that the concept of "pay" in directives on social policy, such as the Pregnancy Directive,[26] is not the same as the concept of "pay" for the purposes of Article 157 TFEU.[27]

95. Furthermore, Iceland argues that the concept of "minimum rates of pay" or "minimum wage" is also not harmonised for the purposes of Directive 96/71. Subject to compliance with the EEA Agreement and general principles of EEA law, Iceland asserts that it is for Icelandic labour law and universally applicable collective agreements in Iceland to determine what constitutes the minimum wage for the purposes of implementation of the

[26] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ 1992 L 348, p. 1.

[27] Reference is made to Case C-411/96 *Boyle and Others* [1998] ECR I-6401.

Directive in Iceland[28] and that nothing prevents Iceland from including entitlement to wages in case of illness or accident as part of a minimum wage determined on a monthly basis.

96. In this context, and in support of its national freedom with respect to defining the relevant "minimum rates of pay", Iceland makes reference to Article 7 EEA, according to which EEA States have the choice of form and method when implementing Directives.

97. Moreover, Iceland claims to find support for its assertions in the different language versions of the Directive. It submits that the different language versions use terms which are not entirely synonymous, but reflect the different notions of "minimum rates of pay" or minimum wages in national labour law and that, therefore, these different notions are decisive in determining what constitutes the minimum wage for the purposes of applying the Directive in each EEA State. It further submits that terms such as the Icelandic "lágmarkslaun" and the Danish "mindsteløn" refer in Nordic labour law to the determination of minimum wages on either a monthly or hourly basis. Consequently, Iceland argues that, at least in Icelandic labour law, it is inherent in the determination of minimum wages on a monthly rather than an hourly basis that the worker's right to absence from work due to illness or accident is included in the calculation.

98. In this context, Iceland also submits that a strict textual understanding of the English language term "minimum rates of pay" cannot be decisive since the ECJ in Case C-341/02 *Commission* v *Germany*, cited above, refers to both "minimum wages" and "minimum rates of pay".

99. With reference to recital 13 in the preamble to the Directive, Iceland adds that in its view the Directive merely provides for coordination of the laws of the EEA States, and not harmonisation, with respect to the nucleus of mandatory rules for

[28] Reference is made to Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 19, and *Laval un Partneri*, cited above, paragraph 60.

minimum protection set out in Article 3 of the PWD. It submits further that the Directive establishes a system recognising the minimum wage as determined according to national practice in each EEA State.

100. Iceland also maintains that since the Directive is not concerned with social security or taxation the comparison between EEA States should be made on the basis of gross pay, not net take-home pay.[29] In Iceland's view, this goes to show, *inter alia*, that the Directive is neutral in respect of whether the host State opts for sick leave payments as part of the social security system, which may be maintained by premiums deducted from gross wages, or a system providing that employers are to maintain the payment of wages in the event of sickness or accidents. Iceland acknowledges, however, that in order to avoid a dual burden account must be taken of elements of wages paid by employers established in other EEA States for the purpose of calculating minimum wages. Iceland submits that the Posting Act ensures this.

101. In conclusion, Iceland contends that by requiring posting undertakings to secure their workers' entitlement to wages in case of illness or accident, Iceland not only acts in conformity with the wording of Article 3(1) of the PWD, but also fulfils its obligation to guarantee posted workers their rights under Article 3(1)(c) of the PWD and furthers the objectives of Article 3(1). Those objectives are, Iceland submits, to avoid distortions of competition, to guarantee the rights of posted workers and to eliminate barriers and ambiguities affecting the freedom to provide services.[30]

Icelandic labour law and the concept of "minimum rates of pay"

102. At the outset, Iceland submits that "entitlement to wages in the case of illness or accident" is not the same as "sickness pay", a term used by ESA. It argued that "sickness pay" is generally

[29] Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 29.
[30] Reference is made to the Opinion of Advocate General Trstenjak in *Commission* v *Luxembourg*, cited above, point 33.

provided for by social security measures, as opposed to the unchanged wages which are paid by the employer in the event of sickness or accident and which stem from the employment relationship as such. Moreover, it underlines that the term "sick leave", also used by ESA, does not necessarily imply continued payment of wages and is inappropriate.

103. Iceland further submits that since, according to Article 3 of the PWD, the "minimum rates of pay" may be laid down in national legislation or, as the case may be, in universally applicable collective agreements, it is of no importance whether there is a provision on minimum wages or a definition of that concept in Icelandic legislation. Iceland asserts that for more than thirty years the entitlement to wages in case of illness or accident has been considered an inherent element of minimum wages in Icelandic labour law, established in collective agreements which have been made universally applicable. It submits that the entitlement is negotiated in collective agreements as part of wages. Statistically the entitlement is said, on average, to represent 3.8% of salary.

104. As Iceland sees it, the fact that parts of the workforce in Iceland fail to make use of their entitlement to wages in the case of illness or accident (because they do not fall ill or have accidents) and thus lose that entitlement demonstrates its nature as part of the minimum wage and not as a replacement for loss of wages or a distinct employment right. If, on the other hand, it were a distinct employment right, it would be natural, in Iceland's view, for unused
rights to be recoverable by employees in the same manner as minimum paid annual leave.

105. Iceland adds, moreover, that the submission of a doctor's certificate is not a procedural requirement as such since it is left to the discretion of the employer to assess whether such proof of illness is needed.

Regulation No 1408/71 and Article 5 of the Posting Act

106. For the sake of completeness, Iceland considers it necessary to assess whether the right under Article 5 of the Posting Act must be considered as one of the "terms of employment" within the scope of Article 3 of the PWD or a social security "benefit" under Regulation No 1408/71.

107. In Iceland's view, it is clear both from the provisions of Regulation No 1408/71 and from the rulings of the ECJ that once consideration or a payment is based on an employment relationship, whether by virtue of a collective agreement or legislation, it is considered to constitute "pay" and not a "social security benefit". It submits
also that no other conclusion can be drawn from *Paletta*, cited above.

108. Iceland refers to Article 1(j) of Regulation No 1408/71, claiming that this provision excludes schemes established under collective agreements from the scope of the Regulation. Iceland further asserts that the said provision recognises the freedom of the EEA States to organise their social security systems in accordance with national policy objectives, without harmonisation. Iceland thus considers the entitlement to maintenance of wages in the event of illness or accidents provided for by Icelandic labour law, from the outset, to fall outside the scope of Regulation No 1408/71. Further, it argues that since Iceland has made no declaration to the contrary, it remains the case that this entitlement cannot be classified as a benefit under Regulation No 1408/71. According to Iceland, *Paletta*, cited above, does not serve to bring the entitlement to wages during illness or accidents under Regulation No 1408/71, contrary to the wording of Article 1(j).

109. In Iceland's view, classification of the rights afforded to workers under Article 5 of the Posting Act as a social security benefit and not a minimum entitlement under national collective agreements is liable to undermine the autonomy of national labour standards to the detriment of the protection of workers built up in the

Icelandic labour market over many decades. Further, it is Iceland's understanding that ECJ case-law recognises that even if maintenance of pay during sickness is in certain countries classified as a social security benefit, this should not be held to prevent other EEA States from enhancing the rights of workers by establishing entitlement to such maintenance of pay as an inalienable part of their right to payment of minimum wages under national collective agreements.[31]

110. Iceland submits further that in *Gillespie and Others*, cited above, the continued payment of wages to a pregnant worker was classified as "pay" despite the fact that it was not rendered as payment for the contribution of the worker. Iceland argues that the same applies in respect of the maintenance of wages in the event of illness notwithstanding a worker's inability to render services to his employer during the period of sickness. Iceland further argues that what defines this entitlement is the direct contractual relationship between employer and worker and not social security legislation.

Article 3(10) of the PWD on public policy and Article 5 of the Posting Act

111. Should the Court conclude that the requirements under Article 5 of the Posting Act fall outside the ambit of Article 3(1) of the PWD, Iceland submits that these provisions are in any event justified on the basis that they derive from imperative provisions of collective agreements which are legally protected and from which there can be no exemptions. As Iceland sees it, the public policy exception in Article 3(10) of the PWD thus applies.

112. For the purposes of the present case, Iceland submits that the right to maintenance of wages in the event of sickness and accidents may be divided into two parts, first, the right as concerns the preservation of minimum wages and, second, the

[31] Reference is made to Case 171/88 *Rinner-Kühn* [1989] ECR 2741, paragraph 5 [*sic*]; *Paletta*, cited above, paragraph 15; Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 22; *Bötel*, cited above; Case C-457/93 *Lewark* [1996] ECR I-243; Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165; and Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 18.

right as concerns the preservation of other wages. Iceland asserts that not only the former right, but also the latter right qualify as public policy exceptions under Article 3(10) of the PWD. Iceland submits that the preservation of all wages and not only minimum wages is important for the balance of rights and obligations in the Icelandic labour market. In Iceland's view, it is imperative that this is not changed so as to hamper the autonomy of the social partners to provide for flexibility, adaptation and diversity in setting pay standards.

113. Iceland also argues that the nature of industrial relations in the EEA States would be impaired were they not permitted to require foreign service providers to comply with provisions of collective agreements considered sufficiently important that the State concerned has enacted legislation rendering these a legally required minimum standard with which all employment contracts must comply.

114. Iceland submits that the requirements under Article 5 of the Posting Act are intended to secure the value of minimum wages and other wages for posted workers, which is considered imperative for the protection of workers and crucial to the social order in Iceland. It submits further that the requirements concerned are suitable and necessary in order to secure that objective,[32] and that they are non-discriminatory.

115. Moreover, Iceland relies on human rights provisions.[33] Reference is made to Articles 65 and 72 of the Icelandic Constitution, Article 14 ECHR and Article 1 of Protocol 1 to the ECHR. As Iceland regards the entitlement to wages in case of illness or accident to be inherent in the concept of wages, Iceland also considers the entitlement to constitute a property right the protection of which must be secured according to the Icelandic Constitution and the ECHR[34] regardless of the origin of the worker. Iceland observes that, under Article 6 of the PWD, judicial proceedings may be

[32] Reference is made to *Laval un Partneri*, cited above, paragraph 101.
[33] Reference is made to Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185.
[34] Reference is made to *Kopecky* v *Slovakia* [GC], judgment of 28 September 2004, ECHR Reports 2004-IX, p. 144, §§ 45–52.

instituted in the host State in order to enforce the right to terms and conditions of employment guaranteed under Article 3 of the PWD.

116. Iceland further asserts that *lex loci laboris*, a general principle of international law, constitutes a general rule under EEA law. Consequently, it submits that workers must be covered by the labour legislation and social security system in the country where they work. According to Iceland, this principle is recognised in Directive 96/71 and Regulation No 1408/71. The relevant provisions of the Directive as well as the provisions of Regulation No 1408/71 which relate to posted workers are, in its view, exceptions in this respect. Moreover, Iceland adds that the posting of workers may, in some instances, last for several years.[35]

117. Iceland argues that ESA is too restrictive in its interpretation of the ECJ case-law on which it relies as regards public policy and Article 3(10) of the PWD. In Iceland's view, that case-law is in essence concerned with circumstances which are dissimilar to those of the present case. Iceland also contends that ESA fails to recognise the bargaining autonomy accorded to the social partners under EEA law.

118. Iceland refers in particular to *Commission* v *Luxembourg*, cited above, which, in its view, demonstrates that provisions of universally applicable collective agreements may in certain circumstances fall under Article 3(10) of the PWD.[36] Iceland submits that a case-by-case examination must be carried out to determine whether the rules in question promote the protection of workers and confer a genuine benefit on them.[37] It observes that the indexation of minimum wages has been deemed to comply with Article 3(10) of the PWD,[38] and submits that the same must apply to the requirements under Article 5 of the Posting Act. In this context, Iceland asserts further that for the

35 Reference is made to Case C-215/01 *Schnitzer* [2003] ECR I-14847.
36 Reference is made to paragraphs 65 and 66 of the judgment.
37 Reference is made to the Opinion of Advocate General Trstenjak in *Commission* v *Luxembourg*, cited above, points 60 to 62.
38 Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 45.

purposes of preserving their value also the indexation of wages other than minimum wages may constitute legitimate means of safeguarding public policy.[39]

Article 36 EEA and Article 5 of the Posting Act

119. Iceland agrees with ESA that Article 36 EEA becomes relevant if Article 5 of the Posting Act is considered to fall outside Article 3 of the PWD. However, Iceland disagrees with the argument that the Directive prevents recourse to overriding requirements in the general interest as grounds for justification. Rather, Iceland asserts that the Directive merely coordinates national legislation.[40] Thus, when applying Article 36 EEA, Iceland asserts that the issue of justification must be dealt with as in a case of infringement of the EEA Agreement in the absence of a relevant directive.

120. According to Iceland, various objectives in the public interest may constitute a legitimate aim and these include the objectives referred to in discussion of Article 3(10) PWD. It refers to the arguments set out in that respect. In particular, Iceland maintains that Article 5 of the Posting Act is concerned with the recognised objective of worker protection.[41] It submits in that regard that the requirements of suitability, necessity and proportionality are fulfilled. Iceland also submits that ESA has failed to establish that any additional financial burden is placed on posting undertakings from countries where workers enjoy similar protection or that the social protection of workers is not enhanced.[42]

Accident insurance, Directive 96/71 and Article 36 EEA

121. Iceland submits that the insurance cover provided for under Article 7 of the Posting Act is a rule of national tort and insurance law, as such falling outside the ambit of Directive

39 Reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 45 to 55.
40 Reference is made to Case C-490/04 *Commission* v *Germany*, cited above, paragraphs 19 to 21, and to the Opinion of Advocate General Ruiz-Jarabo Colomer in the case, point 28 [*sic*].
41 Reference is made to Case C-490/04 *Commission* v *Germany*, cited above, paragraph 46.
42 Ibid., paragraph 54 [*sic*].

96/71. It argues that EEA law does not preclude Member States from applying their legislation, or collective agreements as the case may be, to any person employed, even temporarily, within their territory.[43] Iceland submits that national rules on employees' insurance cover constitute such legislation. It argues further that tort and insurance law is not harmonised in EEA law and that in the absence of harmonisation, rules of tort and insurance law fall outside the ambit of EEA law.[44]

122. However, if the Court should conclude that the requirements of Article 7 of the Posting Act come within the scope of the Directive, Iceland submits that if in turn those requirements are considered a restriction, they are in any case justified. Iceland states that the objective of the legislation is to provide insurance cover to workers posted to Iceland and their families. Iceland considers this to be an imperative requirement. It adds that the requirements at issue are established in collective agreements which are legally protected and from which there can be no exemptions. Iceland refers to Article 3(10) of the PWD and reiterates its general arguments made in respect of that provision.[45]

123. Iceland further submits that any restriction at issue here is both suitable and necessary for securing attainment of the abovementioned objective.[46] It submits also that Article 7 of the Posting Act is necessary to protect the legal rights of workers posted to Iceland and thus ensure social cohesion. Essentially, Iceland submits the same with respect to any assessment under Article 36 EEA, should the Court find the requirements under Article 7 of the Posting Act to fall outside the Directive and within the scope of Article 36 EEA.

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43 Reference is made to recital 12 in the preamble to the Directive.

44 Reference is made to Case E-1/99 *Finanger* [1999] EFTA Ct. Rep. 119 and Case E-7/00 *Helgadóttir* [2001] EFTA Ct. Rep. 246.

45 Further reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 65 and 66, and to the Opinion of Advocate General Trstenjak in the case, points 60 to 62.

46 Reference is made to *Laval un Partneri*, cited above, paragraph 101.

124. In addition, Iceland also submits essentially the same arguments concerning human rights as it advanced with regard to Article 5 of the Posting Act.[47]

Final remarks

125. Lastly, Iceland argues that it would be unacceptable as a matter of both national policy and EEA law that workers be afforded less protection under EEA law than under EU law. In this respect, it refers to Article 9 TFEU and Article 31 of the Charter of Fundamental Rights of the European Union.[48]

The Republic of Finland

Directive 96/71 and Article 5 of the Posting Act

126. The Republic of Finland argues that the interpretation of the concept of "minimum rates of pay" under Article 3(1)(c) of the PWD may be broad and that account can be taken not only of actual working hours, but also of wages paid for a certain period when the employee is justifiably absent from work. In its view, therefore, the obligation pursuant to Article 5 of the Posting Act to pay wages during a period of illness is consistent with the Directive.

127. As the Republic of Finland sees it, the freedom of the individual Member State to define the concept of "minimum rates of pay" is only limited by Article 3(7) of the PWD, according to which certain allowances must be considered part of the minimum wage.

128. The Republic of Finland submits that the concept of "minimum rates of pay" encompasses remuneration for fulfilment of obligations by the employee under the contract of employment. It submits further that an employee does not fail to fulfil his

[47] Further reference is made to *Pressos Compania Naviera S.A. and Others* v *Belgium* [GC], judgment of 3 July 1997, ECHR Reports 1997-IV, p. 1296.

[48] Reference is also made to points 51 to 55 of the Opinion of Advocate General Cruz Villalón in Case C-515/08 *Santos Palhota and Others*, not yet reported.

contract when temporarily absent from work for justified reasons, such as temporary loss of working capacity. Accordingly, an employee is entitled to receive and his employer is obliged to pay the minimum wage even if the former has temporarily fallen ill.

129. The Republic of Finland argues that the contrary interpretation would lead to the conclusion that the sole possibility to define minimum rates of pay is the stipulation of hourly rates. Yet it is not uncommon, according to the Republic of Finland, for the wage to be defined as monthly pay, in which case the rates of pay include all breaks, days off and holidays, that is, justified absences from work. Thus, absence from work does not necessarily constitute a reason for a cessation in the payment of wages.

130. Further, the Republic of Finland contrasts the position with sickness benefits payable under a national social security system. In its view, such benefits are not remuneration for performance under the employment contract and, therefore, an employer is not obliged to pay them. The Republic of Finland further submits that such benefits typically replace the employer's responsibility to pay wages when the employee has lost his working capacity for a longer period of time as defined in national law.

131. The Republic of Finland draws special attention to several ECJ judgments. First, it mentions *Schultz-Hoff*,[49] concerning Directive 2003/88.[50] The Republic of Finland argues that in that case the ECJ established a principle that in calculation of a worker's benefits sick leave can be equated with actual working hours and that as regards workers on duly granted sick leave, the right to paid annual leave conferred by Directive 2003/88 on all workers cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during the leave year laid down by that State.[51] As an employee who has been on

[49] Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others* [2009] ECR I-179.
[50] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299, p. 9.
[51] Paragraph 41 of the judgment.

sick leave is thus entitled to paid annual leave, the Republic of Finland submits that it would be illogical if Member States were precluded from requiring that an employee on short-term sick leave must be paid the minimum rate of pay.

132. Second, the Republic of Finland addresses Case C-341/02 *Commission* v *Germany*, cited above. It argues that the question of the kind of performance that is required from an employee did not arise in the case. Therefore, the judgment is of limited relevance to the case at hand. The Republic of Finland notes that the ECJ stated that in considering the component elements of the minimum wage, it is the gross amount of wages that must be taken into account. According to the Republic of Finland, this means that the amount of wages to be taken into account is the wage before taxes (as opposed to the net wage), and not that the pay must necessarily be reflected in nominal/numerical terms. Moreover, it is the understanding of the Republic of Finland that the ECJ focused on the interpretation of Article 3(7) not Article 3(1)(c) of the PWD and, accordingly, that the Member States' freedom to define the concept of "minimum rates of pay" is not restricted by the judgment.

133. Third, the Republic of Finland also addresses *Laval un Partneri*, cited above. In that context, it submits that the present case does not concern the imposition of standards in areas beyond those listed in Article 3(1) of the PWD. According to the Republic of Finland, the present case concerns interpretation of one of the matters expressly listed, namely, minimum rates of pay. Moreover, it argues that in *Laval un Partneri*, unlike the situation in the present case, the standard of protection imposed was higher than the minimum standard foreseen by the relevant national legislation and that, therefore, it cannot be inferred from *Laval un Partneri* that the Directive precludes legislation such as Article 5 of the Posting Act.

134. The Republic of Finland submits also that a broad interpretation of the concept of "minimum rates of pay" is supported by the

objectives of Directive 96/71, in particular the protection of workers.[52]

135. The Republic of Finland submits further that the concept of "pay" under Article 157 TFEU, on equal treatment of male and female workers as part of EU social policy, is broad and covers the continued payment of wages to an employee in the event of illness.[53] In the view of the Republic of Finland, there is no reason to interpret the concept of "pay" more narrowly in Directive 96/71 than in the context of social policy since a main purpose of the Directive is to strike the balance between, on the one hand, the TFEU provisions guaranteeing free movement of services and, on the other hand, social policy. The Republic of Finland regards the two objectives as reconciled in Article 3(1) of the PWD establishing an exhaustive list of issues left to national legislation and advocates a harmonious interpretation of the concept of pay which applies both under Article 3(1)(c) of the PWD and Article 157 TFEU.

136. The Republic of Finland also considers such an interpretation to strengthen fair competition by making conditions for employment more equal.

137. It argues further that a broad interpretation of the concept of "pay" under Article 3(1)(c) of the PWD does not make the provision of services noticeably more difficult than does compliance with the other provisions of Article 3(1). In the view of the Republic of Finland, Article 5 of the Posting Act thus does not restrict the freedom to provide services in such a way as counters the objectives of the Directive. The Republic of Finland also contrasts the present case with Case C-341/02 *Commission* v *Germany*, cited above, arguing that in the latter case the problem from the point of view of the proper functioning of the internal market was an excessively narrow interpretation of the concept of "pay" adopted by the Federal Republic of Germany.

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52 Reference is made to recital 5 in the preamble to the Directive; to the Opinion of Advocate General Bot in Joined Cases C-307/09 to C-309/09 *Vicoplus* [2011], not yet reported, point 55, and to the Opinion of Advocate General Trstenjak in *Commission* v *Luxembourg*, cited above, point 33.

53 Reference is made to *Rinner-Kühn*, cited above, paragraph 7.

Regulation No 1408/71 and Article 5 of the Posting Act

138. Contrary to the view taken by ESA, the Republic of Finland considers it irrelevant to the interpretation of Article 3(1)(c) of the PWD that the continued payment of wages to an employee in the event of illness can also be classified as a sickness benefit within the meaning of Regulation No 1408/71. With reference to *Paletta*, cited above, the Republic of Finland observes that in that case in relation to the continued payment of wages to an employee in the case of illness the Court held that although covered by the concept of "pay" under Article 157 TFEU, it did not follow that the payment made by the employer could not at the same time constitute sickness benefits under the said Regulation.[54] The Republic of Finland observes further that the judgment in *Paletta* preceded the adoption of the Directive and submits, consequently, that the ECJ did not have the opportunity in that case to resolve the relationship between the continued payment of wages as part of minimum rates of pay under the Directive and payment thereof as a social security benefit.

139. The Republic of Finland adds that its interpretation of Directive 96/71 does not provide employees with double compensation from the employer and the social security system as this is excluded under Article 12 of Regulation No 1408/71.

Conclusion

140. In conclusion, the Republic of Finland submits that Article 36 EEA and Directive 96/71 do not preclude national rules according to which a posted worker shall be entitled to receive wages in the event of illness and accidents while he works in Iceland in connection with the provision of services.

The Kingdom of Norway

141. The Kingdom of Norway supports the submissions made by Iceland on the compatibility with EEA law of Articles 5 and 7 of the Posting Act.

[54] Paragraph 15 of the judgment.

Regulation No 1408/71, Directive 96/71 and Article 5 of the Posting Act

142. The Kingdom of Norway submits that Regulation No 1408/71 and Directive 96/71 constitute, *inter alia*, coordinating legislation laying down conditions for determining the national legislation applicable. It submits further that the ECJ has accordingly held that the provisions of Title II of Regulation No 1408/71 constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complications which may result from that situation.[55]

143. The Kingdom of Norway observes that under Title II of Regulation No 1408/71 Article 14(1)(a) states that the legislation of the home Member State shall apply to posted workers, provided that the anticipated work does not exceed 12 months, whereas Article 3 of the PWD stipulates that the legislation of the host Member State shall apply unless the home State legislation provides for more favourable conditions for posted workers. The Kingdom of Norway concludes from this that Regulation No 1408/71 and Directive 96/71 cannot apply simultaneously as they impose conflicting schemes of coordination of the Member States' legislation.

144. The Kingdom of Norway claims that the conflict must be resolved to the effect that benefits and contributions falling within the scope of Regulation No 1408/71 are not only excluded from the scope of Article 3(1) of the PWD, but fall outside the scope of the Directive in its entirety.[56] The Kingdom of Norway also argues that an overlap in application could entail a risk that Directive 96/71, in so far as social security legislation falls outside Article 3(1)(c) of the PWD, prevents host Member States from applying their social security legislation where this is required by Regulation No

[55] Reference is made to *FTS*, cited above, paragraph 20.

[56] Reference is made to recital 21 in the preamble to the Directive and statements by the Commission in COM(2003) 458 final of 25.7.2003, p. 5.

1408/71 for the protection of workers, for example in situations where more than 12 months posting may be anticipated.

145. In summary, the Kingdom of Norway claims that if Article 5 of the Posting Act is deemed to constitute social security legislation for the purposes of Regulation No 1408/71 then ESA's application must be dismissed in so far as Article 5 is concerned, for the reason that Directive 96/71 is inapplicable. Only if Article 5 of the Posting Act falls outside the scope of Regulation No 1408/71, does it fall to be considered, the Kingdom of Norway claims, whether Article 5 is compatible with Directive 96/71.

Article 3(1) of the PWD – preliminary observations

146. The Kingdom of Norway highlights that the ECJ has found provision of manpower to be a particularly sensitive matter from the occupational and social point of view, directly affecting both relations on the labour market and the lawful interests of the workforce concerned.[57] The Kingdom of Norway further asserts that the ECJ has consistently held that Community law does not preclude Member States from extending their legislation or collective agreements to any person employed, even temporarily, within their territory, no matter in which country the employer is established.[58] Moreover, the ECJ has held that Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first Member State to pay its workers the minimum remuneration laid down by the national rules of that State.[59] According to the Kingdom of Norway, the tenor of this case-law reveals that the ECJ, owing to the particularly sensitive matter concerned, has awarded the Member States a margin of discretion as concerns the extension of their labour law and, in

57 Reference is made to Case 279/80 *Webb* [1981] ECR 3305, paragraph 18.
58 Reference is made to Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18.
59 Reference is made to Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 12; *Arblade and Others*, cited above, paragraph 33 [*sic*]; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraphs 28 and 29; and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21.

particular, rules concerning minimum remuneration to workers temporarily employed on their territory.

147. The Kingdom of Norway further submits that the ECJ has stated that this case-law is enshrined in Article 3(1)(c) of the PWD.[60] It argues that it thus follows from recitals 6 and 13 in the preamble to the Directive that its aim is to coordinate Member States' laws by laying down a nucleus of mandatory rules for minimum protection. Reference is also made to the ECJ having stated that Directive 96/71 does not harmonise the material content of those mandatory rules for minimum protection and that that content may accordingly be freely defined by the Member States.[61] In the view of the Kingdom of Norway, this applies *a fortiori* to Article 3(1)(c) of the PWD and the concept of minimum rates of pay because of the particular provision in the second subparagraph of Article 3(1).

148. In conclusion, the Kingdom of Norway sees no grounds for a narrow interpretation of the nucleus of mandatory rules in Article 3 of the PWD and highlights the Member States' margin of discretion in defining the content of those rules, in particular as concerns the concept of minimum rates of pay.

149. The Kingdom of Norway acknowledges, however, that the Directive also entails harmonisation of the Member States' laws. First, the Kingdom of Norway acknowledges that the possibility to secure posted workers conditions of employment falling outside the matters referred to in Article 3(1) of the PWD is limited. Article 3(10) provides that such conditions may only be justified on grounds of public policy, a notion which must be interpreted strictly.[62] Second, it acknowledges that Member States are prevented from providing for a higher level of protection than the standards referred to in Article 3(1) which the Kingdom of Norway also sees as minimum standards. In this respect, Article 3(1) of the PWD thus provides for total harmonisation.

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60 Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 25.

61 *Laval un Partneri*, cited above, paragraph 60. Further reference is made to Commission statements in SEC(2006) 439 of 4.4.2006, p. 16.

62 Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 30.

150. The Kingdom of Norway argues, however, that it does not follow that also the content of the matters listed in Article 3(1) of the PWD should be narrowly construed. It asserts that this would entail harmonisation of the material content of those mandatory rules for minimum protection in contravention of the abovementioned ECJ case-law. In particular, the Kingdom of Norway refers to *Laval un Partneri*, cited above, arguing that in the light of the ECJ's strict interpretation of Article 3(7) of the PWD it is evident that the Member States' discretion to define the content of the matters listed in Article 3(1) of the PWD is an issue separate from the Member States' possibility to, within the scope of those matters, impose higher standards.

Article 3(1)(c) of the PWD and the concept of "minimum rates of pay"

151. According to the Kingdom of Norway, the wording and structure of Article 3(1)(c) of the PWD imply that the concept of "pay" includes several constituent elements, reflecting, *inter alia*, the conditions under which the work is carried out. This is said to follow from the plural in "minimum rates of pay" and the inclusion of "overtime rates". Further, the word "including" is said necessarily to imply that minimum rates of pay reflecting distinct working conditions other than overtime are included in the concept of pay. The Kingdom of Norway argues that the express exclusion of "supplementary occupation retirement pensions" implies also that the concept of pay is recognised as having a broad meaning.

152. The Kingdom of Norway adds certain remarks on Case C-341/02 *Commission* v *Germany*, cited above, underlining that the case did not relate to the host Member State's rights to define minimum rates of pay. The case concerned Article 3(7) of the PWD and revolved around the conditions under which the Member State had to recognise allowances and supplements provided to posted workers by the posted undertakings as constituent elements of the minimum wage when comparing that remuneration with the minimum wage prescribed by German law. The Kingdom of Norway argues that the judgment affirms the host Member State's

competence to define the constituent elements of its minimum wage and thereby provide the benchmark for comparison under Article 3(7) of the PWD. In this respect, it submits that the ECJ found that Germany was entitled to disregard for the purpose of Article 3(7) of the PWD such allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of Germany, and which alter the relationship between the service provided by the worker and the consideration which he receives in return.

153. The Kingdom of Norway agrees with ESA that "remuneration for work" must be considered to constitute the core of the concept of "pay". However, the Kingdom of Norway considers ESA's further definition of the concept, with reference to notions of whether work is "actually performed" or "arise only on the condition that a certain event takes place", liable to obscure. In its view, ESA's negative definition of "pay" by reference to those conditions lacks legal justification and may undermine the discretion to define the content of "pay" which is afforded to Member States by the second subparagraph of Article 3(1) of the PWD. According to the Kingdom of Norway, this is probably the reason why the ECJ consistently has avoided any attempts to define the notion of pay in Article 3(1)(c) of the PWD.

154. The Kingdom of Norway argues, however, that some guidance in defining "pay" may be derived nonetheless from the definition of "pay" in Article 157(2) TFEU, on equal pay for male and female workers, since it is a fundamental principle underlying the Directive to ensure equal treatment between workers. In ECJ case-law that definition has been further defined as a concept which comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis.[63]

[63] Reference is made to Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 29.

155. The Kingdom of Norway acknowledges that the concept of "pay" must not necessarily have the same meaning under Directive 96/71 as under Article 157(2) TFEU. Nonetheless, the Kingdom of Norway asserts that the core of the definition under the latter provision and related case-law, that is, in its view, that pay means the consideration which a worker receives from his employer in respect of his employment, is of general application and readily transposable. It adds that in the context of the Directive the ECJ has already referred similarly to the consideration which the posted worker receives in return for the service provided.[64]

156. The Kingdom of Norway submits further that also the Commission has acknowledged that the definition of the minimum wage may vary in the different Member States and that they have considerable discretion to determine its constituent elements.[65] Reference is also made to statements by the Council and the Commission found in the preparatory works to the Directive, to the effect that Article 3(1)(b) and (c) cover contributions to national social fund benefit schemes governed by collective agreements or legislative provisions, and benefits covered by these schemes, provided that they do not come within the sphere of social security.[66]

157. In summary, the Kingdom of Norway asserts that the outer limits of the concept of "pay" within the meaning of Article 3(1)(c) of the PWD must be assessed with reference to whether the benefits represent consideration which the worker receives in respect of his employment from his employer. In its view, Article 5 of the Posting Act makes the right to wages in the event of illness and the amount thereof entirely conditional on the work carried out by the posted worker. Consequently, the Kingdom of Norway argues that the wages in question are exclusively borne out of and represent consideration for work carried out by the worker and that such wages form an integral part of the worker's pay.

64 Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 39.
65 Reference is made to SEC(2006) 439 of 4.4.2006, pp. 16–17.
66 Reference is made to statement No 7, Council document 10048/96.

The second subparagraph of Article 3(1) of the PWD

158. According to the Kingdom of Norway, the purpose of the second subparagraph of Article 3(1) of the PWD is to underscore that Article 3(1)(c) does not define the concept of minimum rates of pay and that it is for the host Member State to define the concept in accordance with its national legislation and/or practice. In its view, the reference in the second subparagraph of Article 3(1) to the content of that concept being "defined" by the host Member State is not intended to introduce a formalistic requirement making the recognition of a Member State's definition conditional on whether it has employed the same notions as the Directive. Such an approach, it contends, could usurp the Member States' right to define the concept of minimum rates of pay.

159. In short, the Kingdom of Norway asserts that the second subparagraph of Article 3(1) of the PWD must be interpreted to the effect that if national law and/or practice, including collective agreements, provide for consideration which the worker is to receive in respect of his employment from his employer, this falls within the concept of "rates of pay" mentioned in Article 3(1)(c).

160. The Kingdom of Norway sees no reason to comment in detail on the additional requirement under Article 3(1)(c) of the PWD that the national measures must constitute "minimum" rates of pay. In its view, ESA has not questioned the minimum character of the relevant wages (the "wages in the event of illness and accidents") provided for in Article 5 of the Posting Act.

Article 36 EEA

161. Leaving aside the specific assessment under Article 36 EEA, the Kingdom of Norway agrees with ESA's methodology in so far as the contested measures are deemed to fall outside the scope of Article 3(1)(c) of the PWD (and Regulation No 1408/71). In this event, it must be assessed whether the measures are compatible with the first indent of Article 3(10) of the PWD.

162. The Kingdom of Norway adds, however, that, in its view, a different situation applies if Article 5 of the Posting Act is

deemed to fall within the scope of Article 3(1)(c) of the PWD. According to the Kingdom of Norway, since the level of protection concerning the matters referred to in Article 3(1)(a)–(g) of the PWD has been harmonised at Community level by the Directive,[67] any national measure relating thereto must be assessed in the light of the provisions of the Directive, and not Article 36 EEA.[68]

The Charter of Fundamental Rights of the European Union

163. The Kingdom of Norway agrees with ESA that the Court need not address the Charter in the present case. It observes that the Charter has not been incorporated into the EEA Agreement and consequently asserts that it lacks direct relevance for the interpretation of the Agreement.

The European Commission

General – Directive 96/71

164. The Commission submits that according to recital 13 in the preamble to Directive 96/71, the laws of the Member States should be coordinated in order to lay down a nucleus of mandatory rules for minimum protection ("the hard core") to be observed in the host country by employers who post workers to perform temporary work there. However, this does not entail a harmonisation of the material content of the mandatory rules which thus may be freely defined by the Member States on condition that the content complies with the Treaty and the general principles of EU law.[69]

165. The Commission further submits that for the purposes of defining the nucleus of mandatory rules for minimum protection, Article 3(1) of the PWD sets out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State.[70]

67 Reference is made to *Laval un Partneri*, cited above, paragraphs 80 and 81, and *Rüffert*, cited above, paragraphs 33 and 34.
68 Reference is made to Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9.
69 Reference is made to *Laval un Partneri*, cited above, paragraph 60.
70 Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 26.

166. With regard to the material content of the "hard core" of minimum protection rules, the Commission observes that in its original proposal for a directive on the posting of workers it indicated that the directive would not be a labour law instrument but a directive concerning international private law closely related to the freedom to provide services. In drawing up the list contained in Article 3(1) of the PWD, the Commission applied three criteria: the rules ought to be mandatory or compulsory in all, or the majority of, the Member States; the rules ought to apply to all workers habitually employed in the same place, occupation and industry; and the designation and application of the mandatory rules should be compatible with the temporary nature of the performance of work in the host country.[71]

167. The Commission notes that the second subparagraph of Article 3(1) of the PWD provides that the concept of "minimum rates of pay" referred to in Article 3(1)(c) shall be defined by the national law and/or practice of the Member State to whose territory the worker is posted.

168. As regards the method for comparing the minimum rates of pay under Article 3(1)(c) of the PWD and the pay a worker receives under the terms of the employment relationship, the Commission observes that at the time of the adoption of the Directive the Council and the Commission made the following joint statement: "When comparing the remuneration specified in point (c) of the first subparagraph of paragraph 1 with that which should be paid by virtue of the law applicable to the employment relationship, account should be taken, where remuneration is not determined by the hour, of the relationship between the remuneration and the number of hours to be worked and of any other relevant factors."[72] According to the Commission, this means, for example, that when the remuneration received by the posted worker is determined on a monthly basis, a pro rata adjustment must be made on the basis of the number of hours worked during the month.

[71] Reference is made to COM(91) 230 final of 1.8.1991, p. 15, points 24 and 25.
[72] Reference is made to statement No 9, Council document 10048/96 ADD 1.

169. The Commission further submits that the criteria for determining the constituent elements of the minimum rate of pay have been defined by the ECJ as follows: allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind.[73]

170. The Commission submits further that the ECJ has clarified that an automatic indexation of rates of pay other than the minimum wage does not fall within the matters referred to in Article 3(1)(a)–(g) of the PWD.[74]

171. The Commission submits that the ECJ has stated, *inter alia*, that while the Member States are, in principle, still free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the Community context must be interpreted strictly. This applies particularly when it is cited as justification for a derogation from the fundamental principle of the freedom to provide services. Its scope cannot be determined unilaterally by each Member State. Moreover, according to the Commission, the ECJ has stated that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. The reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated.[75]

[73] Reference is made to Case C-341/02 *Commission* v *Germany*, cited above, paragraph 39.
[74] Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 47.
[75] Ibid., paragraphs 50 to 53.

Directive 96/71 and Article 5 of the Posting Act

172. In the Commission's view, the following features of the Icelandic legislation appear important when examining its compatibility with the nucleus of mandatory provisions under the Directive: (a) the legislation provides for the acquisition of entitlements which increase with the length of employment for a hypothetical event – future illness or accidents – to be paid in return for the worker fulfilling his or her obligation under the employment contract; (b) the legislation allows for certain absences from work, due to illness or accident or other factors; (c) the determination of the amount of hourly/monthly wages due appears to take into account the possibility of absence from work and the potential or acquired right to sickness pay; and (d) the legislation applies without prejudice to more advantageous entitlements under an employment contract.

173. In the Commission's view, the entitlements provided for in Article 5 of the Posting Act do not in all respects appear to relate directly to work performed and thus alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other. Consequently, the Commission contends that the entitlements in question do not qualify as constituent elements of the notion of minimum rates of pay.

174. According to Article 3(10) of the PWD, a Member State may impose terms and conditions of employment beyond those laid down in Article 3(1)(a)–(g) on grounds of public policy. The Commission argues that the justification advanced by Iceland, namely, the preservation of the value of minimum wages in the labour market and the maintenance of the balance of the rights and obligations of the social partners, does not meet the requirement that a failure to impose this requirement would constitute a genuine and sufficiently serious threat to a fundamental interest of society.[76]

[76] Ibid., paragraph 50 and the case-law cited therein.

Directive 96/71 and Article 7 of the Posting Act

175. The Commission points out that the obligation for a foreign service provider to insure a worker posted to Iceland for a period of two continuous weeks or longer, against death, permanent injury and the temporary loss of working capacity, unless the worker has more advantageous insurance cover in the Member State of establishment, does not as such feature among the mandatory terms and conditions listed in Article 3(1)(a)–(g) of the PWD.

176. The Commission considers it questionable whether the notion of "health, safety and hygiene at work" in Article 3(1)(e) of the PWD may be interpreted to cover a civil liability obligation, since the provision in question has been understood, in its view, as referring to the requirements laid down in Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, as well as in the individual directives covering areas listed in the annex to that framework directive.[77]

177. The Commission agrees with Iceland that tort and insurance law are, in principle, a matter of the EEA States' competence. However, the Commission submits that it is settled case-law that Member States must exercise their national competence consistently with EU law.[78]

178. The Commission further submits that the ECJ held in *Laval un Partneri* that the obligation to pay insurance premiums, *inter alia*, for compensation for accidents at work and financial assistance for survivors in the event of death of the worker is a matter not specifically referred to in Article 3(1)(a)–(g) of the PWD.[79]

179. The Commission argues that unlike the situation in *Laval un Partneri*, the requirement for foreign service providers to pay insurance premiums for workers posted to Iceland has been

[77] OJ 1989 L 183, p. 1.
[78] Reference is made to *Laval un Partneri*, cited above, paragraph 87 and the case-law cited therein.
[79] Ibid., paragraphs 83 and 22.

laid down in legislation. Therefore, it remains to be examined whether the requirement may be imposed on grounds of public policy under Article 3(10) of the PWD. In the Commission's view, it is unclear from the facts of the case whether the requirement confers a genuine benefit on the posted workers concerned which significantly adds to their social protection and whether the requirement is proportionate to the public interest pursued.[80] In any event, in the view of the Commission, the requirement does not appear to meet the criteria laid down by the ECJ for a public policy exception.[81]

Conclusion

180. In sum, the Commission supports the declaration sought by ESA in so far as it relates to the failure of Iceland to fulfil its obligations under Article 3 of the PWD.

Per Christiansen

Judge-Rapporteur

[80] Reference is made to *Finalarte and Others*, cited above, paragraph 53.
[81] Reference is made to *Commission* v *Luxembourg*, cited above, paragraphs 50 to 53.

Case E-18/10

EFTA Surveillance Authority
v
The Kingdom of Norway

CASE E-18/10

EFTA Surveillance Authority

v

The Kingdom of Norway

(Non-compliance with a judgment of the Court establishing a failure to fulfil obligations - Article 33 SCA - Measures necessary to comply with a judgment of the Court)

Summary of the Judgment

1. According to Article 33 SCA, the EFTA States are required to take the measures necessary to comply with judgments of the EFTA Court. Even though Article 33 SCA in substance corresponds to Article 260 (1) of the Treaty on the Functioning of the European Union regarding the obligation of EU Member States to comply with a judgment of the Court of Justice of the European Union ("ECJ"), the SCA does not provide for an equivalent system of penalty payment as regards the non-compliance of the EFTA States with judgments by the EFTA Court. However, the obligation on EFTA States to comply with the judgments of the EFTA Court is not less strict than the equivalent obligation on EU Member States to comply with the judgments of the ECJ.

2. Although Article 33 SCA does not specify the period within which measures necessary to comply with a judgment must be taken, the interest in the immediate and uniform application of EEA law requires that the process of compliance with a judgment must be commenced immediately and must be completed as soon as possible.

3. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion.

4. By failing to take the measures necessary to comply with the judgment of the Court in Case E-2/07 *EFTA Surveillance Authority* v *The Kingdom of Norway* by the

end of the period prescribed in the reasoned opinion, namely on 30 December 2009, Norway has failed to fulfil its obligations under Article 33 SCA.

JUDGMENT OF THE COURT

28 June 2011

(Non-compliance with a judgment of the Court establishing a failure to fulfil obligations – Article 33 SCA – Measures necessary to comply with a judgment of the Court)

In Case E-18/10,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal & Executive Affairs, Brussels, Belgium,

applicant,

v

The Kingdom of Norway, represented by Ms Janne Tysnes Kaasin, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Ms Fanny Platou Amble, Advocate, Attorney General (Civil Affairs), acting as Agents,

defendant,

APPLICATION for a declaration that, by failing to take the measures necessary to comply with the judgment of the EFTA Court in Case E-2/07 *EFTA Surveillance Authority* v *The Kingdom of Norway*, the Kingdom of Norway has failed to fulfil its obligations under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson and Per Christiansen (Judge-Rapporteur), Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of:

– the European Commission ("the Commission"), represented by Marc Van Hoof and Michel van Beek, Legal Advisers, acting as Agents,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I THE APPLICATION

1 By application lodged at the Court Registry on 21 December 2010, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") for a declaration that the Kingdom of Norway ("Norway"), by failing to comply with its obligations resulting from the judgment of the Court of 30 October 2007 in Case E-2/07 *EFTA Surveillance Authority* v *The Kingdom of Norway* [2007] EFTA Ct. Rep. p. 280, has failed to fulfil its obligations under Article 33 SCA.

II THE JUDGMENT IN CASE E-2/07 *EFTA SURVEILLANCE AUTHORITY* v *THE KINGDOM OF NORWAY*

2 By a letter of 3 July 2001, ESA informed Norway of the receipt of a complaint alleging that certain provisions of the Norwegian Public Service Pension Act (*lov av 28. juli 1949 nr. 26 om Statens Pensjonskasse*) discriminated against widowers in relation to survivor's pensions granted to persons whose spouse had joined the Public Service Pension Fund prior to 1 October 1976. In such a situation, the survivor's pension of a widower was subject to curtailment where he had other sources of income, whereas no such curtailment took place where the survivor was the widow of a male employee.

3 On 18 September 2003, following the exchange of several letters, ESA sent Norway a letter of formal notice, arguing that the contested legislation was contrary to Article 69 of the Agreement on the European Economic Area ("EEA") as well as Article 6(e) of Council Directive 86/378 of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40).

In a supplementary letter of formal notice of 14 July 2004, ESA maintained its position. Replying to this letter on 29 November 2004, Norway indicated that it would comply with ESA's view and amend the contested legislation accordingly. To that end, an amendment to the Public Service Pension Act would be proposed to ensure that those who become widowers after the amendment, and whose deceased spouses became members of the Public Service Pension Fund before 1 October 1976 will be given the same rights as widows enjoy.

4 By a letter of 15 December 2004, ESA requested clarification of the meaning of the phrase "become widowers after the amendment". In its response of 3 February 2005, Norway confirmed that only persons becoming a widower after 1 January 2006 (the planned date of entry into force of the envisaged amendment) would benefit from the more favourable rules, but not widowers whose spouse had periods of employment after 1 January 1994 and died before 1 January 2006.

5 ESA delivered a reasoned opinion on 26 October 2005. Norway replied by a letter dated 8 March 2006, referring to the envisaged amendment of the contested legislation. By a letter registered at the Court on 19 February 2007, ESA filed an application against Norway. At that time, no amendment had been made to the contested legislation.

6 On 30 October 2007, the Court delivered its judgment in Case E-2/07. The Court held that:

"[B]y maintaining in force rules in lov av 28. juli 1949 nr. 26 om Statens Pensjonskasse relating to pension rights accrued on the basis of periods of employment after 1 January 1994 pursuant to which the survivor's pension of a widower whose spouse became a member of the Public Service Pension Fund prior to 1 October 1976 is curtailed in relation to his other income whereas a widow in the same circumstances receives her survivor's pension without curtailment, the Kingdom of Norway has failed to fulfil its obligations under Article 69(1) EEA and Article 5 of the Act referred to at point 20 in Annex XVIII to the EEA Agreement (Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for

men and women in occupational social security schemes, as amended by Council Directive 96/97/EC of 20 December 1996), as adapted by Protocol 1 thereto".

III PRE-LITIGATION PROCEDURE

7 In a letter of 22 November 2007, ESA informed the Norwegian Government that it had opened an own-initiative case regarding Norway's compliance with the judgment in Case E-2/07.

8 By a letter of 14 March 2008, the Norwegian Government informed ESA that it was preparing a proposal to amend the Public Service Pension Act. When completed, the proposal would be submitted for public consultation for a period of three months. Subsequently, the proposal would be submitted to the Norwegian Parliament.

9 In a letter of 21 April 2008, ESA informed the Norwegian Government that it had concluded from the letter of 14 March 2008 that Norway had not yet taken the measures necessary to comply with the judgment in Case E2/07. The Norwegian Government was invited to provide further information in order to facilitate ESA's monitoring of Norway's compliance with the judgment.

10 By a letter of 16 May 2008, the Norwegian Government provided an outline of the probable timeframe for public consultation and adoption by the Norwegian Parliament of the amendments to the Public Service Pension Act. In the letter, 1 January 2009 was referred to as the expected date of entry into force of the amendments to the Act.

11 By an e-mail of 21 August 2008, the Norwegian Government stated that ESA would be informed when the draft proposal would be ready for public consultation.

12 On 5 November 2008, ESA issued a letter of formal notice to Norway, in which ESA concluded that, by failing to comply with the judgment in Case E-2/07, Norway had breached Article 33 SCA.

13 In a letter of 9 January 2009, the Norwegian Government stated, as observations on the letter of formal notice, that a proposal to amend the Public Service Pension Act had been submitted for public consultation on 19 December 2008. At the end of a three-month period of consultation, the proposals would be submitted to the Norwegian Parliament. In the letter, Norway explained the content of the proposal and how it would, if adopted, achieve equality between men and woman in relation to the issues raised in the EFTA Court judgment.

14 By a letter of 30 October 2009, ESA delivered a reasoned opinion to Norway. Pursuant to the first paragraph of Article 31 SCA, ESA concluded that, by failing to take the measures necessary to comply with the judgment in Case E-2/07, Norway had breached Article 33 SCA. Pursuant to the second paragraph of Article 31 SCA, ESA requested Norway to take the measures necessary to comply with the reasoned opinion within two months following notification thereof; that is, no later than 30 December 2009.

15 In a letter of 13 November 2009, the Norwegian Government indicated, as part of its observations on the reasoned opinion, that a first reading by the Norwegian Parliament of the proposal to amend the Public Pension Act was scheduled for 11 December 2009, followed by a second reading the week after. The Norwegian Government anticipated that the amendments would enter into force on 1 January 2010.

16 By a letter of 29 January 2010, the Norwegian Government informed ESA that amendments to the Public Service Pension Act had been adopted. The letter stated that the amendments would enter into force on 1 February 2010, and with retroactive effect for widowers whose wives had become members in the Pension Fund before 1 October 1976.

17 On 24 February 2010, ESA invited the Norwegian Government to inform it on how far the relevant authorities had progressed with regard to the repayments of past pensions, and whether a specific time limit had been set for this work to be carried out. Moreover, ESA sought information as to whether interest payments would be added, and if so, from what date.

18 In its reply of 11 March 2010, the Norwegian Government stated that the amendments to the Public Service Pension Act were being followed up by the Norwegian Public Service Pension Fund and the Mutual Insurance Company (*Kommunal Landspensjonskasse*). It was expected that repayments of past pensions would be carried out by the end of September 2010. Payment of interest would be decided on in each individual case.

19 By a letter of 3 May 2010, the Norwegian Government informed ESA that the treatment of cases concerning past pensions was, for several reasons, complex and required mainly individual processing. For example, the relevant persons had to be identified in the registers of the pension funds, and the calculation split between pensionable periods before and after 1994. Furthermore, the Government indicated that repayments would be adjusted to reflect changes in the cost of living.

20 In its letter of 8 November 2010, the Norwegian Government stated that the Public Service Pension Fund, responsible for the implementation of this matter, would need more time to finalise the work. The Government stated as the reason for the delay that each case was considerably more resource-intensive than expected. Furthermore, it had transpired that the number of cases was double initial expectations. Whereas the first estimate was for 1 200 to 1 600 cases, the Pension Fund now estimated the number of cases to be approximately 3 000. So far, about 600 cases had been dealt with. Around half of the cases were expected to be finalised before January 2011, the rest in June 2011.

21 On 11 November 2010, the case was discussed at a meeting between ESA and the Norwegian Government. At the meeting, the Norwegian Government admitted that the Pension Fund had not been allocated additional funds following the adoption of the Act with a view to hiring extra personnel to deal with this matter. ESA noted that three years had passed since the EFTA Court had delivered its judgment in Case E-2/07. Consequently, in its view, the progress in the execution of the judgment had been too slow. The Norwegian Government was invited to provide ESA by 12

December 2010 with detailed explanations of the reasons for the delay, the actions that would be taken in order to speed up the process and the effect which the delay might have on the persons entitled to repayments under the Act.

22 By a letter of 13 December 2010, the Norwegian Government provided ESA with further details on the ongoing work to comply with the judgment. According to the letter, the Government considers it realistic that the process will be finished by the end of 2011.

IV PROCEDURE BEFORE THE COURT

23 ESA lodged the present application at the Court Registry on 21 December 2010. In its statement of defence of 4 March 2011, Norway claimed that although the Government had consistently striven to take the measures necessary to comply with the judgment of the Court in Case E-2/07. However, it would not have been possible to effect all the reimbursements in each individual case within the period laid down in the reasoned opinion. Norway acknowledged, nevertheless, that, at the end of the period laid down in the reasoned opinion, it had not fully adopted the measures necessary to comply with the judgment, and thus that it failed to fulfil its obligations under Article 33 SCA. Therefore, it requested the Court to declare ESA's application to be well-founded. In its written observations, the Commission fully supported ESA's position.

24 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

V FINDINGS OF THE COURT

25 The Court recalls that, pursuant to Article 3 EEA, EEA States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Agreement, and facilitate cooperation within its framework.

26 Consequently, under Article 33 SCA, the EFTA States are required to take the measures necessary to comply with judgments of the

Court. Article 33 SCA corresponds in substance to Article 260(1) of the Treaty on the Functioning of the European Union ("TFEU") regarding the obligation of EU Member States to comply with the judgments of the Court of Justice of the European Union ("ECJ"). The Court has repeatedly held, for the sake of procedural homogeneity, that although it is not required by Article 3(1) SCA to follow the reasoning of the ECJ when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see, *inter alia*, Case E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 39, and Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* [2005] EFTA Ct. Rep 117, paragraph 53).

27 Article 260(2) TFEU provides that if the Commission considers that a Member State has not taken the necessary measures to comply with a judgment of the ECJ, infringement proceedings may be brought concerning the non-compliance. The ECJ may impose a lump sum or penalty payment to be paid by the Member State. The possibility of imposing financial sanctions on a Member State that has failed to implement a judgment establishing an infringement was introduced by the Maastricht Treaty, which entered into force in 1993, amending former Article 171, later Article 228 of the Treaty establishing the European Community. Such an order by the ECJ imposing a penalty payment and/or a lump sum is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established (see Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 91).

28 The SCA does not provide for such a system of penalty payment as regards the non-compliance of the EFTA States with judgments by the EFTA Court. This does not, however, entail that the obligation on EFTA States to comply with the judgments of the EFTA Court is less strict than the equivalent obligation on EU Member States to comply with the judgments of the ECJ. In this

regard, the Court recalls that in cases of violation of EEA law by a Contracting Party, the Contracting Party is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement, if the conditions laid down in Cases E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 62 et seq., and E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 25 and 37 to 48, are fulfilled.

29 Although Article 33 SCA does not specify the period within which measures necessary to comply with a judgment must be taken, the interest in the immediate and uniform application of EEA law requires that the process of compliance with a judgment must be commenced immediately and must be completed as soon as possible (see, for comparison, Joined Cases 227/85 to 230/85 *Commission* v *Belgium* [1988] ECR 1, paragraph 11, and Case C-328/90 *Commission* v *Greece* [1992] ECR I-425, paragraph 6).

30 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, e.g., Case E-11/10 *EFTA Surveillance Authority* v *The Principality of Liechtenstein* [2009-2010] EFTA Ct. Rep. 368, paragraph 18).

31 In the case at hand, it is undisputed that at the time the period prescribed in the reasoned opinion expired, namely on 30 December 2009, that is, more than two years after the Court had delivered its judgment in Case E-2/07, Norway had not fully adopted the measures necessary to comply with that judgment.

32 It must therefore be held that, by failing to take the measures necessary to comply with the judgment of the Court in Case E-2/07 *EFTA Surveillance Authority* v *the Kingdom of Norway*, the Kingdom of Norway has failed to fulfil its obligations under Article 33 SCA.

VI COSTS

33 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Norway be ordered to pay the costs and the latter has been unsuccessful, Norway must be ordered to pay the costs. The costs incurred by the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing to take the measures necessary to comply with the judgment in Case E-2/07 EFTA Surveillance Authority v the Kingdom of Norway, the Kingdom of Norway has failed to fulfil its obligations under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.**

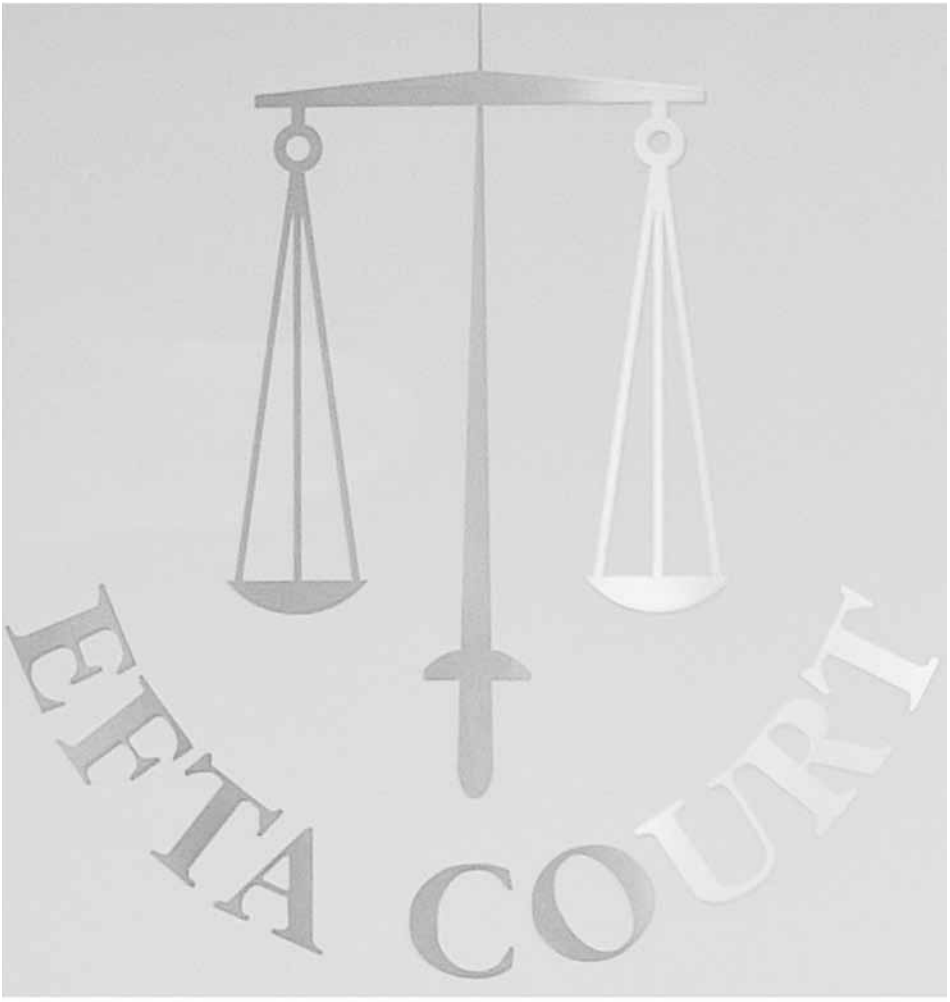
2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Delivered in open court in Luxembourg on 28 June 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President


EFTA COURT

Case E-4/11

Arnulf Clauder

CASE E-4/11

Arnulf Clauder

(Directive 2004/38/EC - Family reunification - Right of residence for family members of EEA nationals holding a right of permanent residence - Condition to have sufficient resources)

Summary of the Judgment

1. Having regard to the context and objectives of Directive 2004/38/EC (The Residence Directive) – promoting the right of nationals of EC Member States and EFTA States and their family members to move and reside freely within the territory of the EEA States – the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness.

2. The Directive provides for three levels of residence rights for EEA nationals: first, in Article 6, the right of residence for up to three months; second, in Article 7, the right of residence for more than three months, which applies to workers, economically self-supporting persons or other persons to be assimilated to them; and third, in Article 16(1), the right of permanent residence.

3. Article 16 of the Directive explicitly states that, once acquired, the right of permanent residence is not subject to the conditions laid down in Chapter III of the Directive, including the condition to have sufficient resources.

4. Article 16(1) of the Directive is silent on whether an EEA national's right to permanent residence pursuant to that article confers a right of residence on his family members. Article 7(1), which concerns the right of residence for more than three months, expressly stipulates in point (d) that family members may accompany or join the EEA national having a residence right, but only if the beneficiary satisfies the conditions in points (a), (b) or (c), in other words, that the beneficiary either is working or self-employed or has sufficient resources for himself and his family

RECHTSSACHE E-4/11

Arnulf Clauder

(Richtlinie 2004/38/EG – Familiennachzug – Aufenthaltsrecht für Familienangehörige von daueraufenthaltsberechtigten EWR-Staatsangehörigen – Voraussetzung ausreichender Existenzmittel)

Zusammenfassung des Urteils

1. Im Blick auf den Kontext und die Ziele der Richtlinie 2004/38 – die Förderung des Rechts der Staatsangehörigen von EG-Mitgliedstaaten und EFTA-Staaten sowie ihrer Familienangehörigen, sich im Hoheitsgebiet der EWR-Staaten frei zu bewegen und aufzuhalten – dürfen deren Bestimmungen nicht eng ausgelegt und keinesfalls ihrer praktischen Wirksamkeit beraubt werden.

2. Die Richtlinie 2004/38 sieht für EWR-Staatsangehörige drei Stufen von Aufenthaltsrechten vor, und zwar erstens in Artikel 6 das Recht auf Aufenthalt bis zu drei Monaten, zweitens in Artikel 7 das Recht auf Aufenthalt für mehr als drei Monate, das für Arbeitnehmer, sonst wirtschaftlich Unabhängige oder entsprechend zu behandelnde Personen gilt, und drittens, in Artikel 16 Absatz 1, das Recht auf Daueraufenthalt.

3. Artikel 16 der Richtlinie bestimmt ausdrücklich, dass das Recht auf Daueraufenthalt, sobald es erworben wurde, nicht mehr an die Voraussetzungen des Kapitels III der Richtlinie einschliesslich der Voraussetzung des Vorhandenseins ausreichender Existenzmittel geknüpft ist.

4. Artikel 16 Absatz 1 der Richtlinie enthält keine Aussage dazu, ob das Daueraufenthaltsrecht eines EWR-Staatsangehörigen gemäss diesem Artikel auch dessen Familienangehörigen ein Aufenthaltsrecht verleiht. Artikel 7 Absatz 1, der das Recht auf Aufenthalt für mehr als drei Monate behandelt, sieht in Buchstabe d ausdrücklich vor, dass Familienangehörige den aufenthaltsberechtigten EWR-Staatsangehörigen begleiten oder ihm nachziehen können. Dies gilt jedoch nur, wenn der Berechtigte die Voraussetzung laut den Buchstaben

members not to become a burden on the social assistance system of the host State.

5. Although not explicitly stated in the wording of the provision, the right to permanent residence under Article 16(1) of the Directive must confer a derived right of residence in the host State on the holder's family members. This derived right is not subject to a condition to have sufficient resources.

6. Consequently, an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification under Article 16(1) of the Directive even if the family member will also be claiming social welfare benefits.

a, b oder c erfüllt, d. h. dass der Berechtigte entweder Arbeitnehmer oder Selbstständiger ist oder für sich und seine Familienangehörigen über ausreichende Existenzmittel verfügt, so dass sie keine Sozialhilfeleistungen des Aufnahmestaats in Anspruch nehmen müssen.

5. Obwohl dies nicht ausdrücklich in der Regelung bestimmt ist, wird in Art. 16 der Richtlinie den Familienangehörigen eines Daueraufenthaltsberechtigten ein abgeleitetes Recht auf Familiennachzug eingeräumt. Das Vorhandensein ausreichender Existenzmittel wird für das abgeleitete Recht nicht vorausgesetzt.

6. Angesichts dieser Erwägungen kann ein daueraufenthaltsberechtigter EWR-Staatsangehöriger, der Rentner ist und Sozialhilfeleistungen im Aufnahme-EWR-Staat in Anspruch nimmt, selbst dann einen Anspruch auf Familiennachzug geltend machen, wenn der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird.

JUDGMENT OF THE COURT

26 July 2011*

(Directive 2004/38/EC – Family reunification – Right of residence for family members of EEA nationals holding a right of permanent residence – Condition to have sufficient resources)

In Case E-4/11,

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 Verwaltungsgerichtshof des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein), in the case of

Arnulf Clauder

concerning the interpretation of Article 16(1) in conjunction with Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Benedikt Bogason (ad hoc), Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– the Complainant, Arnulf Clauder;

– the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Thomas Bischof of the EEA Coordination Unit, acting as Agents;

* Language of the request: German.

URTEIL DES GERICHTSHOFS

26. Juli 2011*

(Richtlinie 2004/38/EG – Familiennachzug – Aufenthaltsrecht für Familienangehörige von daueraufenthaltsberechtigten EWR-Staatsangehörigen – Voraussetzung ausreichender Existenzmittel)

In der Rechtssache E-4/11,

ANTRAG des Verwaltungsgerichtshofs des Fürstentums Liechtenstein an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs in der vor ihm anhängigen Rechtssache

Arnulf Clauder

betreffend die Auslegung von Artikel 16 Absatz 1 in Verbindung mit Artikel 7 Absatz 1 der Richtlinie 2004/38/EG des Europäischen Parlaments und des Rates vom 29. April 2004 über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, wie durch Protokoll 1 zum EWR-Abkommen an das EWR-Abkommen angepasst, erlässt

DER GERICHTSHOF

bestehend aus Carl Baudenbacher, Präsident, Per Christiansen (Berichterstatter) und Benedikt Bogason (ad hoc), Richter,

Kanzler: Skúli Magnússon,

unter Berücksichtigung der schriftlichen Erklärungen

– des Beschwerdeführers, Herrn Arnulf Clauder;

– der Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch und Thomas Bischof von der Stabstelle EWR, als Bevollmächtigte;

* Sprache des Antrags: Deutsch.

– the Netherlands Government, represented by Corinna Wissels, Mielle Bulterman and Jurian Langer, respectively head and staff members of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Florence Simonetti, Senior Officer, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Liechtenstein Government, represented by its agent, Dr Andrea Entner-Koch; the Government of Denmark, represented by its agent, Christian Vang; ESA, represented by its agent, Florence Simonetti; and the Commission, represented by its agent, Christina Tufvesson, at the hearing on 28 June 2011,

gives the following

JUDGMENT

I INTRODUCTION

1 By a letter of 14 February 2011, registered at the EFTA Court on 16 February 2011, the Administrative Court of the Principality of Liechtenstein ("the Administrative Court") made a request for an Advisory Opinion in a case pending before it concerning Arnulf Clauder ("Mr Clauder" or "the Complainant").

2 The case before the Administrative Court concerns the decision by the Liechtenstein Government not to grant the Complainant, who is economically inactive and in receipt of social welfare benefits, a family reunification permit for his spouse.

– der Regierung des Königreichs der Niederlande, vertreten durch Corinna Wissels, Mielle Bulterman und Jurian Langer, Leiter bzw. Mitarbeiter der Abteilung Europarecht der Rechtsabteilung des Aussenministeriums, als Bevollmächtigte;

– der EFTA-Überwachungsbehörde, vertreten durch Xavier Lewis, Direktor, und Florence Simonetti, leitende Beamtin, Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

– der Europäischen Kommission (im Folgenden: Kommission), vertreten durch Christina Tufvesson und Michael Wilderspin, Rechtsberater, als Bevollmächtigte,

unter Berücksichtigung des Sitzungsberichts,

nach Anhörung der mündlichen Ausführungen der Regierung des Fürstentums Liechtenstein, vertreten durch ihre Bevollmächtigte Dr. Andrea Entner-Koch; der Regierung des Königreichs Dänemark, vertreten durch ihren Bevollmächtigten Christian Vang; der EFTA-Überwachungsbehörde, vertreten durch ihre Bevollmächtigte Florence Simonetti; und der Kommission, vertreten durch ihre Bevollmächtigte Christina Tufvesson, in der Sitzung vom 28. Juni 2011

folgendes

URTEIL

I EINLEITUNG

1 Mit Schreiben vom 14. Februar 2011, beim EFTA-Gerichtshof eingegangen am 16. Februar 2011, stellte der Verwaltungsgerichtshof des Fürstentums Liechtenstein (im Folgenden: Verwaltungsgerichtshof) einen Antrag auf Vorabentscheidung in einer bei ihm anhängigen Rechtssache betreffend Herrn Arnulf Clauder (im Folgenden: Herr Clauder oder Beschwerdeführer).

2 Die Rechtssache vor dem Verwaltungsgerichtshof betrifft die Entscheidung der Regierung des Fürstentums Liechtenstein, dem Beschwerdeführer, der nicht erwerbstätig ist und Sozialhilfe bezieht, keine Familiennachzugsbewilligung für seine Ehefrau zu gewähren.

3 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 insofar as is necessary for the reasoning of the Court.

II LEGAL BACKGROUND

European Convention on Human Rights

4 Article 8 of the European Convention on Human Rights ("ECHR") – *Right to respect for private and family life* – reads as follows:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *...*

EEA law

5 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 258, p. 77), as adapted to the EEA Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 ("Directive 2004/38" or "the Directive"), is referred to at point 1 of Annex V and point 3 of Annex VIII to the EEA Agreement. In particular, point 3(c) of Annex VIII provides that for the purposes of the EEA Agreement, the words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'.

6 Article 2 of the Directive – *Definitions* – reads as follows:

> *For the purposes of this Directive:*
>
> *...*

3 Für eine ausführliche Darstellung des rechtlichen Hintergrunds, des Sachverhalts, des Verfahrens und der beim Gerichtshof eingereichten schriftlichen Erklärungen wird auf den Sitzungsbericht verwiesen. Darauf wird im Folgenden nur insoweit eingegangen, wie es für die Begründung des Gerichtshofs erforderlich ist.

II RECHTLICHER HINTERGRUND

Europäische Menschenrechtskonvention

4 Artikel 8 der Europäischen Menschenrechtskonvention (im Folgenden: EMRK) – *Recht auf Achtung des Privat- und Familienlebens* – lautet:

> *1. Jede Person hat das Recht auf Achtung ihres Privat- und Familienlebens, ihrer Wohnung und ihrer Korrespondenz.*
>
> ...

EWR-Recht

5 Auf die Richtlinie 2004/38/EG des Europäischen Parlaments und des Rates vom 29. April 2004 über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten (ABl. 2004 L 258, S. 77), wie durch Beschluss des Gemeinsamen EWR-Ausschusses Nr. 158/2007 vom 7. Dezember 2007 an das EWR-Abkommen angepasst („Richtlinie 2004/38“ oder „Richtlinie“), wird unter Punkt 1 des Anhangs V und Punkt 3 des Anhangs VIII des EWR-Abkommens Bezug genommen. Punkt 3 Buchstabe c des Anhangs VIII sieht vor, dass für die Zwecke des EWR-Abkommens das Wort ‚Unionsbürger‘ durch die Worte ‚Staatsangehörige von EG-Mitgliedstaaten und EFTA-Staaten‘ ersetzt wird.

6 Artikel 2 der Richtlinie – *Begriffsbestimmungen* – lautet:

> *Im Sinne dieser Richtlinie bezeichnet der Ausdruck*
>
> ...

2. "family member" means:

(a) the spouse;

...

7 Article 3 of the Directive – *Beneficiaries* – reads as follows:

(1) This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

...

8 Article 7 of the Directive – *Right of residence for more than three months* – reads as follows:

(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

...

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) ...

...

9 Article 16 of the Directive – *General rule for Union citizens and their family members* – provides:

(1) Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of

2. „Familienangehöriger“

a) den Ehegatten;

...

7 Artikel 3 der Richtlinie – Berechtigte – lautet:

(1) Diese Richtlinie gilt für jeden Unionsbürger, der sich in einen anderen als den Mitgliedstaat, dessen Staatsangehörigkeit er besitzt, begibt oder sich dort aufhält, sowie für seine Familienangehörigen im Sinne von Artikel 2 Nummer 2, die ihn begleiten oder ihm nachziehen.

...

8 Artikel 7 der Richtlinie – *Recht auf Aufenthalt für mehr als drei Monate* – lautet:

(1) Jeder Unionsbürger hat das Recht auf Aufenthalt im Hoheitsgebiet eines anderen Mitgliedstaats für einen Zeitraum von über drei Monaten, wenn er

a) Arbeitnehmer oder Selbstständiger im Aufnahmemitgliedstaat ist oder

b) für sich und seine Familienangehörigen über ausreichende Existenzmittel verfügt, so dass sie während ihres Aufenthalts keine Sozialhilfeleistungen des Aufnahmemitgliedstaats in Anspruch nehmen müssen, und er und seine Familienangehörigen über einen umfassenden Krankenversicherungsschutz im Aufnahmemitgliedstaat verfügen oder

...

d) ein Familienangehöriger ist, der den Unionsbürger, der die Voraussetzungen des Buchstaben a, b ... erfüllt, begleitet oder ihm nachzieht.

...

9 Artikel 16 der Richtlinie – *Allgemeine Regel für Unionsbürger und ihre Familienangehörigen* – bestimmt:

(1) Jeder Unionsbürger, der sich rechtmäßig fünf Jahre lang ununterbrochen im Aufnahmemitgliedstaat aufgehalten hat, hat

permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

(2) Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

...

(4) Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

National law

10 Pursuant to the Liechtenstein Act of 20 November 2009 on the free movement of EEA and Swiss citizens ("PFZG") and the Regulation on the Free Movement of Persons ("PFZV"), economically inactive foreigners holding a permanent residence permit may have their family members take up residence with them only upon provision of evidence of the necessary financial means for maintaining all family members, obviating any claim for social welfare benefits.

III FACTS AND PRE-LITIGATION PROCEDURE

11 Mr Clauder, a German national, has been continuously resident in Liechtenstein since 1992. His first wife, of German nationality, took up residence in Liechtenstein and, initially, Mr Clauder was granted a right of residence as a family member of a worker.

12 In 2002, after repeated renewals of his residence permit, Mr Clauder received a permanent residence permit. Under Liechtenstein legislation, a permanent residence permit is issued for an indefinite period.

das Recht, sich dort auf Dauer aufzuhalten. Dieses Recht ist nicht an die Voraussetzungen des Kapitels III geknüpft.

(2) Absatz 1 gilt auch für Familienangehörige, die nicht die Staatsangehörigkeit eines Mitgliedstaats besitzen und die sich rechtmäßig fünf Jahre lang ununterbrochen mit dem Unionsbürger im Aufnahmemitgliedstaat aufgehalten haben.

...

(4) Wenn das Recht auf Daueraufenthalt erworben wurde, führt nur die Abwesenheit vom Aufnahmemitgliedstaat, die zwei aufeinander folgende Jahre überschreitet, zu seinem Verlust.

Nationales Recht

10 Gemäss dem liechtensteinischen Gesetz vom 20. November 2009 über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsgesetz, PFZG) und der Personenfreizügigkeitsverordnung (PFZV) können nicht erwerbstätige ausländische Staatsangehörige mit Daueraufenthaltsbewilligung nur dann ihre Familienangehörigen nachziehen lassen, wenn sie den Nachweis über notwendige finanzielle Mittel für den Lebensunterhalt aller Familienangehörigen erbringen, so dass keine Sozialhilfe in Anspruch genommen werden muss.

III SACHVERHALT UND VORGERICHTLICHES VERFAHREN

11 Herr Clauder, ein deutscher Staatsangehöriger, hat seit 1992 seinen ständigen Wohnsitz in Liechtenstein. Seine erste Ehefrau, eine deutsche Staatsangehörige, verlegte ihren Wohnsitz nach Liechtenstein, und anfänglich erhielt Herr Clauder eine Aufenthaltsbewilligung als Familienangehöriger einer Arbeitnehmerin.

12 Im Jahr 2002, nach mehrfacher Verlängerung seiner Aufenthaltsbewilligung, erhielt Herr Clauder eine Niederlassungsbewilligung. Nach liechtensteinischem Recht wird eine Niederlassungsbewilligung auf unbestimmte Zeit erteilt.

13 In 2009, Mr Clauder and his first wife divorced. In 2010, Mr Clauder remarried. His new wife, Mrs Eva-Maria Clauder, née Verlohr, a German national, was resident at that time in Germany. On 1 February 2010, Mr Clauder applied to the Liechtenstein Office for Immigration and Passports for a family reunification permit for his second wife.

14 Mr Clauder is a pensioner in receipt of old-age pensions from both Germany and Liechtenstein. As the old-age pensions, even in combination, are relatively modest, Mr Clauder receives supplementary benefits in Liechtenstein pursuant to the Act of 10 December 1965 on supplementary benefits to old-age, survivors' and invalidity insurance.

15 According to the order for reference, if Mrs Clauder were allowed to reside with her husband in Liechtenstein, the amount of the supplementary benefits received by Mr Clauder would increase, even if Mrs Clauder were to take up employment.

16 On 12 February 2010, the Office for Immigration and Passports rejected Mr Clauder's application for family reunification. The basis for the rejection was that Mr Clauder, who was granted a permit of permanent residence as an economically inactive person, could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare benefits. Mr Clauder submitted written observations to that office on 19 February 2010. In an administrative notice of 12 April 2010, the Office for Immigration and Passports confirmed the position it had previously taken and formally rejected the application for family reunification.

17 Mr Clauder lodged an administrative complaint on 26 April 2010 against this administrative notice. The complaint was rejected by the Liechtenstein Government in November 2010. On 6 December 2010, Mr Clauder challenged the Government's decision before the Administrative Court.

13 Im Jahr 2009 wurde die Ehe zwischen Herrn Clauder und seiner ersten Ehefrau geschieden. Im Jahr 2010 heiratete Herr Clauder zum zweiten Mal. Seine zweite Ehefrau, Eva-Maria Clauder, geborene Verlohr, eine deutsche Staatsangehörige, hatte ihren Wohnsitz zu diesem Zeitpunkt in Deutschland. Am 1. Februar 2010 stellte Herr Clauder beim liechtensteinischen Ausländer- und Passamt den Antrag auf Erteilung einer Familiennachzugsbewilligung für seine zweite Ehefrau.

14 Herr Clauder ist Rentner und bezieht Altersrenten aus Deutschland und Liechtenstein. Da die Altersrenten, auch zusammengerechnet, relativ bescheiden sind, erhält Herr Clauder in Liechtenstein Ergänzungsleistungen nach dem Gesetz vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung.

15 Dem Antrag auf Vorabentscheidung zufolge würden sich die von Herrn Clauder bezogenen Ergänzungsleistungen erhöhen, wenn Frau Clauder eine Aufenthaltsbewilligung zur Wohnsitznahme bei ihrem Ehemann ausgestellt würde; dies selbst dann, wenn Frau Clauder eine Erwerbstätigkeit aufnehmen würde.

16 Am 12. Februar 2010 lehnte das Ausländer- und Passamt den Antrag von Herrn Clauder auf Erteilung einer Familiennachzugsbewilligung ab. Die Ablehnung erfolgte, da Herr Clauder, der Inhaber einer Niederlassungsbewilligung als Nichterwerbstätiger war, das Vorhandensein ausreichender Existenzmittel für sich und seine Ehefrau ohne Inanspruchnahme von Sozialhilfe nicht nachweisen konnte. Herr Clauder nahm hierzu gegenüber dem Ausländer- und Passamt am 19. Februar 2010 schriftlich Stellung. In einem sogenannten Verwaltungsbot vom 12. April 2010 bestätigte das Ausländer- und Passamt jedoch seine zuvor eingenommene Position und wies den Antrag auf Familiennachzug formell ab.

17 Am 26. April 2010 erhob Herr Clauder Beschwerde gegen das Verwaltungsbot. Diese Beschwerde wies die Regierung des Fürstentums Liechtenstein im November 2010 ab. Am 6. Dezember 2010 focht Herr Clauder die Entscheidung der Regierung vor dem Verwaltungsgerichtshof an.

18 In its request for an Advisory Opinion, the Administrative Court appears inclined towards the view that a person in Mr Clauder's position, that is, an economically inactive person who is a national of one EEA State who enjoys a right of permanent residence in another EEA State, does not need to demonstrate that he has sufficient means of subsistence in order for a family member to benefit from a derived right of residence in that other EEA State. Notwithstanding that general position, the Administrative Court submits the following three questions to the Court:

1. *Is Directive 2004/38/EC, in particular Article 16(1) in conjunction with Article 7(1), to be interpreted such that a Union citizen with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host Member State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits?*

2. *Is it of relevance for the answer to Question 1, whether the Union citizen with a right of permanent residence was employed or self-employed in the host Member State prior to attaining retirement age?*

3. *Is it of relevance for the answer to Question 1, whether the family member will be employed or self-employed in the host Member State and still be claiming social welfare benefits?*

IV THE FIRST QUESTION

Observations submitted to the Court

19 Mr Clauder, ESA and the Commission assert that the Directive, in particular Article 16(1) in conjunction with Article 7(1), should be interpreted as meaning that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host State, may claim the right to family

18 In seinem Antrag auf Vorabentscheidung scheint der Verwaltungsgerichtshof zu der Auffassung zu neigen, dass eine Person in Herrn Clauders Situation – also ein nicht erwerbstätiger Staatsangehöriger eines EWR-Staats, der ein Daueraufenthaltsrecht in einem anderen EWR-Staat besitzt – keinen Nachweis ausreichender Existenzmittel erbringen muss, damit ein Familienangehöriger ein abgeleitetes Aufenthaltsrecht in diesem anderen EWR-Staat geniesst. Unbeschadet dieser allgemeinen Einschätzung legt der Verwaltungsgerichtshof dem Gerichtshof die drei folgenden Fragen zur Vorabentscheidung vor:

1. *Ist die Richtlinie 2004/38/EG, insbesondere Artikel 16 Absatz 1 in Verbindung mit Artikel 7 Absatz 1, dahingehend auszulegen, dass ein daueraufenthaltsberechtigter Unionsbürger, der Rentner ist und Sozialhilfeleistungen im Aufnahmemitgliedsstaat in Anspruch nimmt, einen Anspruch auf Familiennachzug selbst dann geltend machen kann, wenn auch der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird?*

2. *Spielt es für die Beantwortung der Frage 1 eine Rolle, ob der daueraufenthaltsberechtigte Unionsangehörige vor Eintritt ins Rentenalter Arbeitnehmer oder Selbstständiger im Aufnahmemitgliedsstaat war?*

3. *Spielt es für die Beantwortung der Frage 1 eine Rolle, ob der Familienangehörige im Aufnahmemitgliedsstaat Arbeitnehmer oder Selbstständiger sein wird und dennoch Sozialhilfeleistungen in Anspruch nehmen wird?*

IV ZUR ERSTEN FRAGE

Dem Gerichtshof vorgelegte Stellungnahmen

19 Herrn Clauder, der EFTA-Überwachungsbehörde und der Kommission zufolge ist die Richtlinie, insbesondere Artikel 16 Absatz 1 in Verbindung mit Artikel 7 Absatz 1, dahingehend auszulegen, dass ein daueraufenthaltsberechtigter EWR-Staatsangehöriger, der Rentner ist und Sozialhilfeleistungen im Aufnahmestaat in Anspruch nimmt, einen Anspruch auf

reunification even if the family member will also be claiming social welfare benefits.

20 They note that Article 16 of the Directive states that EEA nationals who have been residing legally for a continuous period of five years in the host Member State shall be granted a right of permanent residence in that State, and that this right of permanent residence also applies to family members who themselves fulfil the same criteria. They observe, however, that Article 16 of the Directive does not contain any express provision regarding the acquisition of a right of residence for a family member seeking to join an EEA national who has already acquired a right of permanent residence when the family member himself does not fulfil the requirements for permanent residence.

21 In their view, although Article 16 of the Directive, unlike Articles 6 and 7, does not contain an explicit provision conferring on the beneficiary of the right of permanent residence the right to have (existing or future) family members who are not already resident with him in the host State join him in order to reside there, the legislature clearly intended such a right to be conferred. They argue that since the right of permanent residence represents the highest level of integration in the host State, it is inconceivable that the legislature did not intend to confer derived rights on family members.

22 According to Mr Clauder, ESA and the Commission, the silence of the Directive on this point should be interpreted to the effect that family members who do not yet fulfil the requirements laid down in Article 16 of the Directive in their own right derive a right of residence from the EEA national with the right of permanent residence. The family member does not have to fulfil the conditions laid down in Article 7. They stress that Article 16 of Directive 2004/38 clearly states that, once acquired, the right of permanent residence shall not be subject to the conditions provided for in Chapter III, *inter alia*, the condition to have

Familiennachzug selbst dann geltend machen kann, wenn auch der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird.

20 Die Genannten bemerken, dass laut Artikel 16 der Richtlinie EWR-Staatsangehörige, die sich rechtmässig fünf Jahre lang ununterbrochen im Aufnahmemitgliedstaat aufgehalten haben, das Recht geniessen, sich dort auf Dauer aufzuhalten, und dass dieses Daueraufenthaltsrecht auch für Familienangehörige gilt, welche dieselben Kriterien erfüllen. Allerdings merken sie an, dass Artikel 16 der Richtlinie keine besondere Bestimmung enthält, welche den Erwerb des Aufenthaltsrechts für Familienangehörige regelt, die einem EWR-Staatsangehörigen, der bereits ein Daueraufenthaltsrecht besitzt, nachziehen möchten, wenn diese Familienangehörigen ihrerseits die Voraussetzungen für ein Daueraufenthaltsrecht nicht erfüllen.

21 Obwohl Artikel 16 der Richtlinie, anders als die Artikel 6 und 7, keine ausdrückliche Bestimmung enthält, die dem Daueraufenthaltsberechtigten das Recht auf den Nachzug von (vorhandenen oder künftigen) Familienangehörigen gewährt, die nicht bereits mit ihm im Aufnahmestaat ansässig sind, ist nach Ansicht Herrn Clauders, der EFTA-Überwachungsbehörde und der Kommission die Einräumung eines solchen Rechts vom Gesetzgeber eindeutig beabsichtigt. Da, so das Vorbringen der Genannten, das Daueraufenthaltsrecht den höchsten Grad an Integration im Aufnahmestaat darstellt, ist es undenkbar, dass der Gesetzgeber keine abgeleiteten Rechte für Familienangehörige vorgesehen haben sollte.

22 Laut Herrn Clauder, der EFTA-Überwachungsbehörde und der Kommission ist das Fehlen einschlägiger Bestimmungen in der Richtlinie so auszulegen, dass Familienangehörige, welche die in Artikel 16 der Richtlinie genannten Voraussetzungen noch nicht selbst erfüllen, ein vom Daueraufenthaltsrecht des EWR-Staatsangehörigen abgeleitetes Aufenthaltsrecht geniessen und die in Artikel 7 angeführten Voraussetzungen nicht erfüllen müssen. Den Genannten zufolge geht aus Artikel 16 der Richtlinie 2004/38 klar hervor, dass ein einmal erworbenes

sufficient resources. They observe that this is in contrast to the situation under earlier legislation, which entitled the host State to monitor whether EEA nationals who enjoyed a right of residence continued to meet the conditions laid down for that purpose, including the condition to have sufficient resources, throughout the period of their residence.

23 Mr Clauder, ESA and the Commission assert that the conditions imposed by Article 7(1)(d) of the Directive are logical when a family member claims rights derived from a person who falls within the scope of Article 7, since this reflects the conditions which that person himself must satisfy to acquire and retain a right of residence. The same reasoning does not hold good where the family member's right of residence is derived from a right of permanent residence, since Article 16 does not create different categories of beneficiaries with greater or lesser rights depending on the circumstances in which that right was acquired.

24 They argue further that EEA secondary legislation on free movement and residence cannot be interpreted restrictively and that, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness.

25 In the view of Mr Clauder, ESA and the Commission, if the derived right to residence for family members of an EEA national holding a permanent residence right were subject to the conditions laid down in Article 7 of the Directive, including the condition to have sufficient resources, this would entail that economically inactive beneficiaries of a right of permanent residence who do not have sufficient resources may not be joined by members of their family. They submit that if EEA nationals are not allowed to lead

Daueraufenthaltsrecht nicht mehr an die Voraussetzungen des Kapitels III, u. a. dasVorhandensein ausreichender Existenzmittel, geknüpft ist. Dies steht im Gegensatz zur früheren Rechtslage, nach welcher der Aufnahmemitgliedstaat während des gesamten Aufenthalts überwachen konnte, ob aufenthaltsberechtigte EWR-Staatsangehörige die einschlägigen Voraussetzungen, darunter das Vorhandensein ausreichender Existenzmittel, erfüllten.

23 Herr Clauder, die EFTA-Überwachungsbehörde und die Kommission bringen vor, dass die Voraussetzungen nach Artikel 7 Absatz 1 Buchstabe d der Richtlinie schlüssig sind, wenn ein Familienangehöriger Rechte von einer Person ableitet, die in den Geltungsbereich des Artikels 7 fällt, da sie die Bedingungen widerspiegeln, die diese Person ihrerseits erfüllen muss, um ein Aufenthaltsrecht zu erwerben und zu wahren. Diese Logik gilt jedoch nicht, wenn das Aufenthaltsrecht des Familienangehörigen von einem Daueraufenthaltsrecht abgeleitet wird, da Artikel 16 keine unterschiedlichen Klassen von Aufenthaltsberechtigten mit mehr oder weniger Rechten vorsieht, je nachdem, unter welchen Umständen das Aufenthaltsrecht erworben wurde.

24 Die Genannten bringen weiter vor, dass das EWR-Sekundärrecht im Bereich der Freizügigkeit und des Aufenthalts nicht eng ausgelegt werden darf, und dass bei verschiedenen möglichen Auslegungen einer Vorschrift des EWR-Rechts derjenigen der Vorzug zu geben ist, welche die praktische Wirksamkeit der Vorschrift zu wahren geeignet ist.

25 Wäre, so Herr Clauder, die EFTA-Überwachungsbehörde und die Kommission, das abgeleitete Aufenthaltsrecht von Familienangehörigen eines daueraufenthaltsberechtigten EWR-Staatsangehörigen an die Erfüllung der Voraussetzungen – darunter das Vorhandensein ausreichender Existenzmittel – gemäss Artikel 7 der Richtlinie geknüpft, so würde das bedeuten, dass für nicht erwerbstätige Daueraufenthaltsberechtigte, die nicht über ausreichende Existenzmittel verfügen, kein Familiennachzug möglich ist. Würde EWR-Staatsangehörigen kein normales Familienleben im Aufnahmestaat zugestanden, könnte die Ausübung des Aufenthaltsrechts, das die Richtlinie

a normal family life in the host State, the exercise of the right of residence granted to EEA nationals by Directive 2004/38 could be seriously obstructed and even deprived of any useful effect.

26 They contend that the abolition of the condition to have sufficient resources included in earlier directives was a deliberate choice of the legislature. This applies not merely to the enjoyment of the right of permanent residence by an EEA national himself but must equally extend to the circumstances in which his family members may themselves acquire a right of residence there.

27 Against this background, they consider that a refusal to recognise Mrs Clauder's derived right of residence in Liechtenstein because of the insufficient resources of her husband would constitute a breach both of Mr Clauder's right of permanent residence under Article 16 of Directive 2004/38 and of his right to family life.

28 The Governments of Liechtenstein, the Netherlands and Denmark submit that Article 16 of the Directive must be interpreted to the effect that a holder of a permanent residence right who is a pensioner may claim the right to family reunification only on the fulfilment of the conditions laid down in Article 7(1)(d) in conjunction with Article 7(1)(b) of the Directive. Accordingly, the family member must not become a burden on the social assistance system in the host EEA State and must have comprehensive sickness insurance cover.

29 The Governments observe that, in contrast to Articles 6 and 7 of the Directive, Article 16 does not explicitly regulate the right to family reunification. As a consequence, it must be assumed that the legislature did not intend to grant any further right to family reunification to nationals of EEA States holding a permanent

2004/38 für EWR-Staatsangehörige vorsieht, erheblich behindert und diesem Recht sogar jede praktische Wirksamkeit genommen werden.

26 Die Genannten tragen vor, bei der Streichung der in früheren Richtlinien vorgesehenen Voraussetzung ausreichender Ressourcen handle es sich um eine bewusst getroffene Entscheidung des Gesetzgebers. Diese gelte nicht nur für den Genuss des Daueraufenthaltsrechts durch einen EWR-Staatsangehörigen selbst, sondern müsse auch auf die Umstände ausgedehnt werden, unter welchen seine Familienangehörigen ihrerseits ein Aufenthaltsrecht in diesem Land erwerben können.

27 Vor diesem Hintergrund vertreten Herr Clauder, die EFTA-Überwachungsbehörde und die Kommission die Auffassung, dass es sowohl eine Verletzung von Herrn Clauders Daueraufenthaltsrecht gemäss Artikel 16 der Richtlinie 2004/38 als auch seines Rechts auf ein Familienleben darstellen würde, wenn Frau Clauders abgeleitetes Aufenthaltsrecht in Liechtenstein aufgrund der unzureichenden Ressourcen ihres Ehemanns nicht anerkannt würde.

28 Den Regierungen Liechtensteins, der Niederlande und Dänemarks zufolge ist Artikel 16 der Richtlinie dahingehend auszulegen, dass ein Daueraufenthaltsberechtigter, der Rentner ist, einen Anspruch auf Familiennachzug nur dann geltend machen kann, wenn die Voraussetzungen des Artikels 7 Absatz 1 Buchstabe d in Verbindung mit Artikel 7 Absatz 1 Buchstabe b der Richtlinie erfüllt werden. Der Familienangehörige darf dementsprechend keine Sozialhilfeleistungen des Aufnahme-EWR-Staats in Anspruch nehmen und muss über einen umfassenden Krankenversicherungsschutz verfügen.

29 Die genannten Regierungen bringen vor, im Gegensatz zu den Artikeln 6 und 7 der Richtlinie regle Artikel 16 das Recht auf Familiennachzug nicht ausdrücklich. Infolgedessen sei davon auszugehen, dass der Gesetzgeber den im Aufnahme-EWR-Staat daueraufenthaltsberechtigten Staatsangehörigen von EWR-Staaten keine weiteren Rechte auf Familiennachzug als die in

residence status in the host EEA State beyond those mentioned in Articles 6 and 7 of the Directive. They assert, therefore, that since the Directive is silent as regards the right to family reunification for holders of a permanent residence right, the EEA States are free to decide whether the right to family reunification shall be subject to a condition to have sufficient resources.

30 They contend further that a distinction must be made between (i) the personal right of residence that the family member as an EEA national may have and (ii) the right of residence that the family member may derive from his status as family member of an EEA national holding a right of permanent residence. In their view, in both situations Directive 2004/38 allows host States to set the requirement of sufficient resources.

31 According to the Governments, only where an EEA national himself does not satisfy the conditions of Article 7(1)(a), (b) or (c) of the Directive does the question arise whether a right of residence can be derived from the status as a family member of an EEA national holding a right of permanent residence in the host State. They observe further that a family member has a derived right of residence on the basis of Article 7(1)(d) of the Directive if the family member is accompanying or joining an EEA national who satisfies the conditions in Article 7(1)(a), (b) or (c).

32 They assert that the standard conditions for a derived right of residence laid down in Article 7(1)(d) of the Directive also apply if the EEA national, whom the family member is joining, has obtained a right of permanent residence in the host State. This understanding of the Directive follows from the wording of Article 16, which stipulates that a family member can claim a right of permanent residence only where the family member himself

den Artikeln 6 und 7 der Richtlinie genannten gewähren wollte. Da die Richtlinie hinsichtlich des Rechts auf Familiennachzug für Daueraufenthaltsberechtigte keine Regelung enthalte, seien die EWR-Staaten frei zu entscheiden, ob das Recht auf Familiennachzug an eine Voraussetzung ausreichender Existenzmittel geknüpft werden soll.

30 Weiter halten es die genannten Regierungen für erforderlich, zwischen (i) dem allfälligen persönlichen Aufenthaltsrecht des Familienangehörigen in seiner Eigenschaft als EWR-Staatsangehöriger und (ii) dem Aufenthaltsrecht, das der Familienangehörige aus seinem Status als Familienangehöriger eines daueraufenthaltsberechtigten EWR-Staatsangehörigen ableiten kann, zu unterscheiden. Ihrer Ansicht nach erlaubt es die Richtlinie 2004/38 den Aufnahmestaaten in beiden Fällen, das Vorhandensein ausreichender Existenzmittel zur Bedingung zu machen.

31 Die Frage, ob aus dem Status als Familienangehöriger eines im Aufnahmestaat daueraufenthaltsberechtigten EWR-Staatsangehörigen ein Aufenthaltsrecht abgeleitet werden kann, stellt sich den Regierungen zufolge nur dann, wenn ein EWR-Staatsangehöriger die Voraussetzungen laut Artikel 7 Absatz 1 Buchstaben a, b oder c der Richtlinie nicht selbst erfüllt. Sie halten weiter fest, dass ein Familienangehöriger ein abgeleitetes Aufenthaltsrecht auf der Grundlage von Artikel 7 Absatz 1 Buchstabe d der Richtlinie geniesst, wenn der Familienangehörige einen EWR-Staatsangehörigen, der die Voraussetzungen gemäss Artikel 7 Absatz 1 Buchstaben a, b oder c erfüllt, begleitet oder diesem nachzieht.

32 Die Regierungen behaupten, dass die üblichen Bedingungen für ein abgeleitetes Aufenthaltsrecht laut Artikel 7 Absatz 1 Buchstabe d der Richtlinie auch dann anwendbar sind, wenn der EWR-Staatsangehörige, dem der Familienangehörige nachzieht, ein Daueraufenthaltsrecht im Aufnahmestaat erworben hat. Dieses Verständnis der Richtlinie ergebe sich aus dem Wortlaut des Artikels 16, demzufolge ein Familienangehöriger nur dann ein Recht auf Daueraufenthalt geltend machen kann, wenn der

fulfils the requirement of legal residence in the host State for a continuous period of five years. The fact that an EEA national has acquired a right of permanent residence does not automatically bring about any changes in the residence status of his family members. In this regard, the Governments argue that Articles 16(1) and 17 of the Directive explicitly concern family members who are already residing in the host State, and that neither these Articles, nor any other provision in the Directive, explicitly address the position of a family member wishing to join an EEA national holding a right of permanent residence.

Findings of the Court

33 As a preliminary point, the Court notes that Directive 2004/38 amended Regulation (EEC) No 1612/68 (OJ English Special Edition 1968 (II), p. 475) and repealed the earlier directives on freedom of movement for persons (Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ 1990 L 180, p. 26, and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ 1990 L 180, p. 28). As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to "strengthen the right of free movement and residence" of EEA nationals (see, for comparison, Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 59).

34 Having regard to the context and objectives of Directive 2004/38 – promoting the right of nationals of EC Member States and EFTA States and their family members to move and reside freely within the territory of the EEA States – the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see, to that effect, *Metock and Others*, cited above, paragraph 84, and the case-law cited).

Familienangehörige selbst die Bedingung erfüllt, sich rechtmässig fünf Jahre lang ununterbrochen im Aufnahmestaat aufgehalten zu haben. Die Tatsache, dass ein EWR-Staatsangehöriger ein Daueraufenthaltsrecht erworben hat, wirke sich nicht automatisch auf den Aufenthaltsstatus seiner Familienangehörigen aus. In diesem Zusammenhang argumentieren die Regierungen, dass die Artikel 16 Absatz 1 und 17 der Richtlinie ausdrücklich Familienangehörige betreffen, die bereits im Aufnahmestaat ansässig sind. Weder diese Artikel noch andere Bestimmungen der Richtlinie beschäftigen sich speziell mit der Situation eines Familienangehörigen, der einem daueraufenthaltsberechtigten EWR-Staatsangehörigen nachziehen möchte.

Entscheidung des Gerichtshofs

33 Vorab stellt der Gerichtshof fest, dass Richtlinie 2004/38 die Verordnung (EWG) Nr. 1612/68 (ABl. 1968 L 257, S. 2) geändert und die früheren Richtlinien über die Personenfreizügigkeit (Richtlinie 90/364/EWG des Rates vom 28. Juni 1990 über das Aufenthaltsrecht, ABl. 1990 L 180, S. 26, und Richtlinie 90/365/EWG des Rates vom 28. Juni 1990 über das Aufenthaltsrecht der aus dem Erwerbsleben ausgeschiedenen Arbeitnehmer und selbständig Erwerbstätigen, ABl. 1990 L 180, S. 28) aufgehoben hat. Wie aus ihrem dritten Erwägungsgrund hervorgeht, bezweckt die Richtlinie 2004/38, das Freizügigkeits- und Aufenthaltsrecht aller EWR-Staatsangehörigen zu vereinfachen und zu verstärken (vgl. Rechtssache C-127/08 *Metock u. a.*, Slg. 2008, I-6241, Randnr. 59).

34 Im Blick auf den Kontext und die Ziele der Richtlinie 2004/38 – die Förderung des Rechts der Staatsangehörigen von EG-Mitgliedstaaten und EFTA-Staaten sowie ihrer Familienangehörigen, sich im Hoheitsgebiet der EWR-Staaten frei zu bewegen und aufzuhalten – dürfen deren Bestimmungen nicht eng ausgelegt und keinesfalls ihrer praktischen Wirksamkeit beraubt werden (vgl. dazu die oben erwähnte Rechtssache *Metock u. a.*, Randnr. 84, und die dort zitierte Rechtsprechung).

35 The Court notes further that even before the adoption of Directive 2004/38, the legislature recognised the importance of ensuring the protection of the family life of nationals of the EEA States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by EEA law (see, in a similar vein, *Metock and Others*, cited above, paragraph 56, and the case-law cited).

36 Moreover, as recital 5 in the preamble to the Directive points out, the right of all EEA nationals to move and reside freely within the territory of the EEA States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.

37 Consequently, Article 3(1) of the Directive provides that it is to apply to all EEA nationals who move to or reside in an EEA State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

38 In this regard, the Court notes that, in contrast to Article 1 of Directive 90/364/EEC and Article 1 of Directive 90/365/EEC, Directive 2004/38 does not contain a general requirement of sufficient resources. Such a requirement exists neither with regard to workers and self-employed persons nor with regard to persons who have acquired a permanent right of residence pursuant to the Directive. Moreover, in comparison to the position under earlier legislation, the Directive has expanded the rights of family members also on several other points. For instance, Article 13 of the Directive now ensures that family members' rights of residence are retained in the event of divorce, annulment of marriage or termination of registered partnership.

39 The rights conferred on the family members of a beneficiary under the Directive are not autonomous rights, but derived rights,

35 Der Gerichtshof stellt weiterhin fest, dass der Gesetzgeber bereits vor Erlass der Richtlinie 2004/38 die Bedeutung anerkannte, die der Gewährleistung des Schutzes des Familienlebens der EWR-Staatsangehörigen für die Beseitigung der Hindernisse bei der Ausübung der durch das EWR-Recht garantierten Grundfreiheiten zukommt (ähnlich die oben erwähnte Rechtssache *Metock u. a.*, Randnr. 56, und die dort zitierte Rechtsprechung).

36 Der fünfte Erwägungsgrund der Richtlinie hebt zudem hervor, dass das Recht aller EWR-Staatsangehörigen, sich im Hoheitsgebiet der EWR-Staaten frei zu bewegen und aufzuhalten, wenn es unter objektiven Bedingungen in Freiheit und Würde ausgeübt werden soll, auch den Familienangehörigen ungeachtet ihrer Staatsangehörigkeit gewährt werden soll.

37 Dementsprechend gilt die Richtlinie laut Artikel 3 Absatz 1 für jeden EWR-Staatsangehörigen, der sich in einen anderen als den EWR-Staat, dessen Staatsangehörigkeit er besitzt, begibt oder sich dort aufhält, sowie für seine Familienangehörigen im Sinne von Artikel 2 Nummer 2, die ihn begleiten oder ihm nachziehen.

38 In diesem Zusammenhang hält der Gerichtshof fest, dass die Richtlinie 2004/38 im Gegensatz zu Artikel 1 der Richtlinie 90/364/EWG und Artikel 1 der Richtlinie 90/365/EWG kein allgemeines Erfordernis ausreichender Ressourcen aufstellt. Solch ein Erfordernis besteht weder in Bezug auf Arbeitnehmer und Selbstständige noch auf Personen, die ein Daueraufenthaltsrecht im Sinne der Richtlinie erworben haben. Darüber hinaus wurden die Rechte von Familienangehörigen in der neuen Richtlinie im Vergleich zu den früheren gesetzlichen Vorschriften auch in mehreren anderen Aspekten erweitert. Beispielsweise gewährleistet Artikel 13 der Richtlinie nun, dass das Aufenthaltsrecht von Familienangehörigen auch bei Scheidung oder Aufhebung der Ehe oder bei Beendigung der eingetragenen Partnerschaft gewahrt ist.

39 Die den Familienangehörigen eines Berechtigten im Sinne der Richtlinie verliehenen Rechte sind keine eigenständigen,

acquired through their status as members of the beneficiary's family (see, in a similar vein, Case C-434/09 *McCarthy*, judgment of 5 May 2011, not yet reported, paragraph 42). Family members who are themselves EEA nationals may also have an autonomous right of residence. However, such an autonomous right is not at issue in the present case.

40 Directive 2004/38 provides for three levels of residence rights for EEA nationals: first, in Article 6, the right of residence for up to three months; second, in Article 7, the right of residence for more than three months, which applies to workers, economically self-supporting persons or other persons to be assimilated to them; and third, in Article 16(1), the right of permanent residence.

41 The Court observes that the first question essentially involves two issues, that is, whether an EEA national's right of permanent residence confers a derived right of residence in the host State on his family members, and, whether such a derived right may be exercised independently of the resources possessed by the family member and the primary beneficiary.

42 Article 16(1) of the Directive is silent on whether an EEA national's right to permanent residence pursuant to that article confers a right of residence on his family members. Article 7(1), which concerns the right of residence for more than three months, expressly stipulates in point (d) that family members may accompany or join the EEA national having a residence right, but only if the beneficiary satisfies the conditions in points (a), (b) or (c), in other words, that the beneficiary either is working or self-employed or has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host State.

sondern abgeleitete Rechte, die sie aufgrund ihres Status als Familienangehörige des Berechtigten erworben haben (vgl. dazu Rechtssache C-434/09 *McCarthy*, Urteil vom 5. Mai 2011, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 42). Familienangehörige, die selbst EWR-Staatsangehörige sind, können darüber hinaus ein eigenständiges Recht auf Aufenthalt haben. Ein solches eigenständiges Aufenthaltsrecht ist jedoch nicht Gegenstand der vorliegenden Rechtssache.

40 Die Richtlinie 2004/38 sieht für EWR-Staatsangehörige drei Stufen von Aufenthaltsrechten vor, und zwar erstens in Artikel 6 das Recht auf Aufenthalt bis zu drei Monaten, zweitens in Artikel 7 das Recht auf Aufenthalt für mehr als drei Monate, das für Arbeitnehmer, sonst wirtschaftlich Unabhängige oder entsprechend zu behandelnde Personen gilt, und drittens, in Artikel 16 Absatz 1, das Recht auf Daueraufenthalt.

41 Die erste Frage betrifft im Wesentlichen zwei Aspekte, nämlich ob das Daueraufenthaltsrecht eines EWR-Staatsangehörigen dessen Familienangehörigen ein abgeleitetes Aufenthaltsrecht im Aufnahmestaat verleiht, und ob ein solches abgeleitetes Recht unabhängig davon ausgeübt werden kann, ob der Familienangehörige und der Daueraufenthaltsberechtigte über ausreichende Existenzmittel verfügen.

42 Artikel 16 Absatz 1 der Richtlinie enthält keine Aussage dazu, ob das Daueraufenthaltsrecht eines EWR-Staatsangehörigen gemäss diesem Artikel auch dessen Familienangehörigen ein Aufenthaltsrecht verleiht. Artikel 7 Absatz 1, der das Recht auf Aufenthalt für mehr als drei Monate behandelt, sieht in Buchstabe d ausdrücklich vor, dass Familienangehörige den aufenthaltsberechtigten EWR-Staatsangehörigen begleiten oder ihm nachziehen können. Dies gilt jedoch nur, wenn der Berechtigte die Voraussetzung laut den Buchstaben a, b oder c erfüllt, d. h. dass der Berechtigte entweder Arbeitnehmer oder Selbstständiger ist oder für sich und seine Familienangehörigen über ausreichende Existenzmittel verfügt, so dass sie keine Sozialhilfeleistungen des Aufnahmestaats in Anspruch nehmen müssen.

43 The Court finds it apparent that although not explicitly stated in the wording of the provision, the right to permanent residence under Article 16(1) of the Directive must confer a derived right of residence in the host State on the holder's family members. It follows from the scheme and purpose of the Directive that the right to permanent residence, which represents the highest level of integration under the Directive, cannot be read as not including the right to live with one's family, or be limited such as to confer on family members a right of residence derived from a different, lower status. In that regard, it must be noted that the right to permanent residence under Article 16 does not confer an autonomous right of permanent residence on family members, but a right to reside with the beneficiary of a right of permanent residence as a member of his or her family. Hence, only on satisfying the condition of legal residence in the host State for a continuous period of five years may a family member acquire an autonomous right to permanent residence, either pursuant to Article 16(1) in the case of EEA nationals or Article 16(2) in the case of non-EEA nationals.

44 Turning to the second issue, the Court notes that Article 16 of the Directive explicitly states that, once acquired, the right of permanent residence is not subject to the conditions laid down in Chapter III of the Directive, in which Article 7 on the right to residence for more than three months, including the condition to have sufficient resources, is set out.

45 This is in contrast to the situation under the repealed Directives 90/364/EEC and 90/365/EEC, which entitled the host EEA State to monitor whether EEA nationals who enjoyed a right of residence continued to meet the conditions laid down for that purpose, including the condition to have sufficient resources, throughout the period of their residence.

43 Nach dem Dafürhalten des Gerichtshofs ist es ersichtlich – wenngleich im Wortlaut der Bestimmung nicht ausdrücklich festgehalten –, dass das Daueraufenthaltsrecht gemäss Artikel 16 Absatz 1 der Richtlinie den Familienangehörigen des Daueraufenthaltsberechtigten ein abgeleitetes Recht auf Aufenthalt im Aufnahmestaat einräumt. Aus dem Aufbau und Zweck der Richtlinie lässt sich ableiten, dass das Daueraufenthaltsrecht, das den höchsten Grad an Integration im Rahmen der Richtlinie darstellt, nicht so ausgelegt werden kann, dass es kein Recht auf ein Zusammenleben mit der Familie enthält oder dergestalt eingeschränkt ist, dass es Familienangehörigen nur ein von einem anderen, niedrigeren Status abgeleitetes Aufenthaltsrecht einräumt. In diesem Zusammenhang ist festzuhalten, dass das Daueraufenthaltsrecht gemäss Artikel 16 Familienangehörigen kein eigenständiges Daueraufenthaltsrecht, sondern ein Recht zur Wohnsitznahme mit dem Daueraufenthaltsberechtigten als dessen Familienangehörige verleiht. Dementsprechend kann ein Familienangehöriger nur dann ein eigenständiges Daueraufenthaltsrecht erwerben, entweder gemäss Artikel 16 Absatz 1 bei EWR-Staatsangehörigen oder gemäss Artikel 16 Absatz 2 bei Nicht-EWR-Staatsangehörigen, wenn er die Voraussetzung erfüllt, dass er sich rechtmässig fünf Jahre lang ununterbrochen im Aufnahmestaat aufgehalten hat.

44 In Bezug auf den zweiten Aspekt weist der Gerichtshof darauf hin, dass Artikel 16 der Richtlinie ausdrücklich bestimmt, dass das Recht auf Daueraufenthalt, sobald es erworben wurde, nicht mehr an die Voraussetzungen des Kapitels III der Richtlinie geknüpft ist, welches Artikel 7 über das Recht auf Aufenthalt für mehr als drei Monate, einschliesslich der Voraussetzung des Vorhandenseins ausreichender Existenzmittel, enthält.

45 Das steht im Gegensatz zur Situation gemäss den aufgehobenen Richtlinien 90/364/EWG und 90/365/EWG, nach denen der Aufnahme-EWR-Staat während des gesamten Aufenthalts überwachen konnte, ob aufenthaltsberechtigte EWR-Staatsangehörige die einschlägigen Voraussetzungen, darunter die Verfügbarkeit ausreichender Existenzmittel, erfüllten.

46 If an EEA national who has a permanent and unconditional right to residence in an EEA State other than that of which he is a national were precluded from founding a family in that State, this would impair the right of EEA nationals to move and reside freely within the EEA, and thus be contrary to the purpose of the Directive and deprive it of its full effectiveness (see, in a similar vein, *Metock and Others*, cited above, paragraphs 89 and 93). This conclusion cannot be different even if the family member becomes a burden on the social assistance system of the host EEA State.

47 Since the retention of a right to permanent residence under Article 16 of the Directive is not subject to the conditions in Chapter III and it is apparent that the right must be understood to confer a derived right on the beneficiary's family members, it must be presumed *prima facie* that also the derived right is not subject to a condition to have sufficient resources.

48 This interpretation is underpinned by the discontinuation of a general requirement to have sufficient resources in the Directive, as mentioned in paragraphs 33 to 38. Thus, in the Court's view, whereas under the previous directives to have sufficient resources was a general condition for residence rights, under Directive 2004/38 it is only a legitimate condition for residence rights in the cases specifically mentioned in the Directive. In that regard, the Court also considers that, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see, for comparison, Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 47, and the case-law cited).

49 Finally, it should be recalled that all the EEA States are parties to the ECHR, which enshrines in Article 8(1) the right to respect for private and family life. According to established case-law,

46 Könnte ein EWR-Staatsangehöriger, der ein ständiges und bedingungsloses Aufenthaltsrecht in einem anderen EWR-Staat als dem geniesst, dessen Staatsangehörigkeit er besitzt, in diesem Staat keine Familie gründen, so würde dies das Recht von EWR-Staatsangehörigen einschränken, sich innerhalb des EWR frei zu bewegen und aufzuhalten und damit dem Zweck der Richtlinie zuwiderlaufen und ihre volle Wirksamkeit behindern (vgl. dazu die oben erwähnte Rechtssache *Metock u. a.,* Randnrn. 89 und 93). An dieser Schlussfolgerung kann sich auch dann nichts ändern, wenn das Familienmitglied Sozialhilfeleistungen des Aufnahme-EWR-Staats in Anspruch nehmen muss.

47 Da die Aufrechterhaltung eines Rechts auf Daueraufenthalt gemäss Artikel 16 der Richtlinie nicht an die Voraussetzungen des Kapitels III geknüpft ist und es ersichtlich ist, dass dieses Recht den Familienangehörigen des Berechtigten ein abgeleitetes Recht einräumt, ist auf den ersten Blick davon auszugehen, dass auch für das abgeleitete Recht keine Bedingung des Vorhandenseins ausreichender Existenzmittel gilt.

48 Diese Auslegung wird dadurch gestützt, dass in der Richtlinie ein allgemeines Erfordernis, über ausreichende Existenzmittel zu verfügen, wie in den Randnrn. 33 bis 38 erläutert, nicht weitergeführt wurde. Nach Auffassung des Gerichtshofs ist das Vorhandensein ausreichender Existenzmittel, das in den früheren Richtlinien noch ein allgemeines Erfordernis für Aufenthaltsrechte darstellte, gemäss der Richtlinie 2004/38 nur noch in den ausdrücklich dort genannten Fällen eine zulässige Voraussetzung für Aufenthaltsrechte. In diesem Zusammenhang gibt der Gerichtshof auch zu bedenken, dass bei verschiedenen möglichen Auslegungen einer Vorschrift des EWR-Rechts derjenigen der Vorzug zu geben ist, die die praktische Wirksamkeit der Vorschrift zu wahren geeignet ist (vgl. die verbundenen Rechtssachen C-402/07 und C-432/07 *Sturgeon u. a.,* Slg. 2009, I-10923, Randnr. 47, und die dort zitierte Rechtsprechung).

49 Schliesslich ist darauf hinzuweisen, dass alle EWR-Staaten Vertragsparteien der EMRK sind, in deren Artikel 8 Absatz 1 das Recht auf Achtung des Privat- und Familienlebens verankert

provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see, for example, Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, paragraph 23, and Case E-12/10 *EFTA Surveillance Authority* v *Iceland*, judgment of 28 June 2011, not yet reported, paragraph 60 and the case-law cited). The Court notes that in the European Union the same right is protected by Article 7 of the Charter of Fundamental Rights.

50 In light of the foregoing, the answer to the referring court's first question must be that Article 16(1) of Directive 2004/38 is to be interpreted such that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

V THE SECOND AND THIRD QUESTIONS

51 As a result of the Court's reply to the first question, it is unnecessary for the Court to answer the second and third questions.

VI COSTS

52 The costs incurred by the Liechtenstein Government, the Netherlands Government, the Danish Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Verwaltungsgerichtshof des Fürstentums Liechtenstein, any decision on costs for Mr Clauder, who is a party to those proceedings, is a matter for that court.

ist. Nach ständiger Rechtsprechung sind die Bestimmungen des EWR-Abkommens im Lichte der Grundrechte auszulegen (vgl. z. B. Rechtssache E-2/03 *Ásgeirsson*, Slg. 2003, 18, Randnr. 23 und Rechtssache E-12/10 *EFTA-Überwachungsbehörde ./. Island*, Urteil vom 28. Juni 2011, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 60, und die dort zitierte Rechtsprechung). Der Gerichtshof stellt fest, dass dieses Recht in der Europäischen Union durch Artikel 7 der Charta der Grundrechte der Europäischen Union garantiert wird.

50 Angesichts dieser Erwägungen ist auf die erste Frage des vorlegenden Gerichts zu antworten, dass Artikel 16 Absatz 1 der Richtlinie 2004/38 dahingehend auszulegen ist, dass ein daueraufenthaltsberechtigter EWR-Staatsangehöriger, der Rentner ist und Sozialhilfeleistungen im Aufnahme-EWR-Staat in Anspruch nimmt, einen Anspruch auf Familiennachzug selbst dann geltend machen kann, wenn auch der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird.

V ZUR ZWEITEN UND DRITTEN FRAGE

51 Angesichts der Antwort des Gerichtshofs auf die erste Frage kann die Beantwortung der zweiten und dritten Frage entfallen.

VI KOSTEN

52 Die Auslagen der Regierung Liechtensteins, der Regierung der Niederlande, der Regierung Dänemarks, der EFTA-Überwachungsbehörde und der Europäischen Kommission, die vor dem Gerichtshof Erklärungen abgegeben haben, sind nicht erstattungsfähig. Da es sich bei diesem Verfahren um einen Zwischenstreit in einem beim Verwaltungsgerichtshof des Fürstentums Liechtenstein anhängigen Rechtsstreit handelt, ist die Kostenentscheidung betreffend Herrn Clauder, der Partei in diesem Verfahren ist, Sache des Verwaltungsgerichtshofs.

On those grounds,

THE COURT

in answer to the questions referred to it by the Verwaltungsgerichtshof des Fürstentums Liechtenstein hereby gives the following Advisory Opinion:

Article 16(1) of Directive 2004/38/EC is to be interpreted such that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

Carl Baudenbacher Per Christiansen Benedikt Bogason

Delivered in open court in Luxembourg on 26 July 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President

Aus diesen Gründen erstellt

DER GERICHTSHOF

in Beantwortung der ihm vom Verwaltungsgerichtshof des Fürstentums Liechtenstein vorgelegten Fragen folgendes Gutachten:

Artikel 16 Absatz 1 der Richtlinie 2004/38/EG ist dahingehend auszulegen, dass ein daueraufenthaltsberechtigter EWR-Staatsangehöriger, der Rentner ist und Sozialhilfeleistungen im Aufnahme-EWR-Staat in Anspruch nimmt, einen Anspruch auf Familiennachzug selbst dann geltend machen kann, wenn auch der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird.

Carl Baudenbacher Per Christiansen Benedikt Bogason

Verkündet in öffentlicher Sitzung in Luxemburg am 26. Juli 2011.

Skúli Magnússon
Kanzler

Carl Baudenbacher
Präsident

REPORT FOR THE HEARING

in Case E-4/11

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 Verwaltungsgerichtshof des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein; "the Administrative Court"), in the case of

Arnulf Clauder

concerning the interpretation of Article 16(1) in conjunction with Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, as adapted to the EEA Agreement by Protocol 1 thereto.[1]

I INTRODUCTION

1. By a letter of 14 February 2011, registered at the EFTA Court on 16 February 2011, the Administrative Court made a request for an Advisory Opinion in a case pending before it concerning Arnulf Clauder ("Mr Clauder" or "the Complainant").

2. The case before the Administrative Court concerns the decision by the Liechtenstein Government not to grant the Complainant, who is economically inactive and in receipt of social welfare benefits, a family reunification permit for his spouse.

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 77, referred to at point 3 of Annex VIII to the EEA Agreement.

SITZUNGSBERICHT

in der Rechtssache E-4/11

ANTRAG des Verwaltungsgerichtshofs des Fürstentums Liechtenstein (im Folgenden: Verwaltungsgerichtshof) an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs in der vor ihm anhängigen Rechtssache

Arnulf Clauder

betreffend die Auslegung von Artikel 16 Absatz 1 in Verbindung mit Artikel 7 Absatz 1 der Richtlinie 2004/38/EG des Europäischen Parlaments und des Rates vom 29. April 2004 über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, wie durch Protokoll 1 zum EWR-Abkommen an das EWR-Abkommen angepasst.[1]

I EINLEITUNG

1. Mit Schreiben vom 14. Februar 2011, beim EFTA-Gerichtshof eingegangen am 16. Februar 2011, stellte der Verwaltungsge·richts·hof einen Antrag auf Vorabentscheidung in einer bei ihm anhängigen Rechtssache betreffend Arnulf Clauder (im Folgenden: Herr Clauder oder Beschwerdeführer).

2. Die Rechtssache vor dem Verwaltungsgerichtshof betrifft die Entscheidung der Regierung des Fürstentums Liechtenstein, den Antrag des Beschwerdeführers, der nicht erwerbstätig ist und Sozialhilfe bezieht, auf Erteilung einer Familiennachzugs·bewilligung für seine Ehefrau abzuweisen.

[1] Richtlinie 2004/38/EG des Europäischen Parlaments und des Rates vom 29. April 2004 über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, zur Änderung der Verordnung (EWG) Nr. 1612/68 und zur Aufhebung der Richtlinien 64/221/EWG, 68/360/EWG, 72/194/EWG, 73/148/EWG, 75/34/EWG, 75/35/EWG, 90/364/EWG, 90/365/EWG und 93/96/EWG, ABl. 2004 L 158, S. 77, auf die unter Punkt 3 des Anhangs VIII des EWR-Abkommens Bezug genommen wird.

II LEGAL BACKGROUND

European law

3. Article 8 of the European Convention on Human Rights ("ECHR") – *Right to respect for private and family life* – reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

...

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("Directive 2004/38" or "the Directive") was incorporated into the EEA Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 ("EEA Joint Committee Decision No 158/2007").[2]

4. The Directive's scope *ratione personae* is defined in Chapter I – *General provisions* – in Article 3 under the heading "Beneficiaries" as follows:

(1) This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

...

5. Article 2 of the Directive – *Definitions* – reads as follows:

For the purposes of this Directive:

...

2. "family member" means:

(a) the spouse;

...

[2] OJ 2008 L 124, p. 20.

II RECHTLICHER HINTERGRUND

Europarecht

3. Artikel 8 der Europäischen Menschenrechtskonvention (im Folgenden: EMRK) – *Recht auf Achtung des Privat- und Familienlebens* – lautet:

   1. Jede Person hat das Recht auf Achtung ihres Privat- und Familienlebens, ihrer Wohnung und ihrer Korrespondenz.

   ...

   Die Richtlinie 2004/38/EG des Europäischen Parlaments und des Rates vom 29. April 2004 über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten (im Folgenden: Richtlinie 2004/38 oder Richtlinie), wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 158/2007 vom 7. Dezember 2007 (im Folgenden: Beschluss des Gemeinsamen EWR-Ausschusses Nr. 158/2007) in das EWR-Abkommen aufgenommen.[2]

4. Der persönliche Geltungsbereich der Richtlinie wurde in Kapitel I – *Allgemeine Bestimmungen* – Artikel 3 unter der Überschrift „Berechtigte" folgendermassen festgelegt:

   (1) Diese Richtlinie gilt für jeden Unionsbürger, der sich in einen anderen als den Mitgliedstaat, dessen Staatsangehörigkeit er besitzt, begibt oder sich dort aufhält, sowie für seine Familienangehörigen im Sinne von Artikel 2 Nummer 2, die ihn begleiten oder ihm nachziehen.

   ...

5. Artikel 2 der Richtlinie – *Begriffsbestimmungen* – lautet:

   Im Sinne dieser Richtlinie bezeichnet der Ausdruck

   ...

   2. „Familienangehöriger"
   a) den Ehegatten;
   ...

[2] ABl. 2008 L 124, S. 20.

6. Article 7 of the Directive – *Right of residence for more than three months* – reads as follows:

(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

...

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) ...

...

7. Article 16 of the Directive sets out the general rule concerning the right of permanent residence. It provides:

General rule for Union citizens and their family members

(1) Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

(2) Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

...

(4) Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

6. Artikel 7 der Richtlinie – *Recht auf Aufenthalt für mehr als drei Monate* – lautet:

(1) Jeder Unionsbürger hat das Recht auf Aufenthalt im Hoheitsgebiet eines anderen Mitgliedstaats für einen Zeitraum von über drei Monaten, wenn er

a) Arbeitnehmer oder Selbstständiger im Aufnahmemitgliedstaat ist oder

b) für sich und seine Familienangehörigen über ausreichende Existenzmittel verfügt, so dass sie während ihres Aufenthalts keine Sozialhilfeleistungen des Aufnahmemitgliedstaats in Anspruch nehmen müssen, und er und seine Familienangehörigen über einen umfassenden Krankenversicherungsschutz im Aufnahmemitgliedstaat verfügen oder

...

d) ein Familienangehöriger ist, der den Unionsbürger, der die Voraussetzungen des Buchstaben a, b ... erfüllt, begleitet oder ihm nachzieht.

...

7. Artikel 16 der Richtlinie legt die allgemeine Regel in Bezug auf das Recht auf Daueraufenthalt fest. Er sieht Folgendes vor:

Allgemeine Regel für Unionsbürger und ihre Familienangehörigen

(1) Jeder Unionsbürger, der sich rechtmäßig fünf Jahre lang ununterbrochen im Aufnahmemitgliedstaat aufgehalten hat, hat das Recht, sich dort auf Dauer aufzuhalten. Dieses Recht ist nicht an die Voraussetzungen des Kapitels III geknüpft.

(2) Absatz 1 gilt auch für Familienangehörige, die nicht die Staatsangehörigkeit eines Mitgliedstaats besitzen und die sich rechtmäßig fünf Jahre lang ununterbrochen mit dem Unionsbürger im Aufnahmemitgliedstaat aufgehalten haben.

...

(4) Wenn das Recht auf Daueraufenthalt erworben wurde, führt nur die Abwesenheit vom Aufnahmemitgliedstaat, die zwei aufeinander folgende Jahre überschreitet, zu seinem Verlust.

8. Article 24 of the Directive – *Equal treatment* – reads as follows:

(1) Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

...

Adaptations to the EEA

9. Joint Declaration by the Contracting Parties to Decision No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement reads as follows:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

...

Sectoral adaptations

10. Annex V to the EEA Agreement states:

...

The provisions in the SECTORAL ADAPTATIONS in Annex VIII concerning Liechtenstein shall apply, as appropriate, to this Annex.

...

8. Artikel 24 der Richtlinie – *Gleichbehandlung* – lautet:

(1) Vorbehaltlich spezifischer und ausdrücklich im Vertrag und im abgeleiteten Recht vorgesehener Bestimmungen genießt jeder Unionsbürger, der sich aufgrund dieser Richtlinie im Hoheitsgebiet des Aufnahmemitgliedstaats aufhält, im Anwendungsbereich des Vertrags die gleiche Behandlung wie die Staatsangehörigen dieses Mitgliedstaats. Das Recht auf Gleichbehandlung erstreckt sich auch auf Familienangehörige, die nicht die Staatsangehörigkeit eines Mitgliedstaats besitzen und das Recht auf Aufenthalt oder das Recht auf Daueraufenthalt genießen.

...

Anpassungen an den EWR

9. Die Gemeinsame Erklärung der Vertragsparteien zum Beschluss des Gemeinsamen EWR-Ausschusses Nr. 158/2007 zur Aufnahme der Richtlinie 2004/38/EG des Europäischen Parlaments und des Rates in das Abkommen lautet:

Der mit dem Vertrag von Maastricht eingeführte Begriff der Unionsbürgerschaft (Artikel 17 ff. EG-Vertrag) findet keine Entsprechung im EWR-Abkommen. Die Aufnahme der Richtlinie 2004/38/EG in das EWR-Abkommen lässt die Bewertung der Bedeutung künftiger Rechtsakte der EU und der künftigen Rechtsprechung des Europäischen Gerichtshofs auf der Grundlage des Begriffs der Unionsbürgerschaft für das EWR-Abkommen unberührt. Das EWR-Abkommen bietet keine Rechtsgrundlage für politische Rechte von EWR-Staatsangehörigen.

...

Sektorielle Anpassungen

10. In Anhang V des EWR-Abkommens heisst es:

...

Die Liechtenstein betreffenden SEKTORALEN ANPASSUNGEN des Anhangs VIII gelten entsprechend für diesen Anhang.

...

11. The Sectoral Adaptations in Annex VIII concerning Liechtenstein read as follows:

The following shall apply to Liechtenstein. Duly taking into account the specific geographic situation of Liechtenstein, this arrangement shall be reviewed every five years, for the first time before May 2009.

I

Nationals of Iceland, Norway and the EU Member States may take up residence in Liechtenstein only after having received a permit from the Liechtenstein authorities. They have the right to obtain this permit, subject only to the restrictions specified below. No such residence permit shall be necessary for a period less than three months per year, provided no employment or other permanent economic activity is taken up, nor for persons providing cross-border services in Liechtenstein.

...

III

Family members of nationals of Iceland, Norway and EU Member States residing lawfully in Liechtenstein shall have the right to obtain a permit of the same validity as that of the person on whom they depend. They shall have the right to take up an economic activity, in which case they will be included in the number of permits granted to economically active persons. However, the conditions in point II may not be invoked to refuse them a permit in the event that the annual number of permits available to economically active persons is filled.

Persons giving up their economic activity may remain in Liechtenstein under conditions defined in Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State and in Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the

11. Die Liechtenstein betreffenden sektoriellen Anpassungen des Anhangs VIII lauten folgendermassen:

Für Liechtenstein gilt Nachstehendes. Unter angemessener Berücksichtigung der speziellen geografischen Lage Liechtensteins wird diese Regelung alle fünf Jahre überprüft, das erste Mal vor Mai 2009.

I

Staatsangehörige Islands, Norwegens und der EU-Mitgliedstaaten dürfen sich nur mit Genehmigung der Behörden Liechtensteins in Liechtenstein niederlassen. Mit den unten aufgeführten Einschränkungen haben sie einen Rechtsanspruch auf diese Genehmigung. Für einen Zeitraum von weniger als drei Monaten je Jahr brauchen Personen, die in Liechtenstein keine Beschäftigung oder sonstige ständige Erwerbstätigkeit aufnehmen, und Personen, die grenzüberschreitende Dienste erbringen, keine derartige Aufenthaltsgenehmigung.

...

III

Familienangehörige der Staatsangehörigen Islands, Norwegens und der EU-Mitgliedstaaten, die ihren rechtmäßigen Aufenthalt in Liechtenstein haben, haben ein Anrecht auf eine Genehmigung der gleichen Gültigkeitsdauer wie die der Person, von der sie abhängen. Sie haben das Recht, eine Erwerbstätigkeit aufzunehmen; in diesem Fall werden sie zu der Quote der Aufenthaltsgenehmigungen für Erwerbstätige gezählt. Die Bedingungen des Abschnitts II dürfen jedoch nicht zu einer Ablehnung der Genehmigung herangezogen werden, wenn die jährliche Quote der Genehmigungen für Erwerbstätige erschöpft ist.

Personen, die ihre Erwerbstätigkeit beenden, können unter den in der Verordnung (EWG) Nr. 1251/70 der Kommission vom 29. Juni 1970 über das Recht der Arbeitnehmer, nach Beendigung einer Beschäftigung im Hoheitsgebiet eines Mitgliedstaats zu verbleiben und in der Richtlinie 75/34/EWG des Rates vom 17. Dezember 1974 über das Recht der Staatsangehörigen eines Mitgliedstaats, nach Beendigung der Ausübung einer selbstständigen Tätigkeit im Hoheitsgebiet eines

territory of another Member State after having pursued therein an activity in a self-employed capacity: they will no longer be counted in the number of permits available to economically active persons nor will they be included in the quota defined in point IV.[3]

National law[4]

12. The Act of 20 November 2009 on the free movement of EEA and Swiss citizens ("PFZG"),[5] and the Regulation on the Free Movement of Persons ("PFZV"),[6] entered into force 1 January 2010.

13. Article 24 of the PFZG concerns the principles of the permanent residence permit. It reads as follows:

... Principle:

(1) Subject to Articles 43 and 46, EEA citizens shall be granted on request a permanent residence permit if:

(a) they have resided in Liechtenstein for a continuous period of five years; and

(b) there is no ground for revocation or expulsion.

(2) The permanent residence permit entitles the beneficiary to permanent residence in Liechtenstein. The permit may not be linked to any conditions.

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3 Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ, English Special Edition 1970 (II), p. 402, and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, OJ 1975 L 14, p. 10, were repealed from Annex V of the EEA Agreement and replaced by Directive 2004/38.

4 Translations of national provisions are unofficial and are based on translations contained in the documents of the case.

5 *Gesetz über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsgesetz)*, Law Gazette 2009 No 348, as amended.

6 *Verordnung über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsverordnung)*, Law Gazette 2009 No 350, as amended.

anderen Mitgliedstaats zu verbleiben festgelegten Bedingungen in Liechtenstein verbleiben: Sie werden dann nicht mehr zu der Quote der Aufenthaltsgenehmigungen für Erwerbstätige noch zu der in Abschnitt IV bestimmten Quote gezählt.[3]

Nationales Recht[4]

12. Das Gesetz vom 20. November 2009 über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsgesetz; im Folgenden: PFZG)[5] und die Verordnung über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsverordnung; im Folgenden PFZV)[6] sind am 1. Januar 2010 in Kraft getreten.

13. Artikel 24 PFZG befasst sich mit den Grundsätzen der Daueraufenthaltsbewilligung. Er lautet:

... Grundsatz:

1) EWR-Staatsangehörigen wird vorbehaltlich Art. 43 und 46 auf Gesuch hin eine Daueraufenthaltsbewilligung erteilt, wenn:

a) sie sich seit fünf Jahren ununterbrochen in Liechtenstein aufgehalten haben; und

b) kein Widerrufs- oder Ausweisungsgrund vorliegt.

2) Die Daueraufenthaltsbewilligung berechtigt zum dauerhaften Verbleib in Liechtenstein. Sie darf nicht mit Bedingungen verbunden werden.

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3 Verordnung (EWG) Nr. 1251/70 der Kommission vom 29. Juni 1970 über das Recht der Arbeitnehmer, nach Beendigung einer Beschäftigung im Hoheitsgebiet eines Mitgliedstaats zu verbleiben, ABl. 1970 L 142, S. 24, und Richtlinie 75/34/EWG des Rates vom 17. Dezember 1974 über das Recht der Staatsangehörigen eines Mitgliedstaats, nach Beendigung der Ausübung einer selbständigen Tätigkeit im Hoheitsgebiet eines anderen Mitgliedstaats zu verbleiben, ABl. 1975 L 14, S. 10, wurden aus Anhang V des EWR-Abkommens gestrichen und durch die Richtlinie 2004/38 ersetzt.

4 [Betrifft nur die englische Sprachfassung]

5 Gesetz über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsgesetz), Landesgesetzblatt 2009 Nr. 348, in der gültigen Fassung.

6 Verordnung über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsverordnung), Landesgesetzblatt 2009 Nr. 350, in der gültigen Fassung.

(3) The control period for the purposes of examining the actual presence in Liechtenstein is five years. The residence card shall be submitted two weeks before the expiry of the control period with a view to obtaining an extension.

...

14. The PFZG provides in the chapter entitled "Family reunification, Family members, General Provisions" as follows:

Article 40:

Principle:

The purpose of family reunification is to allow family members to jointly take up residence

Article 41:

Requirements:

(1) Foreign persons with a residence permit may have their family members join them at any time on provision of the following evidence:

...

(d) in cases pursuant to Articles 17, 18 and 22, evidence of the necessary financial means for maintaining all family members obviating any claim for social welfare benefits; ...

15. "Social welfare benefit" within the meaning of the foregoing provision is defined in Article 8(2) of the PFZV as follows:

In cases under Article 41(1)(d) PFZG, social welfare benefit, in addition to the benefits under paragraph 1, also refers to supplementary benefits under the ELG.[7]

[7] The "ELG" is the Act of 10 December 1965 on supplementary benefits related to old-age, survivors' and invalidity insurance (*Gesetz vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung*), Law Gazette 1965 No 46, as amended.

3) Die Kontrollfrist zur Überprüfung der tatsächlichen Anwesenheit im Inland beträgt fünf Jahre. Der Aufenthaltsausweis ist zwei Wochen vor Ablauf der Kontrollfrist zur Verlängerung vorzulegen.

...

14. Das PFZG bestimmt im Kapitel „Familiennachzug, Familienangehörige, Im Allgemeinen" Folgendes:

Art. 40

Grundsatz

Der Familiennachzug bezweckt die Zusammenführung der Familienangehörigen zur gemeinsamen Wohnsitznahme.

Art. 41

Voraussetzungen

1) Ausländische Personen mit einer Bewilligung zur Wohnsitznahme können jederzeit ihre Familienangehörigen nachziehen lassen, wenn folgende Nachweise vorliegen:

...

d) in den Fällen nach Art. 17, 18 und 22 ein Nachweis über notwendige finanzielle Mittel für den Lebensunterhalt aller Familienangehörigen, sodass keine Sozialhilfe in Anspruch genommen werden muss; ...

15. „Sozialhilfe" im Sinne der vorzitierten Bestimmung wird in Artikel 8 Absatz 2 PFZV wie folgt definiert:

In den Fällen nach Art. 41 Abs. 1 Bst. d PFZG gelten neben den Leistungen nach Abs. 1 auch Ergänzungsleistungen nach dem ELG als Sozialhilfe.[7]

[7] Das ELG ist das Gesetz vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung, Landesgesetzblatt 1965 Nr. 46, in der gültigen Fassung.

16. Articles 17 and 18 referred to in Article 41(1)(d) of the PFZG are not relevant to the present case. Article 22 of the PFZG states as follows:

...

Economically inactive persons

(1) A residence permit without gainful employment may only be issued if:

(a) also no permanent and regular gainful employment is being pursued abroad;

(b) the necessary financial means are available to provide a living, thereby obviating any claim for social welfare benefit; and

(c) evidence of comprehensive sickness insurance is provided which covers all risks in Liechtenstein.

(2) The evidence of sufficient financial means may be verified after two years.

17. Article 44 of the PFZG reads as follows:

(1) Family members of persons who have a permanent residence permit or a settlement permit shall be granted, subject to Article 45, a residence permit with a validity period of 5 years.

(2) Family members of persons who have a short-term residence permit or a residence permit shall be granted a permit valid for the same period as the person from whom they derive their right.

III FACTS AND PROCEDURE

18. Mr Clauder, a German national, has been continuously resident in Liechtenstein since 1992. His first wife, also of German nationality, took up residence in Liechtenstein and, initially, Mr Clauder was granted a right of residence as a family member of a worker.

16. Die in Artikel 41 Absatz 1 Buchstabe d genannten Artikel 17 und 18 PFZG sind für die gegenständliche Rechtssache nicht massgeblich. In Artikel 22 PFZG heisst es:

...

Nichterwerbstätige

1) Eine Aufenthaltsbewilligung ohne Erwerbstätigkeit kann nur erteilt werden, wenn:

a) auch im Ausland keine dauernde und geregelte Erwerbstätigkeit ausgeübt wird;

b) die notwendigen finanziellen Mittel für den Lebensunterhalt vorhanden sind, sodass keine Sozialhilfe in Anspruch genommen werden muss; und

c) ein umfassender Krankenversicherungsschutz nachgewiesen wird, der sämtliche Risiken in Liechtenstein abdeckt.

2) Der Nachweis genügender finanzieller Mittel kann nach zwei Jahren überprüft werden.

17. Artikel 44 PFZG lautet:

1) Familienangehörige von Personen, die über eine Daueraufenthalts- oder Niederlassungsbewilligung verfügen, erhalten vorbehaltlich Art. 45 eine Aufenthaltsbewilligung mit einer Gültigkeitsdauer von fünf Jahren.

2) Familienangehörige von Personen, die über eine Kurzaufenthaltsbewilligung oder Aufenthaltsbewilligung verfügen, erhalten eine Bewilligung mit der gleichen Gültigkeitsdauer wie die Person, von der sie ihr Recht ableiten.

III SACHVERHALT UND VERFAHREN

18. Herr Clauder, ein deutscher Staatsangehöriger, hat seinen ständigen Wohnsitz seit 1992 in Liechtenstein. Seine erste Ehefrau, ebenfalls eine deutsche Staatsangehörige, verlegte ihren Wohnsitz nach Liechtenstein, und anfänglich erhielt Herr Clauder eine Aufenthaltsbewilligung als Familienangehöriger einer Arbeitnehmerin.

19. In 2002, after repeated renewals of his residence permit, Mr Clauder received a permanent residence permit. Under Liechtenstein legislation, a permanent residence permit is issued for an indefinite period.

20. In 2009, Mr Clauder and his first wife divorced. In 2010, Mr Clauder remarried. His new wife, Mrs Eva-Maria Clauder, née Verlohr, a German national was resident at that time in Germany. On 1 February 2010, Mr Clauder applied to the Liechtenstein Office for Immigration and Passports for a family reunification permit for his second wife.

21. Mr Clauder is a pensioner in receipt of old-age pensions from both Germany and Liechtenstein. As the old-age pensions, even in combination, are relatively modest, Mr Clauder receives supplementary benefits in Liechtenstein pursuant to the Act of 10 December 1965 on supplementary benefits to old-age, survivors' and invalidity insurance.

22. According to the order for reference, if Mrs Clauder were allowed to reside with her husband in Liechtenstein, the amount of the supplementary benefits received by Mr Clauder would increase, even if Mrs Clauder were to take up employment.

23. On 12 February 2010, the Office for Immigration and Passports rejected Mr Clauder's application for family reunification. The basis for the rejection was that Mr Clauder, who was granted a permit of permanent residence as an economically inactive person, could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare benefits. Mr Clauder submitted written observations to that office on 19 February 2010 but, in an administrative notice of 12 April 2010, the Office for Immigration and Passports confirmed the position it had previously taken and formally rejected the application for family reunification.

19. Im Jahr 2002, nach mehrfacher Verlängerung seiner Aufenthaltsbewilligung, erhielt Herr Clauder eine Niederlassungsbewilligung. Nach liechtensteinischem Recht wird eine Niederlassungsbewilligung auf unbestimmte Zeit erteilt.

20. Im Jahr 2009 wurde die Ehe zwischen Herrn Clauder und seiner ersten Ehefrau geschieden. Im Jahr 2010 heiratete Herr Clauder zum zweiten Mal. Seine zweite Ehefrau, Eva-Maria Clauder, geborene Verlohr, eine deutsche Staatsangehörige, hatte ihren Wohnsitz zu diesem Zeitpunkt in Deutschland. Am 1. Februar 2010 stellte Herr Clauder beim liechtensteinischen Ausländer- und Passamt den Antrag auf Erteilung einer Familiennachzugsbewilligung für seine zweite Ehefrau.

21. Herr Clauder ist Rentner und bezieht Altersrenten aus Deutschland und Liechtenstein. Da die Altersrenten, auch zusammengerechnet, relativ bescheiden sind, erhält Herr Clauder in Liechtenstein Ergänzungsleistungen nach dem Gesetz vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung.

22. Dem Antrag auf Vorabentscheidung zufolge würden sich die von Herrn Clauder bezogenen Ergänzungsleistungen erhöhen, wenn Frau Clauder eine Aufenthaltsbewilligung zur Wohnsitznahme bei ihrem Ehemann ausgestellt würde; dies selbst dann, wenn Frau Clauder eine Erwerbstätigkeit aufnehmen würde.

23. Am 12. Februar 2010 lehnte das Ausländer- und Passamt den Antrag von Herrn Clauder auf Erteilung einer Familiennachzugsbewilligung ab. Die Ablehnung erfolgte, da Herr Clauder, dem eine Niederlassungsbewilligung als Nichterwerbstätiger gewährt wurde, das Vorhandensein ausreichender Existenzmittel für sich und seine Ehefrau ohne Inanspruchnahme von Sozialhilfe nicht nachweisen konnte. Herr Clauder nahm hierzu am 19. Februar 2010 schriftlich Stellung, doch das Ausländer- und Passamt bestätigte seine zuvor eingenommene Position am 12. April 2010 in einem sogenannten Verwaltungsbot und wies den Antrag auf Familiennachzug formell ab.

24. Mr Clauder lodged an administrative complaint against this administrative notice on 26 April 2010. This complaint was rejected by the Liechtenstein Government in November 2010. On 6 December 2010, Mr Clauder challenged the Government's decision before the Administrative Court.

25. In its request for an Advisory Opinion, the Administrative Court appears inclined towards the view that a person in Mr Clauder's position, that is, an economically inactive person who is a national of one EEA State who enjoys a right of permanent residence in another EEA State, does not need to demonstrate that he has sufficient means of subsistence in order for a family member to benefit from a derived right of residence in that other EEA State. Notwithstanding that general position, the Administrative Court submitted the following three questions to the EFTA Court:

1. Is Directive 2004/38/EC, in particular Article 16(1) in conjunction with Article 7(1), to be interpreted such that a Union citizen with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host Member State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits?

2. Is it of relevance for the answer to Question 1, whether the Union citizen with a right of permanent residence was employed or self-employed in the host Member State prior to attaining retirement age?

3. Is it of relevance for the answer to Question 1, whether the family member will be employed or self-employed in the host Member State and still be claiming social welfare benefits?

IV WRITTEN OBSERVATIONS

26. 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 Complainant;

24. Am 26. April 2010 erhob Herr Clauder Beschwerde gegen dieses Verwaltungsbot. Diese Beschwerde wies die Regierung des Fürstentums Liechtenstein im November 2010 ab. Am 6. Dezember 2010 focht Herr Clauder die Entscheidung der Regierung vor dem Verwaltungsgerichtshof an.

25. In seinem Antrag auf Vorabentscheidung scheint der Verwaltungsgerichtshof zu der Einschätzung zu neigen, dass eine Person in Herrn Clauders Situation – also ein nicht erwerbstätiger Staatsangehöriger eines EWR-Staats, der ein Daueraufenthaltsrecht in einem anderen EWR-Staat besitzt – keinen Nachweis ausreichender Existenzmittel erbringen muss, damit ein Familienangehöriger ein abgeleitetes Aufenthaltsrecht in diesem anderen EWR-Staat geniesst. Unbeschadet dieser allgemeinen Position legte der Verwaltungsgerichtshof dem EFTA-Gerichtshof die drei folgenden Fragen vor:

1. Ist die Richtlinie 2004/38/EG, insbesondere Artikel 16 Absatz 1 in Verbindung mit Artikel 7 Absatz 1, dahingehend auszulegen, dass ein daueraufenthaltsberechtigter Unionsbürger, der Rentner ist und Sozialhilfeleistungen im Aufnahmemitgliedsstaat in Anspruch nimmt, einen Anspruch auf Familiennachzug selbst dann geltend machen kann, wenn auch der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird?

2. Spielt es für die Beantwortung der Frage 1 eine Rolle, ob der daueraufenthaltsberechtigte Unionsangehörige vor Eintritt ins Rentenalter Arbeitnehmer oder Selbstständiger im Aufnahmemitgliedsstaat war?

3. Spielt es für die Beantwortung der Frage 1 eine Rolle, ob der Familienangehörige im Aufnahmemitgliedsstaat Arbeitnehmer oder Selbstständiger sein wird und dennoch Sozialhilfeleistungen in Anspruch nehmen wird?

IV SCHRIFTLICHE ERKLÄRUNGEN

26. Gemäss Artikel 20 der Satzung des Gerichtshofs und Artikel 97 der Verfahrensordnung haben schriftliche Erklärungen abgegeben:

– der Beschwerdeführer;

– the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Thomas Bischof of the EEA Coordination Unit, Vaduz, acting as Agents;

– the Netherlands Government, represented by Corinna Wissels, Mielle Bulterman and Jurian Langer, respectively head and staff members of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, The Hague, acting as Agents;

– the EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Florence Simonetti, Senior Officer, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission, represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents.

The Complainant

The first question

27. The Complainant contends that Directive 2004/38 cannot be interpreted in such a way as to govern merely the right to permanent residence for Union citizens themselves and not family members seeking to join them. He submits that Article 16 of the Directive, which is the legal basis for the right of permanent residence for Union citizens, expressly precludes reference to the conditions set out in Chapter III. He further argues that Article 16(1) expressly provides for a right to permanent residence not only for Union citizens, but also for their family members. Moreover, since Article 16(2) allows for such integration even in the case of family members who are not Union citizens, subject to the condition of a 5-year period of residence, it is the Complainant's view that reunification with family members who are themselves Union citizens is unconditional. The Complainant submits, therefore, that what may be regarded as legislative silence in relation to the acquisition of the right to join a Union citizen with permanent residence does not constitute a gap

– die Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch und Thomas Bischof von der Stabstelle EWR, Vaduz, als Bevollmächtigte;

– die Regierung der Niederlande, vertreten durch Corinna Wissels, Mielle Bulterman und Jurian Langer, Leiter bzw. Mitarbeiter der Abteilung Europarecht der Rechtsabteilung des Aussenministeriums, Den Haag, als Bevollmächtigte;

– die EFTA-Überwachungsbehörde, vertreten durch Xavier Lewis, Direktor, und Florence Simonetti, leitende Beamtin, Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

– die Europäische Kommission, vertreten durch Christina Tufvesson und Michael Wilderspin, Rechtsberater, als Bevollmächtigte.

Der Beschwerdeführer

Zur ersten Frage

27. Der Beschwerdeführer bringt vor, die Richtlinie 2004/38 könne nicht dahin ausgelegt werden, dass sie lediglich das Daueraufenthaltsrecht des Unionsbürgers selbst und nicht auch jenes der Familienangehörigen regle, die zu ihm ziehen möchten. Artikel 16 der Richtlinie, der die Rechtsgrundlage für das Daueraufenthaltsrecht eines Unionsbürgers ist, schliesse die Heranziehung der in Kapitel III enthaltenen Bedingungen ausdrücklich aus. Der Beschwerdeführer argumentiert weiter, dass Artikel 16 Absatz 1 ein Daueraufenthaltsrecht nicht nur für den Unionsbürger selbst, sondern ausdrücklich auch für dessen Familienangehörige vorsieht. Zudem vertritt der Beschwerdeführer angesichts dessen, dass Artikel 16 Absatz 2 eine solche Integration unter der Voraussetzung eines 5-Jahres-Aufenthaltes sogar denjenigen Familienangehörigen zubilligen will, die selbst keine Unionsbürger sind, die Auffassung, dass für den Nachzug von Familienangehörigen, die selbst Unionsbürger sind, keinerlei Bedingungen bestehen. Der Beschwerdeführer trägt daher vor, dass das scheinbare Fehlen von Rechtsvorschriften für den Erwerb eines Nachzugsrechts für Angehörige daueraufenthaltsberechtigter Unionsbürger keine Gesetzes-

in the law but that an unconditional right of reunification was presupposed by the Community legislature to be obvious.

28. Mr Clauder contends that this conclusion is strengthened in the present case, as he already had a right to permanent residence when the Directive entered into force in 2004. That, in turn, justifies application of Article 37 of the Directive which provides that the Directive's provisions may not affect more favourable national provisions.

29. The Complainant submits further that if the Court takes the view that the principle according to which a right of free movement is restricted where an individual is in receipt of social assistance applies also to the right of permanent residence under Article 16(1) of the Directive, the question presumably arises whether this covers all recourse to social assistance or only such where persons become an "unreasonable" burden on the social assistance system.

The second question

30. As regards the Administrative Court's second question, the Complainant contends that this question must be expanded to consider whether it is relevant whether the Union citizen with a right of permanent residence was employed or self-employed in the host Member State after reaching retirement age.

The Liechtenstein Government

The first question

31. The Liechtenstein Government notes that the Directive, which brought together previous rules on residence rights of nationals of EEA States, continues to distinguish between economically active and non-active nationals of EEA States especially with

lücke darstellt, sondern dass das bedingungslose Nachzugsrecht vom gemeinschaftlichen Gesetzgeber als Selbstverständlichkeit vorausgesetzt wurde.

28. Herr Clauder bringt vor, diese Schlussfolgerung werde in der gegenständlichen Rechtssache dadurch untermauert, dass er das Daueraufenthaltsrecht bereits innegehabt habe, als die Richtlinie im Jahre 2004 in Kraft getreten ist. Dies könnte nämlich die Anwendung von Artikel 37 der Richtlinie rechtfertigen, der vorsieht, dass die Richtlinie günstigere nationale Vorschriften unberührt lässt.

29. Der Beschwerdeführer legt weiter dar, dass – sollte der Gerichtshof der Auffassung zuneigen, dass der Grundgedanke der Einschränkung eines Freizügigkeitsrechts im Falle der Inanspruchnahme von Sozialhilfeleistungen auch auf das Aufenthaltsrecht gemäss Artikel 16 Absatz 1 der Richtlinie anzuwenden sei – sich die Frage stellen dürfte, ob dieser Grundgedanke jede Art oder nur die „unangemessene" Inanspruchnahme von Sozialhilfeleistungen erfasst.

Zur zweiten Frage

30. Hinsichtlich der zweiten Frage des Verwaltungsgerichtshofs äussert der Beschwerdeführer, dass diese Frage dahin ergänzt werden muss, ob es eine Rolle spielt, dass der daueraufenthaltsberechtigte Unionsbürger nach Eintritt ins Rentenalter Arbeitnehmer oder Selbstständiger im Aufnahmemitgliedstaat war.

Die Regierung des Fürstentums Liechtenstein

Zur ersten Frage

31. Die Regierung des Fürstentums Liechtenstein stellt fest, dass die Richtlinie, die bestehende Aufenthaltsvorschriften in Bezug auf Staatsangehörige von EWR-Staaten zusammenfasste, weiterhin zwischen erwerbstätigen und nicht erwerbstätigen Staatsangehörigen von EWR-Staaten unterscheidet; dies insbesondere im Zusammenhang mit den Voraussetzungen, die Staatsangehörige

regard to the conditions nationals of EEA States have to fulfil in order to have the right to reside in another EEA State.

32. It notes further that the Directive also confers derived rights of entry into and residence in the host EEA State on family members of a national of an EEA State, within the meaning of point 2 of Article 2 of the Directive, who accompany or join the national of an EEA State in an EEA State other than that of which he is a national.

33. With regard to family members, the Liechtenstein Government draws attention to the fact that the Directive explicitly provides for three types of residence status. First, the residence status for up to three months governed by Article 6 of the Directive (referred to as "informal residence status"), the residence status for more than three months governed by Article 7 of the Directive (referred to as "temporary residence status"), and the permanent residence status provided for in Article 16 of the Directive.

34. The Liechtenstein Government notes that, in contrast to Articles 6 and 7 of the Directive, Article 16 does not explicitly regulate the right to family reunification. As a consequence, in the view of the Liechtenstein Government, it must be assumed that the EC legislature did not intend to grant any further right to family reunification to nationals of EEA States holding a permanent residence status in the host EEA State to those mentioned in Articles 6 and 7 of the Directive.

35. With this in mind, the Liechtenstein Government submits that two questions have to be analysed in order to answer the first question of the referring court. First, whether a family member's residence status conferred by the Directive is directly dependent on and determined by the residence status of the national of an EEA State whom he accompanies or joins, and, second, if a family member's residence status is determined independently of the residence status of the nationals of an EEA State whom

von EWR-Staaten erfüllen müssen, um ihren Wohnsitz in einem anderen EWR-Staat nehmen zu dürfen.

32. Der Regierung des Fürstentums Liechtenstein zufolge räumt die Richtlinie auch Familienangehörigen – im Sinne von Artikel 2 Nummer 2 der Richtlinie – eines Staatsangehörigen eines EWR-Staats, die den Staatsangehörigen eines EWR-Staats in einen anderen EWR-Staat als den, dessen Staatsangehörigkeit er besitzt, begleiten oder ihm nachziehen, abgeleitete Einreise- und Aufenthaltsrechte im Aufnahme-EWR-Staat ein.

33. Im Hinblick auf Familienangehörige verweist die Regierung des Fürstentums Liechtenstein darauf, dass die Richtlinie ausdrücklich drei Arten von Aufenthaltsstatus nennt: das Recht auf Aufenthalt bis zu drei Monaten gemäss Artikel 6 der Richtlinie („informeller Aufenthaltsstatus"), das Recht auf Aufenthalt für mehr als drei Monate laut Artikel 7 der Richtlinie (befristeter Aufenthaltsstatus) und den in Artikel 16 der Richtlinie vorgesehenen Daueraufenthaltsstatus.

34. Die Regierung des Fürstentums Liechtenstein bringt vor, im Gegensatz zu den Artikeln 6 und 7 der Richtlinie regle Artikel 16 das Recht auf Familiennachzug nicht ausdrücklich. Demzufolge sei davon auszugehen, dass im Aufnahme-EWR-Staat daueraufenthaltsberechtigten Staatsangehörigen von EWR-Staaten durch die Rechtsvorschriften der Gemeinschaft keine weiteren Rechte auf Familiennachzug als die in den Artikeln 6 und 7 der Richtlinie genannten gewährt werden sollten.

35. Vor diesem Hintergrund vertritt die Regierung des Fürstentums Liechtenstein die Auffassung, dass zur Beantwortung der ersten Frage des vorlegenden Gerichts zwei Aspekte geprüft werden müssen: Erstens, ob der durch die Richtlinie eingeräumte Aufenthaltsstatus eines Familienangehörigen unmittelbar vom Aufenthaltsstatus des Staatsangehörigen eines EWR-Staats, den er begleitet oder dem er nachzieht, abhängig ist und durch ihn bestimmt wird und zweitens – sofern der Aufenthaltsstatus eines Familienangehörigen unabhängig vom Aufenthaltsstatus des Staatsangehörigen eines EWR-Staats, den er begleitet oder dem er nachzieht,

he accompanies or joins, which criteria apply for the purposes of determining the family member's residence status.

36. With regard to the first of these questions, the Liechtenstein Government is of the opinion that a family member's residence status has to be assessed independently according to that family member's own merits and the fulfilment of the relevant conditions. Were it otherwise, i.e. that the family member's residence status always corresponds to the status of the person from whom he derives his residence rights, certain provisions of the Directive, for example, Article 16(2), would, in the Government's view, be rendered meaningless. The Liechtenstein Government contends that a family member has no individual right to acquire permanent residence status if the relevant conditions of Article 16 of the Directive are not fulfilled. According to the Liechtenstein Government, this contention is supported by the provisions of the Directive dealing with the retention of the right of residence by family members both in the event of death or departure of the national of an EEA State (Article 12) and in the event of divorce, annulment of marriage or termination of registered partnership (Article 13).

37. As regards the second of these questions, i.e. the criteria which determine the family member's residence status, the Liechtenstein Government submits that a family member may acquire any of the three residence statuses in Articles 6, 7 and 16 of the Directive (informal residence status, temporary residence status, and permanent residence status) if he fulfils all relevant conditions. In this context, the residence status which the national of an EEA State, whom the family member is joining, already acquired in the host EEA State is not necessarily decisive in determining the individual residence status of the family member.

ermittelt wird – die Kriterien, die zum Zweck der Bestimmung des Aufenthaltsstatus des Familienangehörigen herangezogen werden.

36. Betreffend den ersten Aspekt ist die Regierung des Fürstentums Liechtenstein der Meinung, dass der Aufenthaltsstatus eines Familienangehörigen unabhängig unter Berücksichtigung dessen eigener Leistungen und der Erfüllung der entsprechenden Voraussetzungen durch diesen Familienangehörigen zu beurteilen ist. Andernfalls, d. h. würde der Aufenthaltsstatus eines Familienangehörigen immer dem Status der Person entsprechen, von der seine Aufenthaltsansprüche abgeleitet sind, würden bestimmte Bestimmungen der Richtlinie, beispielsweise Artikel 16 Absatz 2, nach Ansicht der Regierung des Fürstentums Liechtenstein dadurch sinnlos. Die Regierung des Fürstentums Liechtenstein bringt vor, ein Familienangehöriger habe kein persönliches Recht auf Erwerb des Anspruchs auf Daueraufenthalt, wenn die massgeblichen Bedingungen von Artikel 16 der Richtlinie nicht erfüllt sind. Diese Einschätzung werde, so die Regierung des Fürstentums Liechtenstein, durch die Bestimmungen der Richtlinie gestützt, die sich mit der Aufrechterhaltung des Aufenthaltsrechts der Familienangehörigen bei Tod oder Wegzug des Staatsangehörigen eines EWR-Staats (Artikel 12) sowie bei Scheidung oder Aufhebung der Ehe oder bei Beendigung der eingetragenen Partnerschaft (Artikel 13) beschäftigen.

37. Bezugnehmend auf den zweiten Aspekt, nämlich die Kriterien, die den Aufenthaltsstatus des Familienangehörigen bestimmen, stellt die Regierung des Fürstentums Liechtenstein fest, dass ein Familienangehöriger einen von drei Aufenthaltsstatus gemäss Artikel 6, 7 und 16 der Richtlinie (informeller Aufenthaltsstatus, befristeter Aufenthaltsstatus und Daueraufenthaltsstatus) erwerben kann, wenn er alle anwendbaren Bedingungen erfüllt. In diesem Zusammenhang ist der Aufenthaltsstatus, den der Staatsangehörige eines EWR-Staats, dem der Familienangehörige nachzieht, im Aufnahme-EWR-Staat bereits erworben hat, nicht zwangsläufig entscheidend für die Ermittlung des persönlichen Aufenthaltsstatus des Familienangehörigen.

38. Turning specifically to the acquisition of a temporary residence status for more than three months, the Liechtenstein Government observes that such a right is dependent on the fulfilment of the conditions mentioned in Article 7(1)(d) in conjunction with Article 7(1)(b) of the Directive, i.e. that the family member must not become a burden on the social assistance system of the host EEA State during their period of residence and have comprehensive sickness insurance cover in the host EEA State. According to the Liechtenstein Government, the family member must prove that either he himself or the national of an EEA State whom he is joining has sufficient resources in order to be entitled to take up residence in the host EEA State for more than three months.[8] The Liechtenstein Government notes that resources are considered to be sufficient where the level of the resources is higher than the threshold under which a minimum subsistence benefit is granted in the host EEA State.[9] It submits further that for the purposes of Article 7 of the Directive social assistance benefits must be understood to mean non-contributory benefits paid for from public funds which compensate for a lack of stable, regular and sufficient resources.[10]

39. As regards the facts of the present case, the Liechtenstein Government contends that Mrs Clauder would be dependent on supplementary benefits payable under the Act of 10 December 1965 on supplementary benefits related to old-age, survivors'

8 Reference is made to Case C-408/03 *Commission* v *Belgium* [2006] ECR I-2647, paragraphs 40–42.

9 Reference is made to Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, p. 8.

10 The Government of Liechtenstein refers to Case C-578/08 *Chakroun*, not yet reported, paragraph 49.

38. Mit Blick auf den Erwerb eines befristeten Aufenthaltsrechts für mehr als drei Monate stellt die Regierung des Fürstentums Liechtenstein fest, dass ein solcher Anspruch von der Erfüllung der in Artikel 7 Absatz 1 Buchstabe d in Verbindung mit Artikel 7 Absatz 1 Buchstabe b der Richtlinie genannten Bedingungen abhängt; d. h. der Familienangehörige darf während seines Aufenthalts keine Sozialhilfeleistungen des Aufnahme-EWR-Staats in Anspruch nehmen und muss über einen umfassenden Krankenversicherungsschutz in diesem Land verfügen. Der Regierung des Fürstentums Liechtenstein zufolge muss der Familienangehörige nachweisen, dass entweder er selbst oder der Staatsangehörige eines EWR-Staats, dem er nachzieht, über ausreichende Existenzmittel verfügt, um zur Wohnsitznahme für mehr als drei Monate im Aufnahme-EWR-Staat berechtigt zu sein.[8] Die Regierung des Fürstentums Liechtenstein merkt an, dass Existenzmittel dann als ausreichend gelten, wenn sie über der im Aufnahme-EWR-Staat geltenden Sozialhilfegrenze liegen.[9] Für die Zwecke des Artikels 7 der Richtlinie müsse der Begriff „Sozialhilfe“, so die Regierung des Fürstentums Liechtenstein weiter, dahin ausgelegt werden, dass er sich auf beitragsunabhängige Sozialleistungen bezieht, die aus öffentlichen Mitteln bestritten werden und einen Mangel an ausreichenden festen und regelmässigen Einkünften ausgleichen.[10]

39. Zum Sachverhalt in der gegenständlichen Rechtssache bringt die Regierung des Fürstentums Liechtenstein vor, dass Frau Clauder zum Zeitpunkt der Wohnsitznahme in Liechtenstein von Ergänzungsleistungen im Sinne des Gesetzes vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und

8 Es wird auf die Rechtssache C-408/03 *Kommission* gegen *Belgien*, Slg. 2006, S. I-2647, Randnrn. 40-42 verwiesen.

9 Es wird auf die Mitteilung der Kommission an das Europäische Parlament und den Rat vom 2. Juli 2009, Hilfestellung bei der Umsetzung und Anwendung der Richtlinie 2004/38/EG über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, KOM(2009) 313 endgültig, S. 8, verwiesen.

10 Die Regierung des Fürstentums Liechtenstein bezieht sich auf die Rechtssache C-578/08 *Chakroun*, Slg. 2010, S. I-0000, Randnr. 49.

and invalidity insurance[11] ("the ELG") at the time of taking up residence in Liechtenstein. Since supplementary benefits under the ELG must be understood as social assistance and not as part of the own resources of the national of an EEA State or the family member, both Mr and Mrs Clauder are (or would be) recipients of social assistance benefits in Liechtenstein. Thus, the condition of having sufficient resources not to become a burden on the social assistance system of the host EEA State is obviously satisfied neither by Mrs Clauder as a family member nor by Mr Clauder as a national of an EEA State whom Mrs Clauder wishes to join in the host EEA State.

The second question

40. In the Liechtenstein Government's view, by its second question, the referring court essentially seeks to establish whether a pensioner can still invoke his/her former status as an economically active person (worker or self-employed person) in order to continue to assert rights conferred by the Directive on economically active persons.

41. According to the Liechtenstein Government, it follows from the wording of Article 17(1)(a), (b) and (c) of the Directive, concerning the right of permanent residence of certain groups of persons (amongst them pensioners), who stopped being economically active in the host EEA State before completion of a continuous period of five years of residence, that a pensioner has a status that is different to the status of an economically active person (worker or a self-employed person). As a consequence, a pensioner cannot invoke his former status as an economically active person in order to continue to assert rights conferred by the Directive on economically active persons.

[11] *Gesetz vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung*, Law Gazette 1965 No 46, as amended.

Invalidenversicherung[11] (ELG) abhängig wäre. Da sich Ergänzungsleistungen gemäss ELG als Sozialhilfe und nicht als Teil der Eigenmittel des Staatsangehörigen eines EWR-Staats oder des Familienangehörigen verstehen, sind (bzw. wären) sowohl Herr als auch Frau Clauder in Liechtenstein Sozialhilfeempfänger. Dementsprechend wird die Voraussetzung der Verfügbarkeit ausreichender Existenzmittel, damit während des Aufenthalts keine Sozialhilfeleistungen des Aufnahmemitgliedstaats in Anspruch genommen werden müssen, offenkundig weder von Frau Clauder als Familienangehöriger noch von Herrn Clauder als Staatsangehörigem des EWR-Staats, dem Frau Clauder in den Aufnahme-EWR-Staat nachziehen möchte, erfüllt.

Zur zweiten Frage

40. Nach Auffassung der Regierung des Fürstentums Liechtenstein versucht das vorlegende Gericht mit seiner zweiten Frage im Wesentlichen zu ergründen, ob sich ein Rentner auf seinen früheren Status als Erwerbstätiger (Arbeitnehmer oder Selbstständiger) berufen kann, um weiterhin Rechte geltend zu machen, welche die Richtlinie für Erwerbstätige vorsieht.

41. Der Regierung des Fürstentums Liechtenstein zufolge geht aus dem Wortlaut von Artikel 17 Absatz 1 Buchstaben a, b und c der Richtlinie betreffend das Recht auf Daueraufenthalt bestimmter Personengruppen (darunter Rentner), die ihre Erwerbstätigkeit im Aufnahme-EWR-Staat vor Ablauf des ununterbrochenen Zeitraums von fünf Jahren beendet haben, hervor, dass der Status eines Rentners sich von jenem eines Erwerbstätigen (Arbeitnehmer oder Selbstständiger) unterscheidet. Infolgedessen kann sich ein Rentner nicht auf seinen früheren Status als Erwerbstätiger beziehen, um weiterhin Rechte geltend zu machen, welche die Richtlinie für Erwerbstätige vorsieht.

[11] Gesetz vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung, Landesgesetzblatt 1965 Nr. 46, in der gültigen Fassung.

The third question

42. The Liechtenstein Government contends that the possibilities for a national of an EEA State to claim a right to family reunification do not depend on whether the family member may possibly be economically active in the host EEA State either as a worker or a self-employed person.

43. Thus, the Liechtenstein Government proposes that the Court should answer the questions as follows:

1. Directive 2004/38/EC, in particular Article 16(1) in conjunction with Article 7(1) thereof, is not to be interpreted such that a national of EC Member States and EFTA States with a right of permanent residence, who is a pensioner and in receipt of social assistance benefits in the host EEA State, may claim the right to family reunification, if the family member will also depend on social assistance benefits.

2. It is of no relevance for the answer to Question 1, whether the national of EC Member States and EFTA States with a right of permanent residence was employed or self-employed in the host EEA State prior to attaining retirement age.

3. It is of no relevance for the answer to Question 1, whether the family member will be employed or self-employed in the host EEA State and still be claiming social assistance benefits.

The Netherlands Government

44. At the outset, the Netherlands Government finds it necessary to distinguish between (i) the personal right of residence that the family member as an EU citizen may have and (ii) the right of residence that the family member may derive from his status as family member of an EU citizen holding a right of permanent residence. The Netherlands Government submits that in both

Zur dritten Frage

42. Die Regierung des Fürstentums Liechtenstein bringt vor, dass die Möglichkeiten eines Staatsangehörigen eines EWR-Staats, ein Recht auf Familiennachzug geltend zu machen, nicht davon abhängen, ob der Familienangehörige im Aufnahme-EWR-Staat möglicherweise entweder als Arbeitnehmer oder als Selbstständiger erwerbstätig ist.

43. Die Regierung des Fürstentums Liechtenstein schlägt daher vor, dass der Gerichtshof die an ihn gerichteten Fragen folgendermassen beantwortet:

1. Richtlinie 2004/38/EG, insbesondere Artikel 16 Absatz 1 in Verbindung mit Artikel 7 Absatz 1, ist nicht dahingehend auszulegen, dass ein daueraufenthaltsberechtigter Staatsangehöriger eines EG-Mitgliedstaats oder eines EFTA-Staats, der Rentner ist und Sozialhilfeleistungen im Aufnahme-EWR-Staat in Anspruch nimmt, einen Anspruch auf Familiennachzug geltend machen kann, wenn auch der Familienangehörige von Sozialhilfeleistungen abhängen wird.

2. Für die Beantwortung der Frage 1 spielt es keine Rolle, ob der daueraufenthaltsberechtigte Staatsangehörige eines EG-Mitgliedstaats oder eines EFTA-Staats vor Eintritt ins Rentenalter Arbeitnehmer oder Selbstständiger im Aufnahme-EWR-Staat war.

3. Für die Beantwortung der Frage 1 spielt es keine Rolle, ob der Familienangehörige im Aufnahme-EWR-Staat Arbeitnehmer oder Selbstständiger sein wird und dennoch Sozialhilfeleistungen in Anspruch nehmen wird.

Die Regierung der Niederlande

44. Einleitend hält es die Regierung der Niederlande für erforderlich, zwischen (i) dem möglichen persönlichen Aufenthaltsrecht des Familienangehörigen in seiner Eigenschaft als EU-Bürger und (ii) dem Aufenthaltsrecht, das der Familienangehörige aus seinem Status als Familienangehöriger eines daueraufenthaltsberechtigten EU-Bürgers ableiten kann, zu unterscheiden. Die Regierung der Niederlande bringt vor, die Richtlinie 2004/38 erlaube den Mitgliedstaaten in beiden Fällen, die Verfügbarkeit ausreichender

situations Directive 2004/38 allows Member States to set the requirement of sufficient resources.

45. As regards (i), that is a personal right of residence of the family member, the Netherlands Government notes that Directive 2004/38 confers upon the family member a personal right of residence if the conditions of Article 7(1)(a), (b) or (c) are satisfied by the family member himself. This means that if the family member qualifies as a worker or self-employed person, the person concerned can rely upon Article 7(1)(a) to claim a right of residence. Family members who are not economically active, on the other hand, have a right of residence on the basis of Article 7(1)(b) or (c) if they have sufficient resources and comprehensive sickness insurance cover in the host Member State.

46. Turning to (ii), that is, a derived right of residence as a family member, the Netherlands Government notes that only where the EU citizen himself does not satisfy the conditions of Article 7(1)(a), (b) or (c) of Directive 2004/38 does the question arise whether a right of residence can be derived from the status as a family member of an EU citizen holding a right of permanent residence in the host State. The Netherlands Government observes further that a family member has a derived right of residence on the basis of Article 7(1)(d) of the Directive if the family member is accompanying or joining an EU citizen who satisfies the conditions in Article 7(1)(a), (b) or (c).

47. The Netherlands Government contends that the standard conditions for a derived right of residence laid down in Article 7(1)(d) of the Directive also apply if the EU citizen has obtained a right of permanent residence in the host State. It observes that Article 16(1) and Article 17 explicitly concern family members who are already residing in the host Member State, and that neither Article, nor any other provision in the Directive, explicitly

Existenzmittel zur Bedingung zu machen.

45. Betreffend (i), das persönliche Aufenthaltsrecht des Familienangehörigen, hält die Regierung der Niederlande fest, dass die Richtlinie 2004/38 für den Familienangehörigen ein persönliches Aufenthaltsrecht vorsieht, sofern die Voraussetzungen von Artikel 7 Absatz 1 Buchstaben a, b oder c vom Familienangehörigen selbst erfüllt werden. Gilt der Familienangehörige daher als Arbeitnehmer oder Selbstständiger, so kann die betreffende Person ein Aufenthaltsrecht auf der Grundlage von Artikel 7 Absatz 1 Buchstabe a geltend machen. Im Gegensatz dazu geniessen nicht erwerbstätige Familienangehörige ein Aufenthaltsrecht gemäss Artikel 7 Absatz 1 Buchstaben b oder c, wenn sie über ausreichende Existenzmittel und einen umfassenden Krankenversicherungsschutz im Aufnahmemitgliedstaat verfügen.

46. Bezugnehmend auf (ii), das abgeleitete Aufenthaltsrecht als Familienangehöriger, führt die Regierung der Niederlande aus, dass sich die Frage, ob aus dem Status als Familienangehöriger eines im Aufnahmestaat daueraufenthaltsberechtigten EU-Bürgers ein Aufenthaltsrecht abgeleitet werden kann, nur dann stellt, wenn der EU-Bürger selbst die Voraussetzungen laut Artikel 7 Absatz 1 Buchstaben a, b oder c der Richtlinie 2004/38 nicht erfüllt. Die Regierung der Niederlande stellt weiter fest, dass ein Familienangehöriger ein abgeleitetes Aufenthaltsrecht auf der Grundlage von Artikel 7 Absatz 1 Buchstabe d der Richtlinie geniesst, wenn der Familienangehörige einen EU-Bürger, der die Voraussetzungen gemäss Artikel 7 Absatz 1 Buchstaben a, b oder c erfüllt, begleitet oder diesem nachzieht.

47. Nach Auffassung der Regierung der Niederlande sind die üblichen Bedingungen für ein abgeleitetes Aufenthaltsrecht laut Artikel 7 Absatz 1 Buchstabe d der Richtlinie auch dann anwendbar, wenn der EU-Bürger ein Daueraufenthaltsrecht im Aufnahmestaat erworben hat. Artikel 16 Absatz 1 und Artikel 17 betreffen ausdrücklich Familienangehörige, die bereits im Aufnahmemitgliedstaat ansässig sind, und weder diese Artikel noch andere Bestimmungen der Richtlinie beschäftigen sich speziell mit der Situation eines Familienangehörigen, der einem daueraufenthaltsberech-

addresses the position of a family member wishing to join an EU citizen holding a right of permanent residence. This means that a family member wishing to join an EU citizen holding a right of permanent residence can claim a right of residence under the Directive only where the holder of the right of permanent residence satisfies the conditions set out in Article 7(1)(a), (b) or (c).

48. The Netherlands Government argues that this understanding of the Directive follows from the wording of Article 16, which stipulates that a family member can claim a right of permanent residence only where the family member himself fulfils the requirement of legal residence in the host Member State for a continuous period of five years. In its view, the fact that an EU citizen has acquired a right of permanent residence does not automatically bring about any changes in the residence status of his family members.

49. Thus, according to the Netherlands Government, in the present case, Mrs Clauder has a derived right of residence only in so far as Mr Clauder satisfies the criteria set out in Article 7(1)(b). It notes, however, that it is for the national court to decide whether he satisfies these criteria.

50. The Netherlands Government makes two additional remarks. First, it stresses that since Article 24(1) of the Directive provides that EU citizens must enjoy equal treatment with the nationals of the host State within the scope of the Treaty, it is only if domestic legislation requires a Member State's own nationals to prove that they have the necessary financial means to maintain the family members who wish to join them that such a requirement may be imposed on EU citizens with a right of permanent residence. Second, the right to respect for family life enshrined in Article 8 of the European Convention on Human Rights ("ECHR") may have to be taken into account. It argues, however, that on numerous occasions the European Court of Human Rights has ruled that a State is entitled under international law, subject to its treaty

tigten EU-Bürger nachziehen möchte. Ein Familienangehöriger, der einem daueraufenthaltsberechtigten EU-Bürger nachziehen möchte, kann daher nur dann ein Aufenthaltsrecht entsprechend der Richtlinie geltend machen, wenn die daueraufenthaltsberechtigte Person die in Artikel 7 Absatz 1 Buchstaben a, b oder c genannten Voraussetzungen erfüllt.

48. Die Regierung der Niederlande argumentiert, diese Auslegung der Richtlinie ergebe sich aus dem Wortlaut des Artikels 16, demzufolge ein Familienangehöriger nur dann ein Recht auf Daueraufenthalt geltend machen kann, wenn der Familienangehörige selbst die Bedingung erfüllt, sich rechtmässig fünf Jahre lang ununterbrochen im Aufnahmemitgliedstaat aufgehalten zu haben. Laut der Regierung der Niederlande wirkt sich die Tatsache, dass ein EU-Bürger ein Daueraufenthaltsrecht erworben hat, nicht automatisch auf den Aufenthaltsstatus seiner Familienangehörigen aus.

49. Dementsprechend besitzt Frau Clauder in der vorliegenden Rechtssache, so die Regierung der Niederlande, nur insofern ein abgeleitetes Aufenthaltsrecht, als Herr Clauder die Kriterien gemäss Artikel 7 Absatz 1 Buchstabe b erfüllt. Die Entscheidung, ob diese Kriterien erfüllt werden, obliege jedoch dem nationalen Gericht.

50. Die Regierung der Niederlande bringt zwei weitere Bemerkungen vor. Erstens verweist sie darauf, dass gemäss Artikel 24 Absatz 1 der Richtlinie EU-Bürger im Anwendungsbereich des Vertrags die gleiche Behandlung geniessen wie die Staatsangehörigen des Aufnahmemitgliedstaats, und nur wenn die einzelstaatlichen Rechtsvorschriften vorsehen, dass die eigenen Staatsangehörigen eines Mitgliedstaats nachweisen müssen, dass sie über die notwendigen finanziellen Mittel für den Lebensunterhalt der Familienangehörigen verfügen, die ihnen nachziehen wollen, kann dies auch von daueraufenthaltsberechtigten EU-Bürgern gefordert werden. Zweitens ist möglicherweise das in Artikel 8 der Europäischen Menschenrechtskonvention (EMRK) verankerte Recht auf Achtung des Familienlebens zu berücksichtigen. Die Regierung der Niederlande legt jedoch dar, dass der Europäische Gerichtshof für Menschenrechte in zahlreichen Fällen entschieden hat, dass ein

obligations, to control the entry of aliens into its territory and their residence there. It submits further that on several occasions the European Court of Human Rights has held that Article 8 ECHR cannot be considered to impose on a Member State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to allow family reunion in its territory.[12] The Netherlands Government observes, nonetheless, that the question of whether the circumstances in this specific case are such that a right of residence may be derived from Article 8 ECHR requires a balanced assessment of the competing interests of the individuals concerned, and the interests of the community as a whole, in which the State may exercise a certain degree of discretion, and that such an assessment has to be made by the national court.

51. The Netherlands Government proposes that the Court should answer the referring court's questions as follows:

Article 7(1)(d) of Directive 2004/38 applies to the situation in which a family member wishes to join an EU citizen holding a right of permanent residence in the host State.

The EFTA Surveillance Authority

The first question

52. The EFTA Surveillance Authority ("ESA") notes that Article 16 of the Directive states that EEA nationals who have been residing legally for a continuous period of five years in the host Member State shall be granted a right of permanent residence in that State. It notes further that this right of permanent residence also

[12] Reference is made to Eur. Court HR, *Gül* v *Switzerland* judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 173.

Staat laut Völkerrecht, vorbehaltlich seiner vertraglichen Verpflichtungen, zur Kontrolle der Einreise ausländischer Staatsangehöriger in sein Hoheitsgebiet und ihres Aufenthalts berechtigt ist. Weiter bringt die Regierung der Niederlande vor, der Europäische Gerichtshof für Menschenrechte sei bei mehreren Gelegenheiten zum Schluss gelangt, dass Artikel 8 der EMRK nicht dahin ausgelegt werden kann, dass er eine allgemeine Verpflichtung für einen Mitgliedstaat vorsieht, die Wahl des ehelichen Wohnorts verheirateter Paare zu achten und eine Familienzusammenführung auf seinem Hoheitsgebiet zuzulassen.[12] Gleichwohl stellt die Regierung der Niederlande fest, dass zur Beantwortung der Frage, ob die Umstände in diesem speziellen Fall die Ableitung eines Aufenthaltsrechts aus Artikel 8 der EMRK zulassen, eine sorgfältige Abwägung der konkurrierenden Interessen der Betroffenen mit den Interessen der Gesellschaft als Ganze erforderlich ist, wobei der Staat einen gewissen Ermessensspielraum geniesst; diese Abwägung sei durch das einzelstaatliche Gericht vorzunehmen.

51. Die Regierung der Niederlande schlägt vor, dass der Gerichtshof die Fragen des vorlegenden Gerichts folgendermassen beantwortet:

Artikel 7 Absatz 1 Buchstabe d der Richtlinie 2004/38 findet in Fällen Anwendung, in denen ein Familienangehöriger einem im Aufnahmestaat daueraufenthaltsberechtigten EU-Bürger nachziehen möchte.

Die EFTA-Überwachungsbehörde

Zur ersten Frage

52. Die EFTA-Überwachungsbehörde stellt fest, dass laut Artikel 16 der Richtlinie EWR-Staatsangehörige, die sich rechtmässig fünf Jahre lang ununterbrochen im Aufnahmemitgliedstaat aufgehalten haben, das Recht geniessen, sich dort auf Dauer aufzuhalten. Dieses Daueraufenthaltsrecht, so die EFTA-Überwachungsbehörde, ist auch auf Familienangehörige anwendbar, die sich rechtmässig

[12] Es wird auf die Rechtssache des Europäischen Gerichtshofs für Menschenrechte, *Gül* gegen *Schweiz,* Urteil vom 19. Februar 1996, *Reports of Judgments and Decisions,* 1996-I, S. 173, verwiesen.

applies to family members who have resided legally in the host State for a continuous period of five years. It notes, in addition, that Article 16 states that, once acquired, the right of permanent residence is not subject to the conditions laid down in Chapter III, including the condition to have sufficient resources.

53. ESA observes, however, that Article 16 of the Directive does not contain any express provision regarding the acquisition of a right of residence for a family member seeking to join an EEA national who has already acquired a right of permanent residence when the family member himself does not fulfil the requirements for permanent residence.

54. According to ESA, the silence of the Directive could lead to three different interpretations. Either it is the case (i) that the Directive does not grant family members of beneficiaries of a right of permanent residence any right to join and reside with this person (*no residence right*), (ii) that family members who do not fulfil the requirements for permanent residence pursuant to Article 16 of the Directive because they have not resided in the host State for five years are granted a right of residence pursuant to Article 7(1)(d) (*residence right conditional on sufficient resources and social security coverage*), or (iii) that family members who do not yet fulfil the requirements laid down in Article 16 of the Directive derive a right of residence from the right of permanent residence of the EEA national and do not have to fulfil the conditions laid down in Article 7 (*unconditional derived residence right*).

55. In ESA's view, the first interpretation (*no residence right*) must be rejected at the outset. As family members of EEA nationals who are entitled to a right of residence for more than three months but have not yet acquired permanent residence have a right of residence, the same must apply, *a fortiori*, to family members of EEA nationals with a right of permanent residence.

fünf Jahre lang ununterbrochen im Aufnahmestaat aufgehalten haben. Zudem gehe aus Artikel 16 hervor, dass das Daueraufenthaltsrecht, sobald es erworben ist, nicht an die Voraussetzungen des Kapitels III, einschliesslich des Vorhandenseins ausreichender Existenzmittel, geknüpft ist.

53. Die EFTA-Überwachungsbehörde bemerkt jedoch, dass Artikel 16 der Richtlinie keine einschlägige Bestimmung hinsichtlich des Erwerbs eines Aufenthaltsrechts für einen Familienangehörigen, der einem EWR-Staatsangehörigen, der bereits ein Daueraufenthaltsrecht besitzt, nachziehen möchte, enthält, wenn dieser Familienangehörige seinerseits die Voraussetzungen für ein Daueraufenthaltsrecht nicht erfüllt.

54. Der EFTA-Überwachungsbehörde zufolge könnte das Fehlen einer einschlägigen Bestimmung in der Richtlinie zu drei unterschiedlichen Auslegungen führen: Entweder (i) sieht die Richtlinie keinerlei Recht für Familienangehörige von Daueraufenthaltsberechtigten vor, dieser Person nachzuziehen und mit ihr zusammenzuleben (*kein Aufenthaltsrecht*) oder (ii) den Familienangehörigen, die die Voraussetzungen für die Gewährung eines Daueraufenthaltsrechts gemäss Artikel 16 nicht erfüllen, weil sie sich nicht fünf Jahre lang im Aufnahmestaat aufgehalten haben, wird ein Aufenthaltsrecht nach Artikel 7 Absatz 1 Buchstabe d gewährt (*von ausreichenden Existenzmitteln und Sozialversicherungsschutz abhängiges Aufenthaltsrecht*) oder (iii) die Familienangehörigen, welche die in Artikel 16 der Richtlinie genannten Voraussetzungen noch nicht erfüllen, geniessen ein vom Daueraufenthaltsrecht des EWR-Staatsangehörigen abgeleitetes Aufenthaltsrecht und müssen die in Artikel 7 angeführten Voraussetzungen nicht erfüllen (*bedingungsloses abgeleitetes Aufenthaltsrecht*).

55. Nach Auffassung der EFTA-Überwachungsbehörde ist die erste mögliche Auslegung (*kein Aufenthaltsrecht*) von vornherein abzulehnen. Da Familienangehörige von EWR-Staatsangehörigen, die ein Aufenthaltsrecht für mehr als drei Monate geniessen, jedoch noch kein Daueraufenthaltsrecht erworben haben, einen Aufenthaltsanspruch haben, muss dies erst recht für Familienangehörige von EWR-Staatsangehörigen mit Daueraufenthaltsrecht gelten.

56. ESA submits that many arguments support the third interpretation (*unconditional derived residence right*). Even though the second construction (*residence right conditional on sufficient resources and social security coverage*) – which ESA understands has been chosen by Liechtenstein, Germany and other EEA States – appears to be supported by the fact that certain provisions of Directive 2004/38 draw a distinction between the rights of family members of economically active persons and the rights of family members of economically inactive persons, such an interpretation would entail that economically inactive beneficiaries of a right of permanent residence who do not have sufficient resources may not be joined by members of their family.

57. According to ESA, Article 16 of Directive 2004/38 clearly states that the right of permanent residence granted to EEA nationals who have already legally resided in the host Member State shall not be subject to the conditions provided for in Chapter III, *inter alia*, the self-sufficiency condition. It observes that this is in contrast to the previous situation under Council Directive 90/364/EEC of 28 June 1990 on the right of residence[13] and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity[14] (now repealed) which entitled the host Member State to monitor whether citizens of the Union who enjoyed a right of residence continued to meet the conditions laid down for that purpose, including the condition to have sufficient resources, throughout the period of their residence. In ESA's view, if the legislature had intended to make the right of permanent residence of economically inactive persons conditional on self-sufficiency, this would have been stated explicitly in Directive 2004/38 as was the case in the predecessor directives.

[13] OJ 1990 L 180, p. 26.
[14] OJ 1990 L 180, p. 28.

56. Die EFTA-Überwachungsbehörde bringt vor, dass zahlreiche Argumente die dritte Auslegung (*bedingungsloses abgeleitetes Aufenthaltsrecht*) stützen. Obwohl die Tatsache, dass verschiedene Bestimmungen der Richtlinie 2004/38 zwischen den Rechten der Familienangehörigen von Erwerbstätigen und den Rechten der Familienangehörigen von Nichterwerbstätigen unterscheiden, für die zweite Konstruktion (*von ausreichenden Existenzmitteln und Sozialversicherungsschutz abhängiges Aufenthaltsrecht*) spricht – für welche sich, so die EFTA-Überwachungsbehörde, anscheinend Liechtenstein, Deutschland und andere EWR-Staaten ausgesprochen haben – würde eine solche Auslegung darauf hinauslaufen, dass für nicht erwerbstätige Daueraufenthaltsberechtigte, die nicht über ausreichende Existenzmittel verfügen, kein Familiennachzug möglich ist.

57. Laut der EFTA-Überwachungsbehörde geht aus Artikel 16 der Richtlinie 2004/38 klar hervor, dass das Daueraufenthaltsrecht für EWR-Staatsangehörige, die sich bereits rechtmässig im Aufnahmemitgliedstaat aufgehalten haben, nicht an die Voraussetzungen des Kapitels III, u. a. die finanzielle Eigenständigkeit, geknüpft ist. Die EFTA-Überwachungsbehörde hält fest, dass dies im Gegensatz zur früheren Situation gemäss der Richtlinie 90/364/EWG des Rates vom 28. Juni 1990 über das Aufenthaltsrecht[13] und der Richtlinie 90/365/EWG des Rates vom 28. Juni 1990 über das Aufenthaltsrecht der aus dem Erwerbsleben ausgeschiedenen Arbeitnehmer und selbständig Erwerbstätigen[14] (nunmehr aufgehoben) steht, denen zufolge der Aufnahmemitgliedstaat während des gesamten Aufenthalts überwachen konnte, ob aufenthaltsberechtigte Unionsbürger die einschlägigen Voraussetzungen, darunter die Verfügbarkeit ausreichender Existenzmittel, erfüllten. Hätte der Gesetzgeber beabsichtigt, das Daueraufenthaltsrecht Nichterwerbstätiger von deren finanzieller Eigenständigkeit abhängig zu machen, wäre dies, so die Auffassung der EFTA-Überwachungsbehörde, wie in den Vorgängerrichtlinien ausdrücklich in den Wortlaut der Richtlinie 2004/38 aufgenommen worden.

[13] ABl. 1990 L 180, S. 26.
[14] ABl. 1990 L 180, S. 28.

58. ESA further argues that it is settled case-law that EEA secondary legislation on free movement and residence cannot be interpreted restrictively.[15] In addition, it observes that where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness.[16] It submits that if EEA nationals are, indirectly, not allowed to lead a normal family life in the host Member State, the exercise of the right of residence granted to EEA nationals by Directive 2004/38 could be seriously obstructed and even deprived of any useful effect.[17] In that connection, ESA stresses the importance – recognised by the EU legislature and acknowledged by the European Court of Justice – of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty.[18]

59. In addition, so ESA contends, the right to preserve family unity is intrinsically connected with the right to the protection of family life, a fundamental right granted by the ECHR, in the light of which Directive 2004/38 must be interpreted and applied.[19]

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15 Reference is made to Case C-291/05 *Eind* [2007] ECR I-719, paragraph 43, and the case-law cited therein.

16 ESA refers to Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 47, and the case-law cited therein.

17 Reference is made to Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 45, Case C-310/08 *Ibrahim*, not yet reported, and Case C-480/08 *Teixeira*, not yet reported.

18 Reference is made to *Eind*, cited above, paragraph 44, and the case-law cited therein.

19 ESA refers to Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 79. In an EEA context, ESA refers, on a general basis, to Case E-8/97 *TV 1000 Sverige* v *Norway* [1998] EFTA Ct. Rep. 68, paragraph 26, and Case E-2/03 Ákæruvaldið *(The Public Prosecutor)* v Ásgeir *Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi* Már *Reynisson* [2003] EFTA Ct. Rep. 185, paragraph 23.

58. Die EFTA-Überwachungsbehörde argumentiert weiter, dass nach ständiger Rechtsprechung das abgeleitete Recht des EWR im Bereich der Freizügigkeit und des Aufenthalts nicht eng ausgelegt werden kann.[15] Zudem stellt die EFTA-Überwachungsbehörde fest, dass bei verschiedenen möglichen Auslegungen des EWR-Rechts derjenigen der Vorzug zu geben ist, die die praktische Wirksamkeit der Vorschrift zu wahren geeignet ist.[16] Würde EWR-Staatsangehörigen indirekt kein normales Familienleben im Aufnahmemitgliedstaat zugestanden, könnte die Ausübung des Aufenthaltsrechts, das die Richtlinie 2004/38 für EWR-Staatsangehörige vorsieht, erheblich behindert und diesem sogar jede praktische Wirksamkeit genommen werden.[17] In diesem Zusammenhang verweist die EFTA-Überwachungsbehörde auf die – vom europäischen Gesetzgeber zur Kenntnis genommene und vom Gerichtshof der EU anerkannte – Bedeutung der Gewährleistung des Schutzes des Familienlebens der Staatsangehörigen der Mitgliedstaaten, um Hindernisse für die Ausübung der durch den Vertrag gewährleisteten Grundfreiheiten zu beseitigen.[18]

59. Darüber hinaus ist der EFTA-Überwachungsbehörde zufolge das Recht auf Wahrung der Einheit der Familie intrinsisch mit dem Recht auf den Schutz des Familienlebens – einem in der EMRK verankerten Grundrecht – verknüpft, so dass die Richtlinie 2004/38 vor diesem Hintergrund auszulegen und anzuwenden ist.[19]

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15 Es wird auf die Rechtssache C-291/05 *Eind*, Slg. 2007, S. I-719, Randnr. 43 und die dort zitierte Rechtsprechung verwiesen.

16 Die EFTA-Überwachungsbehörde bezieht sich auf die verbundenen Rechtssachen C-402/07 und C-432/07 *Sturgeon u. a.*, Slg. 2009, S. I-10923, Randnr. 47 und die dort zitierte Rechtsprechung.

17 Es wird auf die Rechtssachen C-200/02 *Zhu und Chen*, Slg. 2004, S. I-9925, Randnr. 45, C-310/08 *Ibrahim*, Slg. 2010, S. I-0000 und C-480/08 *Teixeira*, Slg. 2010, S. I-0000 verwiesen.

18 Es wird auf die oben erwähnte Rechtssache *Eind*, Randnr. 44, und die dort zitierte Rechtsprechung verwiesen.

19 Die EFTA-Überwachungsbehörde bezieht sich auf die Rechtssache C-127/08 *Metock u. a.*, Slg. 2008, S. I-6241, Randnr. 79. Betreffend den EWR nimmt die EFTA-Überwachungsbehörde allgemein Bezug auf die Rechtssachen E-8/97 *TV 1000 Sverige* gegen *Norwegen*, EFTA Court Report 1998, S. 68, Randnr. 26, und E-2/03 *Ákæruvaldið (Staatsanwaltschaft)* gegen *Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson und Helgi Már Reynisson,* EFTA Court Report 2003, S. 185, Randnr. 23.

60. Against this background, ESA considers that a refusal to recognise Mrs Clauder's derived right of residence in Liechtenstein because of the insufficient resources of her husband would constitute a breach both of Mr Clauder's right of permanent residence under Article 16 of Directive 2004/38 and of his right to family life. Consequently, ESA submits that, in cases such as the main proceedings, there is no basis in the Directive for applying the self-sufficiency condition, as it no longer applies to the right of permanent residence of Mr Clauder himself nor to the right of residence that his wife derives from his right of permanent residence.

The second question

61. ESA submits that, if the Liechtenstein Government is correct in its approach to family reunification, whether Mr Clauder was employed or self-employed before he retired is not relevant to the case, because the determining factor is the current economic status of the person concerned and his self-sufficiency. However, in its view, it is also clear that Article 17(3) of the Directive grants family members of former workers or former self-employed persons who fulfil the criteria laid down in Article 17(1) a right of residence whether the marriage took place before or after the right of permanent residence was granted to the former worker or self-employed person.

The third question

62. In ESA's view, even assuming that the right of residence of Mrs Clauder is subject to a condition of self-sufficiency of the family, the joint financial situation of the couple must be taken into account. Accordingly, ESA argues that if Mrs Clauder were to work, Liechtenstein cannot rely simply on the increase in the social welfare benefits received by Mr Clauder – a mere consequence of the application of Liechtenstein law – in order

60. Angesichts dieser Erwägungen vertritt die EFTA-Überwachungsbehörde die Auffassung, dass die Nichtanerkennung des abgeleiteten Aufenthaltsrechts von Frau Clauder in Liechtenstein aufgrund der unzureichenden Existenzmittel ihres Ehemanns sowohl eine Verletzung von Herrn Clauders Daueraufenthaltsrecht gemäss Artikel 16 der Richtlinie 2004/38 als auch seines Rechts auf ein Familienleben darstellen würde. Demzufolge bringt die EFTA-Überwachungsbehörde vor, dass die Richtlinie in Fällen wie diesem Ausgangsverfahren keine Grundlage für die Anwendung der Voraussetzung der finanziellen Eigenständigkeit bietet, da sie auf das Daueraufenthaltsrecht von Herrn Clauder selbst nicht mehr anwendbar ist und auch für das Aufenthaltsrecht, das seine Frau aus seinem Daueraufenthaltsrecht ableitet, nicht gilt.

Zur zweiten Frage

61. Wenn der Ansatz der Regierung des Fürstentums Liechtenstein hinsichtlich des Familiennachzugs korrekt ist, so die EFTA-Überwachungsbehörde, spielt es für die gegenständliche Rechtssache keine Rolle, ob Herr Clauder, bevor er sich aus dem Berufsleben zurückzog, Arbeitnehmer oder Selbstständiger war, da der aktuelle Status der Erwerbstätigkeit der betreffenden Person sowie deren finanzielle Eigenständigkeit die bestimmenden Faktoren sind. Laut der EFTA-Überwachungsbehörde ist jedoch auch offenkundig, dass Artikel 17 Absatz 3 der Richtlinie Familienangehörigen ehemaliger Arbeitnehmer bzw. ehemaliger Selbstständiger, welche die in Artikel 17 Absatz 1 genannten Voraussetzungen erfüllen, ein Aufenthaltsrecht gewährt, und zwar unabhängig davon, ob die Eheschliessung erfolgt ist, bevor oder nachdem der ehemalige Arbeitnehmer bzw. Selbstständige das Daueraufenthaltsrecht erworben hat.

Zur dritten Frage

62. Nach Auffassung der EFTA-Überwachungsbehörde ist, selbst wenn von der Annahme ausgegangen wird, dass für das Aufenthaltsrecht von Frau Clauder die Voraussetzung der finanziellen Eigenständigkeit der Familie gilt, die gemeinsame finanzielle Situation des Ehepaars zu berücksichtigen. Dementsprechend argumentiert

to conclude that the couple represents a greater burden on the Liechtenstein State and, thus, deny the right to family reunification.

63. In any event, ESA questions whether the supplementary benefits received by the complainant in the main proceedings can be qualified as social welfare benefits that may be taken into account to determine whether Mr and Mrs Clauder represent a burden on the Liechtenstein assistance system. Instead, ESA argues that the benefits in question must be regarded as special non-contributory social security benefits within the meaning of Regulation (EEC) No 1408/71 of 14 June 1971.[20]

64. ESA proposes that the Court should answer the referring court's questions as follows:

1. Directive 2004/38/EC, in particular Article 16(1) in conjunction with Article 7(1), shall be interpreted as meaning that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

2. It is of no relevance for the answer to Question 1, whether the Union citizen with a right of permanent residence was employed or self-employed in the host Member State prior to attaining retirement

[20] Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ, English Special Edition 1971 (II), p. 416, as amended. ESA refers, *mutatis mutandis*, to Case C-160/02 *Skalka* [2004] ECR I-5613, paragraphs 26 and 30.

die EFTA-Überwachungsbehörde, dass Liechtenstein, sollte Frau Clauder eine Erwerbstätigkeit aufnehmen, nicht einfach von einem Anstieg der von Herrn Clauder bezogenen Sozialhilfeleistungen ausgehen kann – eine reine Folge der Anwendung liechtensteinischen Rechts – um daraus die Schlussfolgerung zu ziehen, dass das Ehepaar Sozialhilfeleistungen des liechtensteinischen Staats in Anspruch nehmen muss und ihm deshalb das Recht auf Familiennachzug zu verwehren.

63. Die EFTA-Überwachungsbehörde bezweifelt jedenfalls, ob die vom Beschwerdeführer im Ausgangsverfahren bezogenen Ergänzungsleistungen als Sozialhilfeleistungen eingestuft werden können, auf deren Basis ermittelt wird, ob Herr und Frau Clauder in Liechtenstein Sozialhilfeleistungen in Anspruch nehmen müssen. Stattdessen, so die EFTA-Überwachungsbehörde, sind die fraglichen Bezüge als besondere beitragsunabhängige Sozialversicherungsleistungen im Sinne der Verordnung (EWG) Nr. 1408/71 vom 14. Juni 1971 zu betrachten.[20]

64. Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die Fragen des vorlegenden Gerichts folgendermassen beantwortet:

1. Die Richtlinie 2004/38/EG, insbesondere Artikel 16 Absatz 1 in Verbindung mit Artikel 7 Absatz 1, ist dahingehend auszulegen, dass ein daueraufenthaltsberechtigter EWR-Staatsangehöriger, der Rentner ist und Sozialhilfeleistungen im Aufnahmestaat in Anspruch nimmt, einen Anspruch auf Familiennachzug selbst dann geltend machen kann, wenn auch der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird.

2. Für die Beantwortung der Frage 1 spielt es keine Rolle, ob der daueraufenthaltsberechtigte Unionsangehörige vor Eintritt ins Rentenalter im Aufnahmemitgliedstaat Arbeitnehmer oder Selbstständiger war bzw. ob der Familienangehörige im Aufnahmemitgliedstaat

[20] Verordnung (EWG) Nr. 1408/71 des Rates vom 14. Juni 1971 zur Anwendung der Systeme der sozialen Sicherheit auf Arbeitnehmer und Selbständige sowie deren Familienangehörige, die innerhalb der Gemeinschaft zu- und abwandern, ABl. 1971 L 149, S. 2, in der gültigen Fassung. Die EFTA-Überwachungsbehörde bezieht sich entsprechend auf Rechtssache C-160/02 *Skalka*, Slg. 2004, S. I-5613, Randnrn. 26 und 30.

age or whether the family member will be employed or self-employed in the host Member State and still be claiming social welfare benefits.

65. If the Court were to answer to the first question in the negative, ESA submits that the answers to the second and third question should be as follows:

2. Directive 2004/38, in particular Article 17(3), shall be interpreted as meaning that an EEA national who was granted a right of permanent residence pursuant to Article 17(1) and is currently a pensioner in receipt of social welfare benefits in the host State may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

3. Directive 2004/38/EC, in particular Article 7(1), shall be interpreted as meaning that a State cannot rely on the mere fact that the social welfare benefits received by the beneficiary of a right of permanent residence will increase as a result of a family reunification where the family member who is joining takes up paid employment and the increase in the social welfare benefits is a mere consequence of the application of the national law. Besides, only receipt of social assistance benefits can be considered relevant to determining whether the person concerned is a burden to the social assistance system.

The European Commission

66. The European Commission ("the Commission") argues that the first question involves two issues that are closely related but logically separate. First, whether a Union citizen's right of permanent residence confers a derived right of residence in the host State on his family members and, second, whether such a derived right may be exercised independently of whether the primary beneficiary, by analogy with Article 7(1)(b) and (d) of Directive 2004/38, possesses sufficient resources.

67. Even though Article 16 of the Directive, unlike Articles 6 and 7, does not contain an explicit provision conferring on the

Arbeitnehmer oder Selbstständiger sein wird und dennoch Sozialhilfeleistungen in Anspruch nehmen wird.

65. Sollte der Gerichtshof Frage 1 verneinen, sollten die Antworten auf die Fragen 2 und 3, so die EFTA-Überwachungsbehörde, folgendermassen lauten:

2. Die Richtlinie 2004/38, insbesondere Artikel 17 Absatz 3, ist dahingehend auszulegen, dass ein gemäss Artikel 17 Absatz 1 daueraufenthaltsberechtigter EWR-Staatsangehöriger, der derzeit Rentner ist und Sozialhilfeleistungen im Aufnahmestaat in Anspruch nimmt, einen Anspruch auf Familiennachzug selbst dann geltend machen kann, wenn auch der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird.

3. Richtlinie 2004/38/EG, insbesondere Artikel 7 Absatz 1, ist dahingehend auszulegen, dass ein Staat nicht davon ausgehen kann, dass die von einem Daueraufenthaltsberechtigten bezogenen Sozialhilfeleistungen infolge eines Familiennachzugs steigen werden, wenn der nachziehende Familienangehörige eine Erwerbstätigkeit aufnimmt und der Anstieg der Sozialhilfeleistungen eine reine Folge der Anwendung des einzelstaatlichen Rechts ist. Zudem kann nur der Bezug von Sozialhilfe als dafür massgeblich betrachtet werden, ob die betreffende Person Sozialhilfeleistungen in Anspruch nehmen muss.

Die Europäische Kommission

66. Die Europäische Kommission (im Folgenden: Kommission) bringt vor, die erste Frage umfasse zwei Aspekte, die in engem Bezug zueinander stehen, jedoch logisch getrennt sind. Einerseits stellt sich die Frage, ob aus einem Daueraufenthaltsrecht eines Unionsbürgers ein abgeleitetes Aufenthaltsrecht für dessen Familienangehörige im Aufnahmestaat resultiert und andererseits, ob ein solches abgeleitetes Recht unabhängig davon ausgeübt werden kann, ob der betreffende Daueraufenthaltsberechtigte, analog zu Artikel 7 Absatz 1 Buchstaben b und d der Richtlinie 2004/38, über ausreichende Existenzmittel verfügt.

67. Obwohl Artikel 16 der Richtlinie, anders als die Artikel 6 und 7, keine ausdrückliche Bestimmung enthält, die dem Daueraufe-

beneficiary of the right of permanent residence the right to have (existing or future) family members who are not already resident with him in the host State join him in order to reside there, in the Commission's view, the legislature clearly intended such a right to be conferred. It argues that since the right of permanent residence represents the highest level of integration in the host State, it is inconceivable that the legislature did not intend to confer derived rights for family members.

68. According to the Commission, once it is understood why the right of permanent residence conferred by Article 16 entails a derived right of residence for family members, it is comparatively easy to give an answer to the question whether that derived right is conditional on the beneficiary of the permanent right of residence having sufficient resources or satisfying another of the conditions set out in Article 7(1).

69. In the Commission's view, the conditions imposed by Article 7(1)(d) are logical when the family member is claiming rights derived from a person who falls within the scope of Article 7, since they reflect the conditions which that person himself must satisfy to acquire and retain a right of residence. In particular, if he ceases to be a worker or to have sufficient resources, as the case may be, he will lose his own right of residence under Article 7. It is, thus, entirely in conformity with the system established by Article 7 that the family member enjoying the derived right also loses that right.

70. The Commission submits that the same reasoning does not hold good where the family member's right of residence is derived from a right of permanent residence, since Article 16 does not create different categories of beneficiaries with more or fewer rights according to the circumstances in which that right was acquired.

71. It argues that the right of permanent residence builds on the assumption that, after five years of residence in a State, the EEA

enthaltsberechtigten das Recht auf Nachzug (vorhandener oder künftiger) Familienangehöriger gewährt, die nicht bereits mit ihm im Aufnahmestaat ansässig sind, war die Einräumung eines solchen Rechts vom Gesetzgeber nach Auffassung der Kommission eindeutig beabsichtigt. Da, so die Kommission, das Daueraufenthaltsrecht den höchsten Grad an Integration im Aufnahmestaat darstellt, ist es undenkbar, dass der Gesetzgeber keine abgeleiteten Rechte für Familienangehörige vorgesehen haben sollte.

68. Der Kommission zufolge ist es – sobald verstanden wurde, warum das gemäss Artikel 16 gewährte Daueraufenthaltsrecht ein abgeleitetes Aufenthaltsrecht für Familienangehörige einschliesst – vergleichsweise einfach, die Frage zu beantworten, ob dieses abgeleitete Recht von der Verfügbarkeit ausreichender Existenzmittel bzw. der Erfüllung einer anderen in Artikel 7 Absatz 1 genannten Voraussetzung durch den Daueraufenthaltsberechtigten abhängt.

69. Nach Ansicht der Kommission sind die Voraussetzungen gemäss Artikel 7 Absatz 1 Buchstabe d schlüssig, wenn der Familienangehörige Rechte von einer Person ableitet, die in den Geltungsbereich des Artikels 7 fällt, da sie die Bedingungen widerspiegeln, die diese Person ihrerseits erfüllen muss, um ein Aufenthaltsrecht zu erwerben und zu wahren. Insbesondere wenn diese Person die Erwerbstätigkeit beendet oder nicht mehr über ausreichende Existenzmittel verfügt, was möglich ist, wird sie ihrerseits ihr Aufenthaltsrecht laut Artikel 7 verlieren. Es entspricht daher vollkommen dem durch Artikel 7 geschaffenen Rahmen, dass der Familienangehörige, der ein abgeleitetes Recht geniesst, dieses ebenfalls verliert.

70. Die Kommission räumt ein, dass diese Argumentation nicht möglich ist, wenn das Aufenthaltsrecht des Familienangehörigen von einem Daueraufenthaltsrecht abgeleitet wird, da Artikel 16 keine unterschiedlichen Klassen von Aufenthaltsberechtigten mit mehr oder weniger Rechten vorsieht, je nachdem, unter welchen Umständen das Aufenthaltsrecht erworben wurde.

71. Die Kommission führt aus, dass das Daueraufenthaltsrecht auf der Annahme beruht, dass der EWR-Staatsangehörige und seine

national and his family are sufficiently integrated in the society of the host State and should thus be granted a right to stay in this State for an indefinite period of time. The abolition of the condition of self-sufficiency included in earlier directives was, according to the Commission, a deliberate choice of the EU legislature. The Commission contends that it applies not merely to the enjoyment of the right of permanent residence by an EEA national himself but must, by necessary implication, equally extend to the circumstances in which his family members may themselves acquire a right of residence there.

72. Against this background, the Commission considers that a refusal to recognise that Mrs Clauder has a right of residence in Liechtenstein would constitute a breach of Mr Clauder's right of permanent residence under Article 16 of Directive 2004/38, in particular in the light of the couple's right to family life as enshrined in the Directive and general principles of EEA Law.

The second question

73. The Commission considers that, in the light of the answer proposed to the first question and the reasoning in support of that proposal, the second question does not call for a reply.

The third question

74. Since the Commission contends that the right of residence of Mrs Clauder is independent of any condition of self-sufficiency of the couple, it is, in the Commission's view, not necessary to answer the third question of the referring court.

75. However, if Mrs Clauder were to take up employment in Liechtenstein, she would have an autonomous right of residence pursuant to Article 7(1)(a) of the Directive. The Commission recalls that it is settled case-law that the right of residence

Familie nach einem fünfjährigen Aufenthalt in einem Staat ausreichend in die Gesellschaft des Aufnahmestaats integriert sind und ihnen daher ein Aufenthaltsrecht auf unbestimmte Zeit gewährt werden sollte. Die Streichung der in früheren Richtlinien vorgesehenen Voraussetzung der finanziellen Eigenständigkeit war gemäss der Kommission eine bewusst getroffene Entscheidung des europäischen Gesetzgebers. Sie gilt, wie die Kommission festhält, nicht nur für den Genuss des Daueraufenthaltsrechts durch einen EWR-Staatsangehörigen selbst, sondern muss zwangsläufig auf die Umstände ausgedehnt werden, unter welchen seine Familienangehörigen ihrerseits ein Aufenthaltsrecht in diesem Land erwerben können.

72. Vor diesem Hintergrund vertritt die Kommission die Auffassung, dass die Nichtanerkennung des Aufenthaltsrechts von Frau Clauder in Liechtenstein einen Verstoss gegen das Daueraufenthaltsrecht von Herrn Clauder gemäss Artikel 16 der Richtlinie 2004/38 darstellen würde; dies insbesondere unter Berücksichtigung des in der Richtlinie und den allgemeinen Grundsätzen des EWR-Rechts verankerten Anspruchs des Ehepaars auf ein Familienleben.

Zur zweiten Frage

73. Die Kommission ist der Meinung, dass die Beantwortung der zweiten Frage angesichts der für die erste Frage vorgeschlagenen Antwort und der dafür vorgebrachten Argumente nicht erforderlich ist.

Zur dritten Frage

74. Da die Kommission zu dem Schluss gelangt, dass das Aufenthaltsrecht von Frau Clauder nicht von der Voraussetzung der finanziellen Eigenständigkeit des Ehepaars abhängt, muss die dritte Frage des vorlegenden Gerichts nach Meinung der Kommission nicht beantwortet werden.

75. Nähme Frau Clauder jedoch in Liechtenstein eine Erwerbstätigkeit auf, würde ihr ein eigenständiges Aufenthaltsrecht gemäss Artikel 7 Absatz 1 Buchstabe a der Richtlinie zukommen. Die Kom-

pursuant to Article 7(1)(a) applies even in the case of a part-time job or if the income generated by this employment is modest.[21] Moreover, the Commission argues that there is no doubt that such a right of residence is independent of any condition relating to the possession of sufficient financial means by Mrs Clauder or her husband.

76. The Commission proposes that the Court should answer the referring court's questions as follows:

1. Directive 2004/38/EC, in particular Article 16(1) thereof, confers a derived right of residence on a family member of an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host Member State, even if the family member will also be claiming social welfare benefits.

2. Questions 2 and 3 do not call for a reply.

Per Christiansen

Judge-Rapporteur

[21] The Commission refers to Case 344/87 Bettray [1989] ECR 1621, paragraphs 15 and 16, and Case C-188/00 Kurz [2002] ECR I-10691, paragraph 32.

mission erinnert daran, dass nach ständiger Rechtsprechung das Aufenthaltsrecht laut Artikel 7 Absatz 1 Buchstabe a selbst bei Teilzeitbeschäftigung oder bescheidenem Einkommen anwendbar ist.[21] Darüber hinaus weist die Kommission darauf hin, dass ein solches Aufenthaltsrecht zweifellos unabhängig von einer Bedingung im Zusammenhang mit der Verfügbarkeit ausreichender finanzieller Mittel durch Frau Clauder oder ihren Ehegatten ist.

76. Die Kommission schlägt vor, dass der Gerichtshof die Fragen des vorlegenden Gerichts folgendermassen beantwortet:

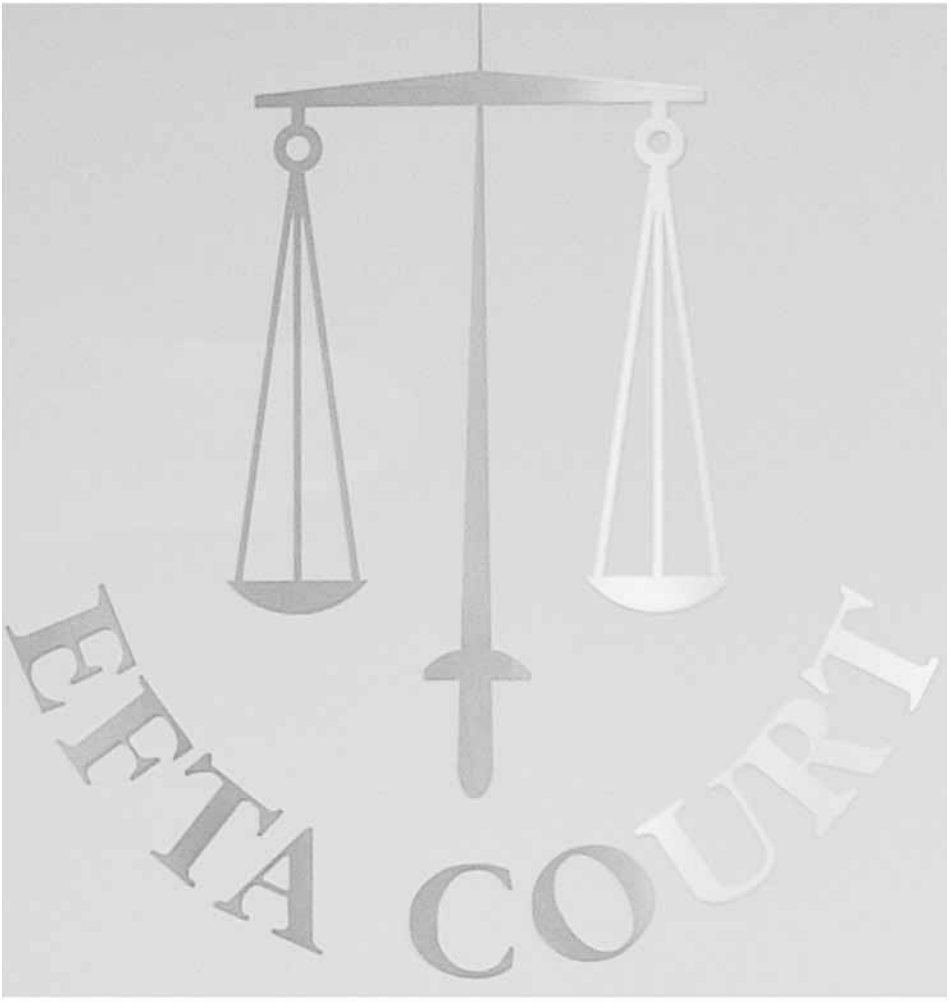
1. Die Richtlinie 2004/38/EG, insbesondere deren Artikel 16 Absatz 1, gewährt einem Familienangehörigen eines daueraufenthaltsberechtigten EWR-Staatsangehörigen, der Rentner ist und Sozialhilfeleistungen im Aufnahmemitgliedstaat in Anspruch nimmt, selbst dann ein abgeleitetes Aufenthaltsrecht, wenn auch der Familienangehörige Sozialhilfeleistungen in Anspruch nehmen wird.

2. Die Beantwortung der Fragen 2 und 3 ist nicht erforderlich.

Per Christiansen

Berichterstatter

[21] Die Kommission bezieht sich auf die Rechtssachen 344/87 *Bettray*, Slg. 1989, S. 1621, Randnrn. 15 und 16 sowie C-188/00 *Kurz*, Slg. 2002, S. I-10691, Randnr. 32.


EFTA COURT

Case E-14/10

Konkurrenten.no AS
v
EFTA Surveillance Authority

CASE E-14/10

Konkurrenten.no AS

v

EFTA Surveillance Authority

(Action for annulment of a decision of the EFTA Surveillance Authority - State aid - Local bus transport services - Existing aid - Obligation to state reasons - Decision to close the case without opening the formal investigation procedure)

Summary of the Judgment

1. One of the purposes of Article 16 SCA, according to which decisions of ESA must state the reasons on which they are based, is that the addressee of the decision, or anyone else directly concerned by it, must be able to assess why the decision has been taken, how ESA has applied the EEA Agreement and the SCA and whether or not there are grounds to seek judicial review.

2. The statement of reasons must disclose in a clear and unequivocal fashion ESA's reasoning so that concerned persons may ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review. Thus it is necessary to ascertain whether the statement of reasons in the contested decision indicates clearly and unequivocally ESA's reasoning.

3. Regarding the Court's examination of ESA's reasoning, an absence of or an inadequate statement of reasons constitutes an infringement of an essential procedural requirement for the purposes of Article 16 SCA which may be raised by the Court of its own motion. Therefore, the Court is not bound by the arguments of the parties as to how the decision might be considered lacking in terms of its reasoning.

4. In order to provide sufficient reasoning for the purposes of Article 16 SCA, it is incumbent on ESA to disclose, in a clear and unequivocal manner, by reference

to the provisions of national law providing for the renewal of the concession, how the renewal of the concession can be classified as part of an existing aid scheme.

5. Pursuant to Article 1(b)(v) of Part II of Protocol 4 SCA, aid is deemed to be existing aid if it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the EEA and without having been altered by the EGTA State concerned. It is only where measures become aid following the liberalisation of an activity by EEA law that such measures may not be considered as existing aid after the date fixed for liberalisation.

6. Any aid granted to an undertaking in excess of the losses actually incurred in connection with the services in question cannot be regarded as constituting, on the basis of that aid scheme, existing aid.

7. If doubts are raised as to the compatibility of aid with the EEA Agreement, ESA is obliged to open the formal investigation procedure in order to become fully informed of all the facts of the case and in order to protect the rights of parties concerned by allowing them to make their views know. This principle applies not only to notified aid, but also to complaints alleging the existence of unlawful aid.

JUDGMENT OF THE COURT

22 August 2011

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Local bus transport services – Existing aid – Obligation to state reasons – Decision to close the case without opening the formal investigation procedure)

In Case E-14/10,

Konkurrenten.no AS, established in Evje, Norway, represented by Jon Midthjell, advokat,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as Agents,

defendant,

supported by **Kollektivtransportproduksjon AS**, established in Oslo, Norway, represented by Gaute Sletten, advokat,

intervener,

APPLICATION for the annulment of decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene),

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Per Christiansen, Judges

Registrar: Skúli Magnússon,

having regard to the written pleadings of the applicant and the defendant, and the written observations of

– the European Commission ("the Commission"), represented by Leo Flynn and Tim Maxian Rusche, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Jon Midthjell, the defendant, represented by its agent, Xavier Lewis, the intervener, represented by Gaute Sletten, the Norwegian Government, represented by Ida Thue, Office of the Attorney General (Civil Affairs), acting as Agent, and the Commission, represented by its agent, Tim Maxian Rusche, at the hearing on 10 May 2011,

gives the following

JUDGMENT

I INTRODUCTION

1 The applicant Konkurrenten.no AS ("Konkurrenten") is a privately owned operator in the express bus market between the central and southern region of Norway. It is owned by Olto Holding AS, which owns also Risdal Touring AS, a company active in the tour bus market. The group had a combined turnover of NOK 54 million in 2009 and operates a fleet of 17 buses serving approximately 200 000 passengers per year.

2 The case concerns the decision by the EFTA Surveillance Authority ("ESA") to close case No 60510 on the grant of State aid by the Norwegian authorities to AS Oslo Sporveier ("Oslo Sporveier") and AS Sporveisbussene ("Sporveisbussene") for the provision of scheduled bus services in Oslo. In the decision, ESA concluded that the contested measures, although being aid incompatible with the EEA Agreement, constituted existing aid and, in view of the termination of those aid measures, considered that no further measures were required.

II LEGAL BACKGROUND

EEA law

3 Article 61(1) EEA reads as follows:

Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

4 Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Protocol 3 SCA") reads:

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

5 Under Section I of Part II of Protocol 3 SCA, Implementing provisions, Article 1, *Definitions*, reads:

...

(b) 'existing aid' shall mean:

(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

...

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not

constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) *'new aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;*

(d) *'aid scheme' shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;*

...

(f) *'unlawful aid' shall mean new aid put into effect in contravention of Article 1(3) in Part I;*

...

6 Under Section II of Part II of Protocol 3 SCA, Procedure regarding notified aid, Article 4(4), *Preliminary examination of the notification and decisions of the EFTA Surveillance Authority*, reads:

4. Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a 'decision to initiate the formal investigation procedure').

7 Under Section III of Part II of Protocol 3 SCA, Procedure regarding unlawful aid, Article 13(1), *Decisions of the EFTA Surveillance Authority*, reads:

1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4) of this Chapter. In the case

of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7 of this Chapter. If an EFTA State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

8 Article 16 SCA reads as follows:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

National law

9 At the time when the Kingdom of Norway became a party to the EEA Agreement, local bus transport in Norway was governed by the provisions of the 1976 Transport Act and its implementing regulations. Under those rules, concessions for local bus transport were granted for fixed ten-year periods, without public tendering. The concession to carry out local bus transport included a right, and also an obligation, to serve the area or route in question, in return for ticket income from passengers.

10 Section 24a, paragraph 1, of the 1976 Transport Act provided that it was the responsibility of the county (*fylkeskommune*, in this context the City of Oslo) to provide for compensation for specific, unprofitable transport services it wished to introduce or continue to operate within the County. This provision is now to be found in Section 22 of the 2002 Commercial Transport Act which replaced the 1976 Transport Act with effect from 1 January 2003.

11 An amendment to the 1976 Transport Act of 11 June 1993, which took effect on 1 January 1994, permitted local bus transport to be submitted to public tendering. The concession would follow the successful bidder for the duration of the contract. The provisions relevant for the rights and duties of the concession holder remained essentially unchanged.

III PRE-LITIGATION PROCEDURE

12 By letter of 11 August 2006, Konkurrenten lodged a complaint with ESA, claiming that the Norwegian authorities had granted State aid to Oslo Sporveier and its subsidiary Sporveisbussene.

13 In the subsequent investigation, ESA invited the Norwegian authorities to comment and requested further information from them in letters of 7 September 2006, 29 November 2006, 19 June 2007 and 2 April 2008. The Norwegian authorities replied to these requests by letters of 11 October 2006, 11 January 2007, 16 August 2007 and 29 April 2008. Konkurrenten submitted comments by letter on 20 October 2006 and further information by emails of 25 February 2008, 25 May 2008, 4 June 2008, 15 August 2008, 1 September 2008 and 20 January 2009.

14 At the beginning of 2010, ESA and the Norwegian authorities had informal telephone and email contact regarding the case. The information received in this context was, according to the decision, consolidated in a letter submitted electronically to ESA by the Norwegian authorities on 21 April 2010.

IV THE CONTESTED DECISION

15 On 21 June 2010, ESA adopted the decision to close the case.

16 The decision describes the recipients of the aid as follows:

AS Oslo Sporveier has since its establishment been active in bus transport, metro ("T-banen"), tram ("Trikk") and ferry transport [in Oslo]. ... As of 1934, Oslo Municipality became practically the sole owner (with 98.8% ownership) until a reorganization in July 2006. Following this reorganization, a new company, Kollektivtrans-portproduksjon, which is wholly owned by Oslo Municipality, became the 100% owner of AS Oslo Sporveier. According to the Norwegian authorities Oslo Municipality was involved in all issues of commercial importance relating to the carrying out of collective bus transport by AS Oslo Sporveier, including financial aspects of agreements/ contracts with subsidiaries (such as AS Sporveisbussene) or other third parties.

AS Oslo Sporveier operated an in-house department which carried out most collective bus transport in Oslo. On 23 April 1997 the bus transport was separated from AS Oslo Sporveier and transferred to a newly established company, AS Sporveisbussene.

Since 1994 AS Oslo Sporveier operated a tour bus division. The division was transferred to AS Sporveisbussene when the company was established in 1997. ...

In 2003 AS Sporveisbussene established a subsidiary, Nexus Trafikk AS, in order to participate in tenders for operating scheduled bus transport routes in Oslo. In 2005 AS Sporveisbussene acquired the company, Arctic Express, engaged in flight bus transport and regional bus transport.

17 The system of concession and compensation is described in the following way:

Since the 1950's AS Oslo Sporveier has held concessions awarded by Oslo Municipality for carrying out scheduled bus transport in Oslo. The latest concession was awarded by Oslo Municipality on 16 November 1992 and permitted AS Oslo Sporveier to operate scheduled bus transport in the entire Oslo grid (the "Concession"). The Concession was awarded on the basis of the rules in the 1976 Transport Act and was therefore valid for ten years: It was granted with retroactive effect from 1 January 1990 until 31 December 1999. The Concession was renewed for a further ten-year period or until all scheduled bus transport in Oslo had been tendered out. Since all scheduled bus transport was tendered out by 30 March 2008 the renewal period of the Concession expired on that date.

The Concession – and the previous concessions granted since 1976 – were all based on a Royal Decree issued on the basis of the Transport Act. The Royal Decree provides that the grant of a concession is linked to an obligation to carry out the transport services stipulated in the concession. Since the Concession was granted for carrying out scheduled bus services in Oslo, AS Oslo Sporveier was therefore under an obligation to carry out the relevant services in Oslo.

In order to compensate for the operation of bus transport services based on the Concession Oslo Municipality granted ... funding to AS Oslo Sporveier. From the 1980's the compensation was granted as a lump sum to cover the difference between the costs and ticket revenues based on all activities carried out by AS Oslo Sporveier. Hence the lump sum also financed the operation of scheduled bus transport in Oslo to the extent that this was not covered by ticket revenue.

... After the separation of the bus transport division ..., AS Oslo Sporveier and AS Sporveisbussene entered into a "Transport Agreement" on the provision of scheduled bus transport services in Oslo. The Transport Agreement provided that AS Sporveisbussene carries out scheduled bus transport in Oslo based on the Concession on behalf of Oslo Sporveier. ...

By linking the Transport Agreement to the Concession, AS Oslo Sporveier channelled the compensation received from Oslo Municipality for carrying out scheduled bus transport to its subsidiary AS Sporveisbussene. Based on the Transport Agreement (and explanations by the Norwegian authorities) AS Sporveisbussene was entitled to receive on an annual basis ... [revenue from various ticket sales] and (iv) a subsidy. The subsidy was fixed annually for the following year on the basis of the following formula: Using as a basis the amount of costs for the previous year the parties negotiated and agreed on a "cost amount" and then deducted (i) 3% of the total to ensure efficiency improvements; and (ii) the estimated revenues for the following year. The difference represented the subsidy.

The Norwegian authorities have provided the Authority with the following figures on the annual amounts of the subsidy: NOK 97 million in 1997; NOK 60.6 million in 1998; NOK 42 million in 1999; NOK 42 million in 2000; NOK 37.3 million in 2001; NOK 19.2 million in 2002; NOK 10.5 million in 2003; and NOK 11.5 million in 2004.

In addition hereto the Norwegian authorities have explained that in the year 2004 AS Sporveisbussene received "a quality bonus" over and beyond the subsidy. The bonus represented NOK 3.9 million.

18 Furthermore, it follows from the decision that Oslo Sporveier and Sporveisbussene also received a capital injection in 2004. In this regard, ESA observed in its decision:

It is also clear that in 2004 Oslo Municipality contributed capital of NOK 800 million to Oslo Sporveier which then paid the outstanding amount of underfunding to the pension fund. The amount of NOK 111 760 000 was paid to the pension fund by AS Oslo Sporveier on behalf of AS Sporveisbussene and featured as capital injection in the accounts of AS Sporveisbussene. ...

However, in this context the Authority points out that the pension obligations of AS Sporveisbussene did not constitute new costs but were costs accrued in the past which had just technically been kept outside the general accounts of the company. The only reason the specific costs of the pension obligations in question were paid later than when they accrued was a change in the accounting principles. Since all costs related to bus transport activities of AS Sporveisbussene were, under the terms of the Concession, ultimately compensated for by Oslo Municipality, pension costs normally also formed part of the costs financed by Oslo Municipality. Hence the payment for the pension obligations would otherwise have constituted an integral part of the compensation granted to AS Sporveisbussene. On this basis the Authority concludes that the capital injection in 2004 to cover underfunding of pension obligations (in respect of costs accrued until the end of 2002) constitutes part of the overall costs to be covered by the compensation to AS Sporveisbussene.

19 ESA found that the aid was existing aid. It considered that the compensation for carrying out bus transport in Oslo was inherently linked to the concession awarded by Oslo Municipality in 1990, on the basis of the 1976 Transport Act, and which was renewed in 1999. ESA observed that the sector had never been liberalised on the basis of EEA law and that the measure became State aid only in 1995 due to the opening up for competition of the sector at that time. As a result, in ESA's view, the aid constituted existing aid. ESA then considered whether the aid could have become new aid by alteration within the meaning of the SCA. It answered that question in the negative on the grounds

that no changes had been made to the concession throughout the period, including at the time of its renewal at the end of 1999. The fact that the transport division was transferred from Oslo Sporveier to Sporveisbussene in 1997 was considered merely an administrative act which did not involve any changes in the nature of the bus transport activities. ESA concluded:

On the basis of the above the Authority considers that the Concession has not been altered within the meaning of the state aid rules since 1990 until its full expiry on 30 March 2008. Hence, in line with Article 1(b)(i) and (v) of Part II of Protocol 3 to the Surveillance and Court Agreement the Authority considers that the compensation granted on the basis of the Concession to AS Oslo Sporveier and AS Sporveisbussene qualifies as existing aid.

20 In assessing the compatibility of the aid with the State aid rules, ESA reasoned that a public service obligation existed on the following grounds:

The obligation to carry out scheduled bus transport has been imposed on AS Oslo Sporveier and on AS Sporveisbussene respectively based on three measures: (i) The 1976 Transport Act and the implementing Royal Decree state that the grant of concessions involves an obligation to carry out the transport services stipulated in the concessions; (ii) the Concession, granted initially to AS Oslo Sporveier, refers to the carrying out of collective bus transport in Oslo; and (iii) the Transport Agreement delegated, as of April 1997, the responsibility to carry out bus transport services in Oslo based on the Concession to AS Sporveisbussene. The Authority considers that the duties are clearly identified and described in the Concession ....

21 Turning to the question whether the Norwegian authorities had demonstrated that the amount of compensation received by Oslo Sporveier and Sporveisbussene did not exceed what was necessary to cover the costs associated with discharging the public service obligation, ESA found that this was, for the following reasons, not the case:

First, the Authority notes that as regards AS Oslo Sporveier, the company received a lump sum without any reference to costs incurred

in the past or the future. As regards Sporveisbussene, the Authority notes that besides keeping ticket revenues, in all years between 1997 and 2004, the company received a subsidy to cover the gap between revenues and costs. Although the subsidy amount was based on an initial cost estimate, the subsidy was not based on a determination of real costs and the amount was subsequently the subject of negotiations between the parties to the Transport Agreement. Moreover, in 2004 a bonus was granted. Secondly, the Authority notes that the Norwegian authorities have not submitted information showing that AS Oslo Sporveier and AS Sporveisbussene had arrangements for allocating costs nor that the accounts for carrying out collective bus transport services in Oslo were kept separate from any other commercial activities carried out by AS Oslo Sporveier and AS Sporveisbussene, such as operating tour buses.

...

[T]he Authority considers that the Norwegian authorities have not demonstrated that the amount of compensation received by AS Oslo Sporveier and AS Sporveisbussene prior to 31 March 2008 did not exceed what was necessary to cover the costs associated with discharging the public service obligation, nor that a cost separation was made between public services and other commercial activities. The Authority concludes therefore that the Norwegian authorities failed to demonstrate that the compensation granted by the State to AS Oslo Sporveier and AS Sporveisbussene for public service obligations was not excessive. As a consequence the compensation granted from the State to AS Oslo Sporveier and AS Sporveisbussene for public service obligations was not proportional.

On this basis the Authority concludes that the compensation linked to the Concession to AS Oslo Sporveier and AS Sporveisbussene was not compatible with the EEA Agreement on the basis of Regulation 1370/2007 and Article 49 of the EEA Agreement.

22 On the question whether there was a need to propose any appropriate measures, the contested decision reads:

... However, in the present case, the Norwegian authorities, between 2003 and 2008, gradually phased out the Concession for the provision

of scheduled bus transport services in Oslo and subjected all such services to public tenders by 30 March 2008. The conclusion of this process automatically terminated both the Concession, the Transport Agreement and the compensation in favour of AS Oslo Sporveier and AS Sporveisbussene.

...

Given the termination of the existing state aid measures by the Norwegian authorities the Authority considers that no further measures are required in this case.

23 The operative part of the contested decision, Article 1, reads:

The case on the grant of state aid by the Norwegian authorities to AS Oslo Sporveier and AS Sporveisbussene for the provision of scheduled bus transport services in Oslo is hereby closed.

V PROCEDURE AND FORMS OF ORDER SOUGHT

24 By application lodged at the Court on 2 September 2010, Konkurrenten brought the present action.

25 The applicant requests the Court:

– to annul EFTA Surveillance Authority decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene); and

– to order the defendant to pay the costs.

26 The defendant lodged a defence on 8 November 2010, in which it claims that the Court should:

– dismiss the application as unfounded; and

– order the applicant to pay the costs.

27 A reply by the applicant was lodged at the Court on 10 December 2010. A rejoinder by the defendant was registered at the Court on 26 January 2011.

28 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Commission submitted written observations registered at the Court on 10 January 2011.

29 By document lodged at the Registry of the Court on 8 March 2011, Kollektivtransportproduksjon AS sought leave to intervene in support of the defendant. Written observations on the application to intervene were received from both the applicant and defendant on 21 March 2011. By order of the President of the Court of 25 March 2011, Kollektivtransportproduksjon AS was granted leave to intervene at the hearing on the basis of the Report for the Hearing.

30 By document lodged at the Registry of the Court on 14 March 2011, the applicant requested the Court to summon Mr Steinar Undrum, Director of the Competition Policy Department of the Norwegian Ministry of Government Administration, as a witness. In its observations, lodged at the Court Registry on 29 March 2011, the defendant contended that the Court should reject the applicant's request. On 4 April 2011, the Court ordered Mr Undrum to be heard as a witness.

31 Mr Undrum testified and answered questions of the Court and of the parties at the hearing on 10 May 2011 in Luxembourg. At the same hearing, the applicant, the defendant, the intervener, the Norwegian Government and the Commission presented oral argument and replied to questions put to them by the Court.

32 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

VI LAW

33 The application is based on three pleas in law. First, it is alleged that ESA infringed its obligation to open the formal investigation procedure for aid granted between 2000 and 2008. Second, the applicant alleges that ESA infringed its obligation to open the formal investigation procedure for aid granted between 1997 and 2000. Finally, it is alleged that ESA infringed its obligation to state reasons.

34 With regard to the first and second plea, the applicant argues that ESA had a duty to open the formal investigation procedure in accordance with the procedure for unlawful aid, as a preliminary examination raised doubts in relation to the compatibility of the aid with the EEA Agreement. According to the decision, Oslo Sporveier received significant State aid between 1997 and 2008 within the meaning of Article 61(1) EEA not compatible with the functioning of the EEA Agreement. However, the defendant categorised this aid as existing aid.

35 By its first plea, the applicant submits that aid granted after the renewal of the concession in 1999 must be considered as new aid. The applicant argues, first, that ESA should have regarded the renewal of the concession and the prolongation of the aid which it entailed to constitute a material alteration of the aid which ought to have been notified to ESA.

36 By the second part of its first plea, the applicant contends that the aid granted after the renewal of the concession in 1999 must be considered as new aid, because the terms of the new concession were materially altered, as well as the conditions for granting aid.

37 Having regard to the applicant's arguments to the effect that the new concession should have prompted ESA to classify the aid granted after the renewal of the concession as new aid, it is appropriate to consider, first, the applicant's third plea, namely, that ESA failed to provide sufficient reasoning for its decision in this regard, since only if the decision is adequately reasoned will it be possible to consider whether the first and second part of the first plea are well founded.

Third plea: Infringement of the obligation to state reasons

Arguments of the parties

38 The applicant claims that the defendant infringed its duty to state reasons under Article 16 SCA in concluding that the aid granted after the renewal of the concession in 1999 constituted existing aid. In particular, the applicant submits that the decision offers

no reasons on why, as a matter of law, only a change in the terms of the concession should be relevant or why the fact that a new concession was granted does not qualify as a relevant change.

39 Furthermore, the applicant challenges the admissibility before the Court of the arguments advanced by the defendant which build upon the classification of the relevant aid measure as a system of public service compensation consisting of the Transport Act, the implementing regulation and the area concession granted to Oslo Sporveier. The applicant argues that this constitutes new reasoning without a basis in the contested decision. In its view, the decision refers only to the concession as the relevant aid measure.

40 The defendant, supported by the Commission, considers that the decision adequately sets out the facts and elements in law upon which it is based, and therefore complies with Article 16 SCA. As regards the allegation that its defence is based on new reasoning, it contends that the contested decision contains all the elements that it relied on in reaching its conclusion. In its view, its reasoning, the beginnings of which are set out in the contested measure, may be enlarged upon and clarified during the proceedings.

Findings of the Court

41 The Court recalls that one of the purposes of Article 16 SCA, according to which decisions of ESA must state the reasons on which they are based, is that the addressee of the decision, or anyone else directly concerned by it, must be able to assess why the decision has been taken, how ESA has applied the EEA Agreement and the SCA and whether or not there are grounds to seek judicial review (see Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority* [1994–1995] EFTA Ct. Rep. 59, paragraph 25).

42 It follows that the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons

for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review (see most recently Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein and Others* v *EFTA Surveillance Authority*, judgment of 10 May 2011, not yet reported, paragraph 171, and case-law cited).

43 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. In particular, what matters is the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 16 SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Principality of Liechtenstein and Others* v *EFTA Surveillance Authority*, cited above, paragraph 172).

44 Although ESA is not required to discuss all the issues of fact and law raised by interested parties during the administrative procedure in its reasons for a decision, it must none the less take account of all the circumstances and all the relevant factors of the case (see, for comparison, Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 32) so as to enable the Court to review its lawfulness and make clear to the EEA States and the persons concerned the circumstances in which ESA has applied the relevant rules of the EEA Agreement (see, for comparison, Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 39).

45 Thus, it is necessary to ascertain whether the statement of reasons in the contested decision indicates clearly and unequivocally ESA's reasoning, particularly in view of the complaint concerning the assessment of the contested aid and ESA's findings that it constituted existing aid.

46 As regards the Court's examination of the reasoning provided by ESA, it must be noted that an absence of or inadequate statement of reasons constitutes an infringement of an essential procedural requirement for the purposes of Article 16 SCA which may be raised by the Court of its own motion (see, for comparison, Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 34, and case-law cited). Therefore, the Court is not bound by the arguments of the parties as to how the decision might be considered lacking in terms of its reasoning.

47 According to the conclusion of ESA's decision, the latter considered that the concession and the compensation linked to it in favour of Oslo Sporveier and Sporveisbussene involved existing State aid within the meaning of Article 61(1) EEA and Article I(b)(i) and (v) of Part II of Protocol 3 SCA.

48 It is evident from the assessment of the compatibility of the aid in the contested decision that ESA considered the aid to be based on three measures: (i) the 1976 Transport Act and the implementing Royal Decree, which stated that the grant of concessions involves an obligation to carry out the transport services stipulated in the concession; (ii) the concession, granted initially to Oslo Sporveier, which refers to the carrying out of collective bus transport services in Oslo; and (iii) the Transport Agreement which delegated, as of April 1997, the responsibility to carry out bus transport services in Oslo based on the concession to Sporveisbussene. In its decision, ESA stated that it considered these duties to be clearly identified and described in the concession with respect to the public service task and the geographical area concerned, namely, Oslo. Moreover, the obligation to carry out bus transport services was clearly entrusted to (i) Oslo Sporveier as of 1990; and (ii) Sporveisbussene as of April 1997 on the basis of the Transport Agreement.

49 As regards the term "concession", it clearly follows from the decision that it refers to the concession awarded by Oslo Municipality on 16 November 1992, which permitted Oslo

Sporveier to operate scheduled bus transport in the entire Oslo grid. In the decision, it is moreover explicitly stated that this concession was granted with retroactive effect from 1 January 1990 until 31 December 1999, when it was renewed for a further ten-year period or until all scheduled bus transport in Oslo had been tendered out.

50 Whether the aid granted after the renewal of the concession constitutes "existing aid" not subject to recovery depends upon the interpretation of the provisions of Protocol 3 SCA, which govern the procedure and the powers of ESA in the field of State aid. Protocol 3 SCA corresponds to Article 108 of the Treaty on the Functioning of the European Union and Council Regulation No 659/1999. Part II of Protocol 3 SCA essentially reproduces the Regulation.

51 Article 1(b)(i) of Part II of Protocol 3 SCA defines "existing aid" as all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA State, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement.

52 As the concession in question was limited in time and had to be renewed for the financial support to continue beyond 1999, it is clear that the renewed concession cannot qualify as an existing individual aid measure which was put into effect before the entry into force of the EEA Agreement and still applicable after that date.

53 Accordingly, in order for the renewed concession to qualify as an "existing aid measure" under the EEA State aid rules, it must be part of an aid scheme that was put into effect before the entry into force of the EEA Agreement.

54 The concept of an aid scheme is defined in Article 1(d) of Part II of Protocol 3 SCA. According to this definition, an "aid scheme" means "any act on the basis of which, without further implementing measures being required, individual aid awards

may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount".

55 The question whether the renewal of the concession could be classified as part of an existing aid scheme that predated Norway's accession to the EEA was relevant to ESA's conclusion in the case at hand, given the different legal consequences attached depending on whether the renewal was classified as existing aid or new aid. In this regard, the Court recalls that measures taken after the entry into force of the EEA Agreement to grant or alter aid, whether the alterations relate to existing aid or to initial plans notified to ESA, must be regarded as new aid (see, for comparison, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 48, and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 51).

56 It follows, therefore, that ESA was obliged under Article 16 SCA to elaborate the reasons for its assessment concerning the renewal of the concession and its classification of the aid as existing aid in light of the applicable EEA rules, that is, in particular, Article 1(b)(i) and Article 1(d) of Part II of Protocol 3 SCA.

57 In this regard, the Court notes that questions concerning the classification of State aid, such as whether aid may be classified as new aid, existing aid, alteration of existing aid or part of a general aid scheme, must be determined by reference to the provisions providing for it (see, for comparison and *mutatis mutandis*, Case C-44/93 *Namur-Les Assurances du Credit* [1994] ECR I-3829, paragraph 28).

58 Therefore, in order to provide sufficient reasoning for the purposes of Article 16 SCA, it was incumbent on ESA to disclose, in a clear and unequivocal manner, by reference to the provisions of national law providing for the renewal of the concession, how the renewal of the concession could be classified as a part of an existing aid scheme.

59 As ESA neither explained its findings to an adequate extent in this regard nor indicated what criteria were laid down in the national provisions for the allocation of individual aid awards, its decision fails to identify how the renewal of the concession could fit within an existing "aid scheme", as defined in Article 1(d) of Section I of Part II of Protocol 3 SCA.

60 Further, even on the assumption that the concession was part of an existing aid scheme, the Court notes that it would have been incumbent on ESA to explain why it considered the renewal of the concession in 1999 not to be a relevant alteration of that aid scheme.

61 Instead, ESA's decision merely sets out its observation that no changes were made to the concession in the context of the renewal. This finding is not supported by any further explanation. The mere setting-out of that conclusion does not meet the requirements for sufficient reasoning mentioned in paragraphs 41 to 44 above. It neither gives the applicant a real opportunity to express its views as regards ESA's conclusion nor does it permit the Court to exercise its power of review in accordance with settled case-law (see paragraph 42 above).

62 As the grounds of the contested decision did not make it clear how and for what reasons ESA came to the conclusion that the renewed concession constituted a part of an aid scheme that was introduced prior to the entry into force of the EEA Agreement, the third plea must be regarded as well founded. As a result, it follows also that the Court is not in a position to address the first and second part of the first plea.

63 Accordingly, the contested decision must be annulled on the ground that the statement of reasons is inadequate regarding the renewal of the concession.

Second plea: Infringement of the obligation to open a formal investigation procedure for aid granted between 1997 and 2000

Arguments of the parties

64 The applicant submits that the defendant should have categorised the aid as new aid from 1995 onwards, when the market for bus transport opened up for competition in the EEA, or, at the latest, from 1997, when Sporveisbussene started to position itself in order to compete in the newly liberalised market.

65 The applicant argues that the concession did not entail a right for Oslo Sporveier to receive aid. Rather, it claims that the aid was granted by the City of Oslo on the basis of its annual budget, and, hence, by implication, was discretionary and independent of the duration of any concession granted. On that basis, the applicant submits that each annual decision to grant aid from the city budget should be considered a separate aid measure and, consequently, assessed as new aid.

66 Moreover, the applicant contends that the aid must be regarded as new aid because the City of Oslo operated, in any event, outside of any approved aid scheme. It submits that, whether under the 1976 Transport Act or the 2002 Commercial Transport Act, no overcompensation could be paid for local bus transport after 1992. However, according to the contested decision, the subsidy at issue could not be considered cost-based compensation. Nor was it established that Oslo Sporveier and Sporveisbussene had arrangements for allocating costs or that the accounts for carrying out collective bus transport services in Oslo were kept separate from other commercial activities such as operating tour buses.

67 The defendant, supported by the Commission, considers that neither the liberalisation of the market by virtue of national law nor an internal reorganisation within Oslo Sporveier could have the effect of turning the aid provided under the scheme into new aid. As regards the argument that the aid was granted on a discretionary basis under the city budget, the defendant

maintains that the aid must be seen in the context of the legal framework governing it. It contends that the imprecise way of determining the level of the public service compensation is a problem for the assessment of the compatibility of the aid, but that it is not significant for the classification of the aid as existing or new.

Findings of the Court

68 As regards the first argument of the applicant, that is, that the liberalisation of the market for bus transport and the change of business strategy of Oslo Sporveier turned the contested measures into new aid, it appears from the decision that the defendant considered the contested measures to have evolved into existing aid initially when the sector was opened up for competition.

69 Pursuant to Article 1(b)(v) of Part II of Protocol 3 SCA, aid is deemed to be existing aid if it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State concerned. It is only where measures become aid following the liberalisation of an activity by EEA law that such measures may not be considered as existing aid after the date fixed for liberalisation.

70 In the present case, the market for local scheduled bus transport was not liberalised on the basis of EEA law, but was opened up by virtue of national law. It follows that the defendant correctly applied Article 1(b)(v) of Part II of Protocol 3 SCA, considering that the contested measures became existing aid when the sector was opened up for competition. The alleged changes in the business strategy of the recipient of the aid are irrelevant in this regard.

71 Accordingly, the first argument of the applicant must be rejected.

72 As to the argument that the aid was granted annually and on a discretionary basis under the city budget, the Court recalls that the emergence of new aid or the alteration of existing

aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. As noted in paragraph 57, whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.

73 It follows, therefore, that contrary to the applicant's assertion, it does not matter whether the beneficiary had a right to receive the aid. Rather, what is relevant is whether the aid was granted in accordance with the provisions providing for it.

74 In the case at hand, the City of Oslo was entitled, under the provisions of the 1976 Transport Act and the implementing regulations, to provide financial support in order to enable the operation of non-profitable scheduled bus services. The fact that the level of the compensation was "negotiated" does not, as such, entail that the payments did not cover actual losses incurred in the operation of those services and were *per se* not covered by the scheme. The Court considers that in so far as the compensation payments were indeed used to finance the operation of non-profitable scheduled bus services, the defendant may correctly have classified those payments as existing aid.

75 The argument that the aid must be considered as new aid because it was granted on an annual and discretionary basis under the city budget must therefore be rejected.

76 However, it also follows from those findings that any aid granted to Oslo Sporveier in excess of the losses actually incurred in connection with the services in question cannot be regarded to constitute, on the basis of that aid scheme, existing aid (see, for comparison, Case C-400/99 *Italian Republic* v *Commission* [2005] ECR I-3657, paragraphs 65 to 66).

77 The defendant noted in the decision that the Norwegian authorities had not submitted information showing that Oslo Sporveier and Sporveisbussene had arrangements for

allocating costs nor that the accounts for carrying out collective bus transport services in Oslo were kept separate from any other commercial activities carried out by Oslo Sporveier and Sporveisbussene, such as operating tour buses. It also found that the Norwegian authorities had failed to demonstrate that the compensation granted was not excessive. It is clear that ESA could not exclude the possibility that Oslo Sporveier had received aid over and above the losses associated with discharging the public service obligation and, indeed, according to information submitted at the hearing, it considered that such overcompensation was likely.

78 It follows from established case-law that if doubts are raised as to the compatibility of aid with the EEA Agreement, ESA is obliged to open the formal investigation procedure in order to become fully informed of all the facts of the case and in order to protect the rights of parties concerned by allowing them to make their views known. This principle applies not only to notified aid, but also to complaints alleging the existence of unlawful aid (see Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 64, paragraphs 74 to 76, and, for comparison, Cases C-521/06 P *Athinaïki Techniki AE* v *Commission* [2008] ECR I-5829, paragraph 34, and *Italian Republic* v *Commission*, cited above, paragraphs 47 to 48).

79 In the present case, not only had the defendant doubts concerning the legality of some of the aid; it even considered it likely that unlawful aid was present. The fact that it found itself unable, after almost four years of investigation, to establish which parts of the aid granted by the City of Oslo were existing aid and which parts were unlawful aid should have prompted it not to close the case but, on the contrary, to open the formal investigation procedure in order to become, as far as possible, fully informed of the facts.

80 Accordingly, the plea that the defendant failed to open the formal investigation procedure for the period from 1997 to 2000 must be declared well founded. Moreover, the third part of the first plea, which addresses the same issues with regard to the period from 2000 to 2008, must also be declared well founded.

Fourth part of the first plea: 2004 capital injection

Arguments of the parties

81 The applicant asserts that the NOK 800 million investment in Oslo Sporveier in 2004, of which Sporveisbussene received NOK 111.7 million, must be considered a separate, one-off transaction constituting new aid. It contends that the transaction was an investment made by the City of Oslo in its capacity as the owner of the company and not a payment for transport services provided.

82 The defendant, supported by the intervener and the Norwegian Government, submits that the capital injection forms part of the aid scheme and must accordingly be considered as existing aid. In that regard, those parties contend that the pension obligations, which this capital injection covered, did not constitute new costs, but were costs that had been accrued in the past and had only been kept outside of the company's general accounts due to the use of the "corridor solution" accounting principle. In ESA's view, the change in accounting principle, that is, the abandoning of the "corridor solution", is a mere technical adjustment that cannot be qualified as a substantial alteration entailing a re-qualification of the aid system and which impacted neither on the amount necessary to cover the underfunding, nor on the duration of the aid, nor on the use of the aid by the recipient.

83 The Commission takes the view that any public support to an undertaking in order to finance pension obligations constitutes, in principle, State aid. It considers that there is no intrinsic link between the aid granted to fund the pension deficit and the compensation payments for public service obligations awarded by the City of Oslo through the grant of concessions. The Commission concludes that the capital injection is severable from the annual compensation payments made under the existing aid scheme. In the absence of information indicating that the capital injection is existing aid for other reasons, in the Commission's view, the 2004 capital injection constitutes new aid.

Findings of the Court

84 As a preliminary point, it should be noted that the applicant contends that the 2004 capital injection is a separate transaction constituting new aid. It does not claim that the injection constitutes a relevant alteration of the aid scheme. Rather, it argues that the capital injection is not covered by any aid scheme and therefore constitutes new aid.

85 It is common ground between the parties that the material scope of the aid scheme was to compensate the aid recipients for the operation of the bus transport services, that is, to cover gaps between costs and revenues related to the operation of the services.

86 It is also undisputed that pension costs are, as such, costs related to the operation of services, like wages or social security contributions. The question, however, remains to what extent the capital injection, and the pension costs it was intended to meet, qualify as "costs related to the operation of the services" which were covered by the aid scheme at issue.

87 In order to constitute existing aid on the basis of the aid scheme in question, the capital injection must have been granted on the basis and in accordance with the provisions of the aid scheme providing for it (see paragraphs 72 to 76 above). Accordingly, if the relevant aid scheme does not have any particular provisions on how the aid is to be provided, a divergence from the usual procedure cannot, in itself, lead to the finding that the aid was not granted on the basis of the aid scheme. In the same way, it cannot matter whether a single aid payment relates to the upcoming year, to the past year or to another period of time, as long as the aid is covered by the legal basis providing for it.

88 In the decision, after explaining the reasons for the change in accounting principles, the defendant merely stated that "[s]ince all costs related to bus transport activities of AS Sporveisbussene were, under the terms of the Concession, ultimately compensated for by Oslo Municipality, pension costs normally also formed part of the costs financed by Oslo Municipality. Hence the

payment for the pension obligations would otherwise have constituted an integral part of the compensation granted to AS Sporveisbussene." On this basis, ESA concluded "that the capital injection in 2004 to cover underfunding of pension obligations (in respect of costs accrued until the end of 2002) constitutes part of the overall costs to be covered by the compensation to AS Sporveisbussene".

89 While the decision states that the pension costs related to the public bus transport activities formed a part of the costs to be compensated in the past, it fails to provide any explanation whether and to what extent the capital injection was actually linked to losses relating to the discharge of these public services. In this regard, the Court notes that it follows from the case-file that both Oslo Sporveier and Sporveisbussene also provided other commercial services, in addition to their public service activities, during the period when the shortfall in the pension fund accumulated. Therefore, it was incumbent on ESA, in light of Article 16 SCA and the criteria laid down in paragraphs 41 to 44 above, to identify whether the capital injection only concerned unfunded pension liabilities that arose in connection with the discharge of public service obligations, or if it also covered other activities.

90 In the absence of such an assessment, the Court is not in a position to review the decision in relation to the applicant's claim that the capital injection did not correspond to a payment for transport services provided. As has been held at paragraph 46 above, an inadequate statement of reasons constitutes an infringement of an essential procedural requirement for the purposes of Article 16 SCA.

91 In light of the decision's lack of reasoning, the Court is not in a position to properly exercise its power of review with regard to the fourth part of the applicant's first plea. For this reason, the part of the decision relating to the capital injection must also be annulled.

92 It follows from all of the foregoing that the contested decision is vitiated both by a lack of reasoning on several issues and an error of law in so far as the defendant, notwithstanding the fact that unlawful aid may have been granted to Oslo Sporveier and Sporveisbussene, decided not to initiate the formal investigation procedure for aid granted between 1997 and 2008. Accordingly, the decision to close the case must be annulled in its entirety.

VII COSTS

93 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has requested that the defendant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. Kollektivtransportproduksjon AS bears its own costs. The costs incurred by the Norwegian Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Annuls decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene).**

2. **Orders the defendant to pay the costs incurred by the applicant.**

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Delivered in open court in Luxembourg on 22 August 2011.

Moritz Am Ende
Acting Registrar

Carl Baudenbacher
President

REPORT FOR THE HEARING

in Case E-14/10

APPLICATION to the Court pursuant to the second paragraph of Article 37 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Konkurrenten.no AS

and

EFTA Surveillance Authority,

supported by **Kollektivtransportproduksjon AS**

seeking the annulment of the EFTA Surveillance Authority's Decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveir and AS Sporveisbussene).

I INTRODUCTION

1. The applicant Konkurrenten.no AS (hereinafter "Konkurrenten") is a privately owned operator in the express bus market between the Central and Southern Region of Norway. It is owned by Olto Holding AS, which owns also Risdal Touring AS, a company active in the tour bus market. The group had a combined turnover of NOK 54 million in 2009 and operates a fleet of 17 buses serving approximately 200,000 passengers per year.

2. The case concerns the decision by the EFTA Surveillance Authority (hereinafter "ESA") to close case No 60510 on the grant of State aid by the Norwegian authorities to AS Oslo Sporveir (hereinafter "Oslo Sporveier") and AS Sporveisbussene (hereinafter "Sporveis-bussene") for the provision of scheduled bus services in Oslo. In the decision, ESA concluded that the contested measures, although being aid incompatible with the EEA Agreement, constituted existing aid and, in view of the termination of those aid measures, considered that no further measures were required.

3. The application is based on three pleas in law, namely that ESA infringed its duty to open the formal investigation procedure for aid granted between 2000 and 2008; that ESA infringed its duty to open the formal investigation procedure for aid granted between 1997 and 2000; and that ESA infringed its duty to state reasons.

II LEGAL BACKGROUND

EEA law

4. Article 61(1) of the Agreement on the European Economic Area (hereinafter "EEA") reads:

> *Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.*

5. Article 1 of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "Protocol 3 SCA") reads:

> *1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.*
>
> *2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.*
>
> *[...]*

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

6. Under Section I of Part II of Protocol 3 SCA Implementing provisions, Article 1 Definitions reads:

[...]

(b) 'existing aid' shall mean:

(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

(ii) authorised aid ...

[...]

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalization;

(c) 'new aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

[...]

(f) 'unlawful aid' shall mean new aid put into effect in contravention of Article 1(3) in Part I;

[...]

7. Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA") reads:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

8. Article 36 SCA reads:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

[...]

National law

9. Local bus transport was governed in Norway by the provisions of the 1976 Transport Act and its implementing regulations. Under these rules, concessions for local bus transport were granted for fixed ten year periods, without public tendering. The concession to carry out local bus transport included a right, and also an obligation, to serve the area or route in question, in return for ticket income from passengers.

10. Concerning additional compensation for specific, unprofitable transport services paragraph 1, Section 24a of the 1976 Transport Act provided that it was the responsibility of the County (*fylkekommune*: in this context the City of Oslo) to provide for contributions to local bus transport services it wanted to set up or continue to operate within the County. This provision is now to be

found in Section 22 of the 2002 Commercial Transport Act which replaced the 1976 Transport Act with effect of 1 January 2003.[1]

11. An amendment to the 1976 Transport Act of 11 June 1993, which took effect on 1 January 1994, permitted local bus transport to be submitted to public tendering. The concession would follow the successful bidder for the duration of the contract. The provisions relevant for the rights and duties of the concession holder remained essentially unchanged.

III PRE-LITIGATION PROCEDURE

12. By letter dated 11 August 2006, Konkurrenten lodged a complaint with ESA, claiming that the Norwegian authorities had granted State aid to Oslo Sporveier and its subsidiary Sporveisbussene.

13. In the subsequent investigation, ESA invited the Norwegian authorities to comment and requested further information from them in letters dated 7 September 2006, 29 November 2006, 19 June 2007 and 2 April 2008. The Norwegian authorities replied to these requests by letters dated 11 October 2006, 11 January 2007, 16 August 2007 and 29 April 2008. The applicant, Konkurrenten, submitted comments by letter on 20 October 2006 and further information by emails dated 25 February 2008, 25 May 2008, 4 June 2008, 15 August 2008, 1 September 2008 and 20 January 2009.

14. At the beginning of 2010, ESA and the Norwegian authorities had informal contact via both telephone and email regarding the case. The information received in this context was, according to the decision, consolidated in a letter submitted electronically on 21 April 2010 by the Norwegian authorities.

15. On 21 June 2010, ESA adopted the contested decision, closing the case on the grounds that the complaint concerned existing aid

[1] The parties disagree on whether the national legislation merely establishes a competence of the counties to provide additional compensation, or whether it involves an obligation for counties to cover losses incurred by concession holders in the discharge of their public service obligations.

incompatible with the EEA Agreement, and that there was no need for further measures.

16. By application registered at the EFTA Court on 2 September 2010, Konkurrenten requested the EFTA Court to annul the contested decision.

IV THE CONTESTED DECISION

17. The contested decision describes the recipients of the aid as follows:

AS Oslo Sporveier has since its establishment been active bus transport, metro ("T-banen"), tram ("Trikk") and ferry transport [in Oslo]. [...] As of 1934, Oslo Municipality became practically the sole owner (with 98.8% ownership) until a reorganization in July 2006. Following this reorganization, a new company, Kollektivtransportproduksjon, which is wholly owned by Oslo Municipality, became the 100% owner of AS Oslo Sporveier. According to the Norwegian authorities Oslo Municipality was involved in all issues of commercial importance relating to the carrying out if collective bus transport by AS Oslo Sporveier, including financial aspects of agreements/contracts with subsidiaries (such as AS Sporveisbussene) or other third parties.

AS Oslo Sporveier operated an in-house department which carried out most collective bus transport in Oslo.[2] On 23 April 1997 the bus transport was separated from AS Oslo Sporveier and transferred to a newly established company, AS Sporveisbussene.

Since 1994 AS Oslo Sporveier operated a tour bus division, The division was transferred to AS Sporveisbussene when the company was established in 1997. [...]

[2] The contested decision makes reference to three other operators which also held concessions for carrying scheduled bus transport "on a few specific routes in Oslo". According to information contained in the letter by the Norwegian authorities of 16. August 2007, approximately 65% of the market were covered by Sporveisbussene prior to tendering the bus routes in Oslo (Annex A.8, p. 164–165).

In 2003 AS Sporveisbussene established a subsidiary, Nexus Trafikk AS, in order to participate in tenders for operating scheduled bus transport routes in Oslo. In 2005 AS Sporveisbussene acquired the company, Arctic Express, engaged in flight bus transport and regional bus transport.

18. It further appears from the contested decision that in connection with the reorganisation of 1 July 2006, Sporveisbussene became a subsidiary of Kollektivtransportproduksjon AS, the latter undertaking taking over the operative part of Oslo Sporveier.

19. The system of concession and compensation is described in the following way in the contested decision:

Since the 1950's AS Oslo Sporveier has held concessions awarded by Oslo Municipality for carrying out scheduled bus transport in Oslo. The latest concession was awarded by Oslo Municipality on 16 November 1992 and permitted AS Oslo Sporveier to operate scheduled bus transport in the entire Oslo grid (the "Concession"). The Concession was awarded on the basis of the rules in the 1976 Transport Act and was therefore valid for ten years: It was granted with retroactive effect from 1 January 1990 until 31 December 1999.[3] The Concession was renewed for a further ten-year period or until all scheduled bus transport in Oslo had been tendered out. Since all scheduled bus transport was tendered out by 30 March 2008 the renewal period of the Concession expired on that date.

The Concession – and the previous concessions granted since 1976 – were all based on a Royal Decree issued on the basis of the Transport Act.[4] The Royal Decree provides that the grant of a concession is linked to an obligation to carry out the transport services stipulated in the concession.[5] Since the Concession was granted for carrying out scheduled bus services in Oslo, AS Oslo Sporveier was therefore under an obligation to carry out the relevant services in Oslo.

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3 The contested decision makes reference to Section 3 of the 1976 Transport Act and Section 7(2) of the Royal Decree no. 2170 of 8 December 1986 based thereupon (hereinafter the "1986 Royal Decree").

4 The contested decision makes reference to the 1986 Royal Decree.

5 The contested decision makes reference to Section 7 of the 1986 Royal Decree.

In order to compensate for the operation of bus transport services based on the Concession Oslo Municipality granted [...] funding to AS Oslo Sporveier. From the 1980's the compensation was granted as a lump sum to cover the difference between the costs and ticket revenues based on all activities carried out by AS Oslo Sporveier. Hence the lump sum also financed the operation of scheduled bus transport in Oslo to the extent that this was not covered by ticket revenue.

[...] After the separation of the bus transport division [...], AS Oslo Sporveier and AS Sporveisbussene entered into a "Transport Agreement" on the provision of scheduled bus transport services in Oslo. The Transport Agreement provided that AS Sporveisbussene carries out scheduled bus transport in Oslo based on the Concession on behalf of Oslo Sporveier. [...]

By linking the Transport Agreement to the Concession, AS Oslo Sporveier channelled the compensation received from Oslo Municipality for carrying out scheduled bus transport to its subsidiary AS Sporveisbussene. Based on the Transport Agreement (and explanations by the Norwegian authorities) AS Sporveisbussene was entitled to receive on an annual basis [...] [revenue from various ticket sales] and (iv) a subsidy. The subsidy was fixed annually for the following year on the basis of the following formula: Using as a basis the amount of costs for the previous year the parties negotiated and agreed on a "cost amount" and then deducted (i) 3% of the total to ensure efficiency improvements; and (ii) the estimated revenues for the following year. The difference represented the subsidy.

The Norwegian authorities have provided the Authority with the following figures on the annual amounts of the subsidy: NOK 97 million in 1997; NOK 60.6 million in 1998; NOK 42 million in 1999; NOK 42 million in 2000; NOK 37.3 million in 2001; NOK 19.2 million in 2002; NOK 10.5 million in 2003; and NOK 11.5 million in 2004.

In addition hereto the Norwegian authorities have explained that in the year 2004 AS Sporveisbussene received "a quality bonus" over and beyond the subsidy. The bonus represented NOK 3.9 million.

20. Furthermore, it appears from the contested decision that Sporveier and Sporveisbussene also received capital injections in 2004. ESA considered in this regard:

It is also clear that in 2004 Oslo Municipality contributed capital of NOK 800 million to Oslo Sporveier which then paid the outstanding amount of underfunding to the pension fund. The amount of NOK 111 760 000 was paid to the pension fund by AS Sporveier on behalf of AS Spoveisbussene and featured as capital injection in the accounts of AS Sporveisbussene. [...]

However, in this context the Authority points out that the pension obligations of AS Sporveisbussene did not constitute new costs but were costs accrued in the past which had just technically been kept outside the general accounts of the company. The only reason the specific costs of the pension obligations in question were paid later than when they accrued was a change in the accounting principles. Since all costs related to bus transport activities of AS Sporveisbussene were, under the terms of the Concession, ultimately compensated for by Oslo Municipality, pension costs normally also formed part of the costs financed by Oslo Municipality. Hence the payment for the pension obligations would otherwise have constituted an integral part of the compensation granted to AS Sporveisbussene. On this basis the Authority concludes that the capital injection in 2004 to cover underfunding of pension obligations (in respect of costs accrued until the end of 2002) constitutes part of the overall costs to be covered by the compensation to AS Sporveisbussene.

21. In its assessment whether the aid constituted new or existing aid, ESA found that the aid was existing aid. It considered that the compensation for carrying out bus transport in Oslo was inherently linked to the concession awarded by Oslo Municipality in 1990, on the basis of the 1976 Transport Act, and which was renewed in 1999. ESA observed that the sector had never been liberalised on the basis of EEA law and that the measure became State aid only in 1995 due to the opening up for competition of the sector at that time. ESA took from this that the aid constituted originally existing aid. ESA then considered whether the aid may have become new aid by alteration within the meaning of the

SCA.[6] It answered that question in the negative on the grounds that no changes had been made to the concession throughout the time, including at the time of its renewal at the end of 1999. The fact that the transport division was transferred from Oslo Sporveier to Spoeveisbussene in 1997 was considered to be a merely administrative act which did not involve any changes in the nature of the bus transport activities. ESA concluded:

On the basis of the above the Authority considers that the Concession has not been altered within the meaning of the state aid rules since 1990 until its full expiry on 30 March 2008. Hence, in line with Article 1(b)(i) and (v) of Part II of Protocol 3 to the Surveillance and Court Agreement the Authority considers that the compensation granted on the basis of the Concession to AS Oslo Sporveier and AS Sporveisbussene qualifies as existing aid.

22. Assessing the compatibility of the aid on the basis of Regulation 1370/2007[7], ESA considered, on the following grounds, that a public service obligation existed:

[...]

The obligation to carry out scheduled bus transport has been imposed on AS Oslo Sporveier and on AS Sporveisbussene respectively based on three measures: (i) The 1976 Transport Act and the implementing Royal Decree state that the grant of concessions involves an obligation to carry out the transport services stipulated in the concessions; (ii) the Concession, granted initially to AS Oslo Sporveier, refers to the carrying out of collective bus transport in Oslo; and (iii) the Transport Agreement delegated, as of April 1997, the responsibility to carry out bus transport services in Oslo based on the Concession to AS Sporveisbussene. The Authority considers that the duties are clearly identified and described in the Concession [...].

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6 The contested decision makes, at this point, reference to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 13.

7 Regulation 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ 2007 L 315, p. 1, referred to at point 4a of Annex XIII to the EEA Agreement.

23. Turning to the question whether the Norwegian authorities demonstrated that the amount of compensation received by Oslo Sporveier and Sporveisbussene did not exceed what was necessary to cover the costs associated with discharging the public service obligation, ESA found that this was, for the following reasons, not the case:

First, the Authority notes that as regards AS Oslo Sporveier, the company received a lump sum without any reference to costs incurred in the past or the future. As regards Sporveisbussene, the Authority notes that besides keeping ticket revenues, in all years between 1997 and 2004, the company received a subsidy to cover the gap between revenues and costs. Although the subsidy amount was based on an initial cost estimate, the subsidy was not based on a determination of real costs and the amount was subsequently the subject of negotiations between the parties to the Transport Agreement. Moreover, in 2004 a bonus was granted. Secondly, the Authority notes that the Norwegian authorities have not submitted information showing that AS Oslo Sporveier and AS Sporveisbussene had arrangements for allocating costs nor that the accounts for carrying out collective bus transport services in Oslo were kept separate from any other commercial activities carried out by AS Oslo Sporveier and AS Sporveisbussene, such as operating tour busses.

24. With regard to the question whether there was a need to propose any appropriate measures, the contested decision reads:

[...] However, in the present case, the Norwegian authorities, between 2003 and 2008, gradually phased out the Concession for the provision of scheduled bus transport services in Oslo and subjected all such services to public tenders by 30 March 2008. The conclusion of this process automatically terminated both the Concession, the Transport Agreement and the compensation in favour of AS Oslo Sporveier and AS Sporveisbussene. [...]

Given the termination of the existing state aid measures by the Norwegian authorities the Authority considers that no further measures are required in this case.

V FORMS OF ORDER SOUGHT BY THE PARTIES

25. The applicant, Konkurrenten.no AS, requests the Court:

    (i) to annul EFTA Surveillance Authority Decision No. 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene)

    (ii) to order the Defendant to pay the costs.

26. The defendant, the EFTA Surveillance Authority, claims that the Court should:

    (i) dismiss the Application as unfounded;

    (ii) order the Applicant to pay the costs.

27. Kollektivtransportproduksjon AS has intervened in support of the EFTA Surveillance Authority.

VI WRITTEN PROCEDURE

28. Pleadings have been received from:

    – the applicant, represented by Jon Midthjell, advokat;

    – the defendant, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as agents.

29. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

    – the European Commission (hereinafter "the Commission"), represented by Leo Flynn and Tim Maxian Rusche, members of its Legal Service, acting as agents.

Admissibility

30. The applicant submits, undisputed by the defendant, that the application is admissible. In particular, Konkurrenten asserts that it has *locus standi* with regard to its pleas that the defendant failed to open the formal investigation procedure in his capacity as "party concerned" under Article 1(2) in Part I of Protocol 3 SCA, as the defendant closed the case without opening the formal

investigation procedure.[8] Moreover, the applicant considers that it is also individually concerned by the decision because its position on the market is substantially affected by the aid.[9] It is claimed that the aid provided Sporveisbussene the financial means to acquire Arctic Express AS and to aggressively enter the express bus market, thereby sustaining additional losses.

Identification of the relevant aid measures and admissibility of certain arguments raised by the defendant

31. The defendant submits that the relevant aid measure is the system of public service compensation for Oslo Sporveier which, in its view, consisted of a combination of several elements: The Transport Act, the implementing regulation and the area concession granted to Oslo Sporveier. ESA claims that this system of aid, which remained basically unchanged over time, provided that a concession-holder which operated unprofitable routes, such as Oslo Sporveier, received compensation for the operation of those routes. In that regard, ESA draws attention to the fact that both in 1992 and 2001 the concessions had retroactive effect, yet Oslo Sporveier continued to receive funding during the periods even at the times when the concession had elapsed.

32. The applicant takes the view that the definition of the aid applied by ESA in its defence has no basis in the contested decision which, in its opinion, considered only the concession to be the relevant aid measure.

33. In that regard, Konkurrenten refers to the wording of the contested decision, to the fact that the contested decision unlike the defence did not assess whether there have been any relevant changes to the applicable legislation, that the contested decision was adopted shortly after ESA received a copy of the concessions

[8] Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 64, paragraphs 61–62, 64; Case T-388/03 *Deutsche Post* v *Commission* [2009] ECR II-199, paragraphs 41–43; and Case C-321/99 P *ARAP* v *Commission* [2002] ECR I-4287, paragraphs 61–62.

[9] Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 64, paragraph 49.

in April 2010, and that the contested decision found that the aid measures had been terminated when the concession phased out.

34. Based on the above, Konkurrenten submits that the arguments put forward by the defendant which build upon classification of the measures as a national system of aid constitute new reasoning and must be refused as inadmissible by the Court.[10]

35. In its rejoinder, ESA contests Konkurrenten's claim that it has introduced new elements to the case in its defence. ESA submits that the contested decision contains all of the elements that it relied on in reaching its conclusion. It is argued that reasoning, the beginnings of which are set out in the contested measure, may be enlarged upon and clarified during the proceedings.[11]

First plea: Infringement of the duty to open a formal investigation procedure for aid granted between 2000 and 2008

36. Konkurrenten claims that ESA erred in law when it assessed the aid which was granted after the expiration of the concession valid until 31 December 1999 as existing aid rather than as new aid, and that by closing the case it infringed its duty to open the formal investigation procedure in accordance with the procedure for unlawful aid. The plea is based on four separate heads: (1) The renewal of the concession constitutes an alteration of the aid; (2) the terms of the new concession as well as the conditions for granting aid were materially altered; (3) the aid must be considered as new because it was granted on an annual and discretionary basis; (4) the capital injections of 2004 were separate and on-off transactions that constituted new aid.

10 Reference is made to Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-143, paragraphs 124–126; and Joined Cases T-371/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 116–117.

11 Reference is made to Case T-16/91 *Rendo NV and Others* v *Commission* [1996] ECR II-1827, paragraph 55; Opinion of Advocate General Leger in Case C-310/93 P *British Gypsum* v *Commission* [1995] ECR I-865, point 24; and Case T-65/89 *British Gypsum* v *Commission* [1993] ECR II-389, paragraph 154.

First part: Renewal of the concession

37. The applicant bases its claim on Article 1(c) of Part II of Protocol 3 SCA, according to which alterations of existing aid are to be considered as new aid. Konkurrenten submits that Member States are not at liberty to prolong existing aid beyond the original expiry date. It argues that the new concession constituted a new aid measure or, at least, that the prolongation of the aid by more than eight years was a material alteration of that aid.[12]

38. To Konkurrenten, the 2001 concession, being a new concession, cannot be considered a measure that is "still applicable" in the sense of Article 1(b)(i) of Part II of Protocol 3 SCA. It also refers to Article 1(b)(v) of Part II of Protocol 3 SCA which provides that existing aid ceases from "the date fixed for liberalization", pointing out that the local bus market was liberalised in Norway since 1994, and has been open to competition in the EEA since 1995. Nor could a new concession be regarded as a "modification of a purely formal or administrative nature" in the meaning of Article 4(1) of Regulation 794/2004.[13]

39. Konkurrenten submits that its reading of Protocol 3 SCA is corroborated by the rationale of the concept of existing aid. In its view, Article 1(b) is intended to create only a transitional period in order to protect legitimate interests and legal certainty. However, recipients as well as the Member State concerned are well aware that once the expiry date of an aid has passed, Member States have a duty to loyally notify plans to reintroduce or continue aid. The interpretation advanced in the decision would allow Member

[12] Reference is made to Case T-332/06 *Alcoa* v *Commission* [2009] ECR II-29, paragraphs 128–129; Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 175; Joined Cases T-227/01 to T-229/09, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others* v *Commission* [2009] ECR II-3029, paragraphs 232–233; Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 80 [*sic*]; Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 73; and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraphs 51–54.

[13] Commission Regulation (EC) 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as adopted by Authority Decision No 195/04/COL.

States to prolong aid in principle in perpetuity, without giving ESA any right to order recovery of the aid, thus failing to guarantee effective protection against lasting distortions of competition.

40. The defendant contends that the aid measure – the system of public service compensation described in paragraph 31 – remained unchanged by the renewal of the concession and, consequently, that the duration of the aid measure was not altered. To ESA, the relevant point of reference to determine whether the aid has been altered is the legal basis of the aid and not the factual extension of the undertaking's activities.[14] ESA submits that the case of the renewal of a concession must be distinguished from the case law relied upon by the applicant, which in its view concerned the extension by legislation or regulation of aid schemes of predetermined duration. ESA argues that it was not the concession in itself that entitled Oslo Sporveier to receive aid, but the provisions of the Transport Act according to which Oslo Sporveier had a right to compensation for fulfilling its public service obligation.

41. Furthermore, the defendant submits that in the assessment of whether a change to an aid measure has the effect of turning hitherto existing aid into new aid, the Commission has examined whether the change is substantive in nature.[15] The Commission has taken account of the nature of the advantage, the aim pursued with the advantage, the basis on which the advantage is made, the persons and bodies affected by it and the relevant sources of finance. In contrast, the Commission has not looked into legislative changes which are not a part of the aid measure in question.

[14] Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraphs 23, 28–29 and 23–33; and Opinion of Advocate General Fenelly in Joined Cases C-15/98 and C-105/99 *Italian Republic and Sardegna Lines - Servizi Marittimi della Sardegna SpA* v *Commission* [2000] ECR I-8855, point 64.

[15] Reference is made to Commission Decision of 24 April 2007, case E 10/2005, paragraph 33; Commission Decision of 4 April 2007 in case E 7/2005 – *Finnish guarantee schemes*; Commission Decision of 20 April 2005 in case E 8/2005 – *Spanish Broadcaster RTVE*, point 2.2; and Commission Decision of 22 March 2006 in case E 22/2004 regarding direct tax incentives in favour of export related activities, paragraphs 34–35.

42. In this regard, ESA points out that the renewal of the concession meant that Oslo Municipality continued to impose on Oslo Sporveier the public service obligation and the Municipality continued to pay for the service on the same legal basis as before the renewal.

43. Apart from considering ESA's representation of the relevant aid measure to be inadmissible (see above, paragraphs 31–35), the applicant also disagrees with ESA's description of the national law. Konkurrenten claims that the law was build on the tenet that an operator had to obtain a concession before offering commercial services,[16] and that the authorities could attach a wide set of conditions to the concessions and thereby exercise control, including public price control, over each operator and market.[17] According to Konkurrenten, neither was Oslo Sporveier entitled to the 2001 concession after the old concession had expired, nor was it entitled to aid once the concession was granted. To support the latter point, the applicant refers to a report of the Office of the City Auditor of Oslo (hereinafter "the City Auditor"), according to which the City Government rejected in 1996 the idea of entering an agreement with Oslo Sporveier on granting aid beyond the annual budget period, because such an agreement would unduly tie up the discretion of the City Council in future budgets.[18] According to Konkurrenten the 1976 Transport Act, and specifically Section 24a, was not established as a national measure to grant aid to concession holders by overcompensating them for the transport services provided, but concerns the separation of powers between the government and the counties.[19]

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16 Reference is made to Articles 3, 5, 7, 8 and 10 of the 1976 Transport Act.

17 Reference is made to Article 13 of the 1976 Transport Act.

18 Reference is made to Report 22/2006 on control and monitoring of subsidies to public transport by the Office of the City Auditor in Oslo of 6 November 2006, p. 12 (Annex A.12).

19 Reference is made to the preparatory works on Section 22 of the 2002 Commercial Transport Act, which corresponds to Section 24a of the 1976 Transport Act, Ot. prp. nr. 74 (2001–2002), p. 8. The relevant part reads: "*Through the EEA Agreement, Norway is bound by the general rules on state aid which also takes effect on the area regulated by this law. [...] The rules require that arrangements of grants within the transport sector is* [sic] *designed and enforced so that no overcompensation is given for the services agreed/stipulated. Any overcompensation can be recovered pursuant to the law.*" (translation by the applicant).

44. In the rejoinder, the defendant maintains that the 1976 Transport Act establishes the basis of a system of aid. It points out that it is irrelevant whether or not this was the intention or the objective of the legislator, as the concept of aid is defined according to the effects of the measure, without it being necessary to take account of its causes or aims or the particular situation of the bodies distributing or managing the aid.[20] The report of the City Auditor is considered to be without value for the examination of this question because it does not analyse the provisions providing for the aid to Oslo Sporveier and Sporveisbussene. Moreover, ESA takes the view that overcompensation is an example of incompatible aid, i.e. where compensation for public services is excessive. Thus, it considers that the reference of the preparatory works to "overcompensation" supports, rather than contradicts, the existence of a national system of aid if it is stated that aid granted within the system should be compatible by ensuring that there is no overcompensation.

Second part: Terms and conditions materially altered

45. The applicant submits that whether aid may be classified as new aid or as an alternation of existing aid must be determined by reference to the provisions providing for it.[21] Where the alteration affects the actual substance of the original scheme that latter is transformed into a new aid scheme; there can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.[22]

46. The applicant considers the decision to be manifestly incorrect in stating that no changes were made to the concessions during the entire period from 1990 to 2008.[23] Konkurrenten first of all refers to the aspects treated by the other parts of the first plea: to the

[20] Reference is made to Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraphs 27 and 28 [*recte*: paragraph 13]; and Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 21.

[21] Reference is made to Case C-44/93 *Namur-Les Assurances du Credit* [1994] ECR I-3829, paragraph 28.

[22] Reference is made to Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111.

[23] Reference is made to the contested decision, at p. 16.

extension of the aid by the new concession, to what it considers to be annual and discretionary budget grants, and to the separate decision to make a NOK 800 million investment in Oslo Sporveier in 2004.

47. Apart from that, the applicant claims that under the 1990 concession, Oslo Sporveier held an area concession that was restricted by five and six separate route concessions granted to two competitors, Norgesbuss Oslo AS and Ing. M. O. Schøyens Bilcentraler AS respectively. In contrast, the 2001 concession was granted as an exclusive area concession, thereby removing the restraints posed by the route concessions.[24] It is claimed that these changes were part of a significant reform of public transport in the City of Oslo in 2001, which included a reorganisation of Oslo Sporveier: Oslo Sporveier was intended to continue as a purchasing organisation of transport services, whereas the performance of those services would be transferred to a separate holding company. Sporveisbussene should compete on the same terms as privately owned companies in the market and eventually be put up for sale, while local bus transport market should become subject to competitive tendering.[25]

48. The defendant maintains that no changes were made to Oslo Sporveier's concession between 1992 and its expiry in 2008.[26] It is asserted that contrary to what the applicant claims, the route concessions held by Ing. M. O. Schøyens Bilcentraler AS and Norgesbuss AS were simultaneously prolonged with Oslo Sporveier's area concession.[27] It is further submitted that even if some changes were made to the two other route concessions

[24] Reference is made to the decision by the City of Oslo of 16 November 2001 to grant concessions, including the applications and accompanying documents (Annex A.11.4).

[25] Reference is made to case 265/01, proposal for an overall strategy on ownership and organization of public transport in Oslo from the City Government, of 20 September 2001 (Annex A.11.1).

[26] Reference is made to the 1990 area concession granted to Oslo Sporveier dated 16 November 1992 (Annex A.11.2, p. 387) and the decision by the City of Oslo of 16 November 2001 to grant concessions, including the applications and accompanying documents (Annex A.11.4, p. 432).

[27] Reference is made to the decision by the City of Oslo of 16 November 2001 to grant concessions, including the applications and accompanying documents (Annex A.11.4, p. 432).

which had an effect on Oslo Sporveier's operations, such changes cannot alter the classification of the aid.[28]

Third part: Aid granted on an annual and discretionary basis

49. The applicant contends that the concession did not carry any right for Oslo Sporveier to receive aid. Rather, it claims that the aid was granted by the City of Oslo on the basis of its annual budget, the implication being that the aid granted by the City was discretionary and independent of the duration of any concession granted. In that regard, Konkurrenten points out that the City Auditor categorised the contested measures as annual subsidies to Oslo Sporveier, and claims that the City Government rejected in 1996 the idea of entering an agreement with Oslo Sporveier on granting aid beyond the annual budget period, because such an agreement would unduly tie up the discretion of the City Council in future budgets.[29] On that basis, the applicant submits that each annual budget should be considered as a separate aid measure, and be consequently assessed as new aid.[30]

50. The defendant reiterates that the aid must be seen in the legal framework governing it. In the alternative, ESA contends that even if the applicant would be correct in asserting that the legal basis of the aid granted was the City's discretionary budget, each individual grant of aid would nevertheless be existing aid. It is considered inconceivable that each individual aid would have to be notified merely because it was granted as part of annual budgetary decisions. ESA contends that in this case the long standing practice of the City of Oslo, which existed prior to the formation of the EEA Agreement, to provide funding for the public services performed by Oslo Sporveier must be considered as an existing system of aid within the meaning of Article 62 EEA.[31]

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28 Reference is made to Case C-44/93 *Namur-Les Assurances du Credit* [1994] I-3829, paragraph 28.

29 Reference is made to Report 22/2006 on control and monitoring of subsidies to public transport by the Office of the City Auditor in Oslo of 6 November 2006, p. 8, 12 and 20 (Annex A.12).

30 Reference is made to Joined Cases T-227/01 to T-229/09, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others* v *Commission* [2009] II-3029, paragraphs 232–233.

31 Reference is made to ESA decision no. 491/09/COL (Norsk Film).

The imprecise way of determining the level of the public service compensation is considered a problem for the assessment of the compatibility of the aid, but deemed [*recte*: not] to be significant for the classification of the aid as existing or new.

51. In its reply, the applicant submits that the alternative reasoning has no basis in the contested decision and must therefore be dismissed. Moreover, Konkurrenten rejects the alternative reasoning on the merits as implying that the mere habitude of a Member State to grant aid on an annual and discretionary basis could be sufficient to qualify as an existing aid scheme.

52. Additionally, the applicant contends in its reply that the aid must be regarded as new aid because the City of Oslo operated outside of any approved aid scheme. It is argued that no overcompensation could be paid for local bus transport under either the 1976 Transport Act or the 2002 Commercial Transport Act after 1992. Nevertheless, the decision found that the subsidy could not be considered to be a cost-based compensation. Nor was it established that Oslo Sporveier and Sporveisbussene had arrangements for allocating costs or that the accounts for carrying out collective bus transport services in Oslo were kept separate from other commercial activities such as operating tour busses. It is added that the City Auditor's 2006 report concluded that the aid was not subject to a proper written procedure, with the City of Oslo neither stipulating the objectives, the criteria for the use nor any routines for the monitoring of the aid.[32]

Fourth part: 2004 capital injections constituted new aid

53. The applicant asserts that the NOK 800 million investment in Oslo Sporveier in 2004, of which Sporveisbussene received NOK 111.7 million, must be considered as separate, one-off transactions constituting new aid. It is claimed that Oslo Sporveier was not entitled to this aid, neither on the basis of the concession nor the system of aid as put forward in the defence, and that the

[32] Reference is made to Report 22/2006 on control and monitoring of subsidies to public transport by the Office of the City Auditor in Oslo of 6 November 2006, p. 8 and 20 (Annex A.12).

decision to make the capital injection was taken separately from the annual grants, as shown by the fact that in the same year, Sporveisbussene additionally received an annual subsidy of NOK 11.5 million and a "quality bonus" of NOK 3.9 million.

54. Konkurrenten argues that the transactions were investments by the City of Oslo in its capacity as the owner of the company and not payments for transport services performed. Reference is made to statements of the City of Oslo that it had no obligation based on law to solve the problem with underfunding of the pension fund.[33] It is pointed out that the contested decision established that the underfunding had never been reflected in the accounts of Oslo Sporveier or Sporveisbussene. It is further claimed that following the capital injection, Oslo Sporveier outsourced its pension fund and stated that by doing so it "liberated" NOK 485 million from its present pension fund, that it would use NOK 168 million to eliminate the current underfunding, set aside NOK 131 million for future pension costs and on top of that had received NOK 186 million in "fresh" money.[34]

55. The defendant submits that the investments form part of the aid system identified, and are accordingly to be considered as existing aid as well. In that regard, ESA contends that the pension obligations, which these capital injections covered, did not constitute new costs, but were costs that had been accrued in the past and had only been kept outside of the company's general accounts due to the use of the "corridor solution" accounting principle. In the rejoinder, it is claimed that the annual compensation included, since 1995, amounts to cover higher premiums intended to make-up for the underfunding over a 25 year period. However, when Sporveisbussene's pension fund was outsourced in 2004, Norwegian law required it to abandon the "corridor solution" and to pay up the outstanding premiums.[35]

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[33] Reference is made to the letter by the City of Oslo of 4 January 2007, annexed to the letter from the Ministry of the Government Administration and Reform to ESA of the same day (Annex A.6, p. 86).

[34] Reference is made to the press release of Oslo Sporveier of 25 November 2005 "*485 millioner kroner frigjøres ved overgang til forsikret tjenestepensjon*" (Annex A.19, p. 609).

[35] Reference is made to Section 8c-11 in conjunction with paragraphs 1 and 3 of Section 8c-10 of the 1988 Insurance Activity Act (Lov 1988-06-10 nr 39: *Lov om forsikringsvirksomhet*).

56. In ESA's view, the change in accounting principle – the abandoning of the "corridor solution" – is a mere technical adjustment that cannot be qualified as a substantial alteration entailing a re-qualification of the system of aid (the Transport Act, the implementing regulation and the area concession) as new aid.[36] It is argued that the change in accounting principle had impact neither on the amount necessary to cover the underfunding, nor on the duration of the aid, nor on the use of the aid by the recipient. On the last aspect, it is pointed out that the funds were never at the disposition of Sporveisbussene but were directly paid to "Oslo Sporveiers Pensjonskasse".

57. Concerning Konkurrenten's assertion on the outsourcing of Oslo Sporveier's pension fund, ESA claims that this operation concerned pension funds for companies other than Sporveisbussene,[37] whose pension fund had already been outsourced from "Oslo Sporveiers Pensjonskasse" to Vital Forsikring ASA at that time.[38] ESA also rejects Konkurrenten's claim that the City of Oslo was under no legal obligation to rectify the underfunding of the pension fund. ESA asserts that local authorities in Norway and companies owned by them were under an obligation to provide their employees upon retirement with an indexed pension equal to 66% or 70% of their final salary, and that the national authorities required the rectification of the underfunding.[39] ESA argues that the statement by the City of Oslo referred to by the applicant was made at an early stage in the administrative procedure, is contradicted by the subsequent

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[36] Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 28; and Joined cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others* v *Commission* [2008] ECR II-3269, paragraph 362 (pending appeal in Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato "Venezia vuole vivere"* v *Commission*).

[37] The outsourcing of the pension fund of Oslo Sporveier, Oslo Tbanedrift AS and Oslo Sporvognsdrift AS from "Oslo Sporveiers Pensjonskasse" to "Storebrand".

[38] Reference is made to a letter from Sporveisbussene to Oslo Sporveiers Pensjonskasse of 4 June 2004 (Annex D.1, p. 1).

[39] Reference is made to the letter by the City of Oslo of 4 January 2007, annexed to the letter from the Ministry of the Government Administration and Reform to ESA of the same day (Annex A.6, p. 87 and 88); and Section 8c-11 in conjunction with paragraphs 1 and 3 of Section 8c-10 of the 1988 Insurance Activity Act (Lov 1988-06-10 nr 39: *Lov om forsikringsvirksomhet*).

statements of the Norwegian authorities and that accordingly, that statement cannot be given any weight.

58. In the alternative, if the capital injection should be regarded as a separate aid measure by the Court, ESA argues that the transaction is severable from the original aid measure within the meaning of the *Gibraltar* judgment and that therefore, it cannot have an effect on the classification of the original system of aid if the capital injection is regarded as new aid.[40]

Second plea: Infringement of the duty to open a formal investigation procedure for aid granted between 1997 and 2000

59. Konkurrenten claims that the defendant erred in law when it assessed the aid which was granted from 1997 until the expiry of the concession on 31 December 1999 as existing aid rather than as new aid, and that by closing the case it infringed its duty to open the formal investigation procedure in accordance with the procedure for unlawful aid.

60. On the basis of Article 1(b)(v) of Part II of Protocol 3 SCA, the applicant submits that ESA should have considered the aid as being new from 1995 onwards, having established in the contested decision that the market for bus transport has been open for competition in the EEA since 1995. Referring to the *Alzetta* case, the applicant argues that that case does not apply to circumstances such as in the present case, where the national market has already been liberalised (in 1991) before the EEA market was liberalised (in 1995).[41]

61. Konkurrenten reiterates its view that the aid was granted on an annual and discretionary basis by the City of Oslo through the city budget. The applicant further asserts that in the wake of the liberalisation of the national bus market, neither the City of Oslo

[40] Reference is made to Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111.

[41] Reference is made to Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraphs 141–147.

nor Oslo Sporveier could have had legitimate expectations that the aid would be treated as existing aid.[42] Consequently, it was foreseeable to the City of Oslo that the aid could be contrary to Article 61 EEA and should therefore have been notified before the next annual and discretionary grant was made.

62. In the alternative the applicant maintains that the contested aid must be regarded at the latest as new aid from 1997, when the bus division of Oslo Sporveier was transferred to Sporveisbussene to allow the new subsidiary better opportunities to compete in the liberalised market. Konkurrenten does not consider the reorganisation as such to be relevant. However, it is claimed that the City of Oslo was positioning the bus division from 1997 to trump the emerging competition and later also started preparations to sell the company. Under these circumstances, neither the City of Oslo nor Oslo Sporveier could have entertained legitimate expectations in seeing the aid treated as existing aid. Konkurrenten argues that the effectiveness of Article 61 EEA would be significantly reduced if aid granted to a publicly owned and formerly almost *de facto* monopolist following the liberalisation of a market would be beyond the reach of any recovery order.

63. The defendant submits that it is apparent from the wording of Article 1(b)(v) of Part II of Protocol 3 SCA that it is applicable only when the market was liberalised by virtue of EEA law. It is pointed out that the contested decision concluded, on that basis, that the system of aid became existing aid in 1995. Moreover, ESA contends that internal reorganisation within Oslo Sporveier, such as entrusting the bus services to its subsidiary Sporveisbussene, is irrelevant with regard to the classification of

[42] Reference is made to Case T-288/97 *Regione Friuli Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraphs 89–90.

the aid.[43] Concerning the arguments identical with the first plea, ESA refers to its respective reasoning and asks the Court to reject the plea on the same basis.

Third plea: Infringement of the duty to state reasons

64. The applicant claims that ESA infringed its duty to state reasons, and that the contested decision should accordingly be annulled. It is submitted that Article 16 SCA requires that a decision stets out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the Authority to its decision may be understood.[44]

65. Konkurrenten considers the contested decision to be opaque on the assessment of whether the measure is new or existing aid. In particular, the applicant submits that the decision offers no reasons why only a change in the terms of the concession should be relevant as a matter of law, when the concession itself did not entitle the holder to receive any aid. Furthermore, it is criticised that the decision contains no explanation why the fact that a new concession was granted does not qualify as a relevant change. Konkurrenten maintains that by not explaining these issues, it was not possible to understand how the decision arrived at the conclusion that the aid must be considered as existing.

66. The defendant submits that the statement of reasons required under Article 16 SCA must disclose in a clear and unequivocal fashion the reasoning followed by the Authority, in such a way as to enable the parties to ascertain the reasons for the decision adopted and enable the EFTA Court to exercise its power of

[43] Reference is made to Commission Decision of 29 November 2007 in case C-56/2007 – France, *Garantie illimitée de l'Etat en faveur de La Poste*, paragraphs 93–97; Commission Decision in case E 14/2005 – Portugal, *Compensation payments to public service broadcaster RTP*, paragraphs 78–80, Commission Decision of 20 April 2005 in case E 10/2005 (ex C 60/1999) – France, *Redevance radiodiffusion TF1*, paragraph 33; and Letter from the Commission to Germany of 8 May 2000 proposing appropriate measures in case E 10/2000, Landesbank, point 7, first paragraph.

[44] Reference is made to Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority* [1994–1995] EFTA Ct. Rep. 59, paragraph 26.

review. To ESA it is, however, not necessary for the reasoning to go into all the various relevant facts and points of law. The question whether the statement of reasons for a decision meets those requirements must be assessed with regard not only to its wording, but also to its context and to all the legal rules governing the matter in question.[45]

67. Against this standard, ESA considers that the Decision adequately sets out the facts and elements in law upon which it is based, and therefore complies with Article 16 SCA. ESA asserts that the applicant *de facto* restates his previous arguments, and adds in that respect that the duty to state adequate reasons must be distinguished from the question whether the reasoning is well founded.[46] It submits that whether or not the case-law regarding the extension of aid schemes is applicable is an issue of substance, which would alter the classification of the aid, but that there was no obligation for ESA to explain why it did not consider this case-law to be relevant.

Written observations of the European Commission

68. The Commission notes that it is undisputed between the parties that the payments to Oslo Sporveier constituted existing aid when the EEA Agreement entered into force. The decisive question for the present case therefore is how the expression "alterations to existing aid" in Article 1(c) of Part II of Protocol 3 SCA is to be interpreted.

69. To begin with, the Commission considers two different scenarios where aid may be altered: first, alterations which affect the actual substance of the original scheme and second, alterations which are severable from the scheme. To establish the first kind

[45] Reference is made to Joined Cases E-5/04 to E-7/04 *Fesil and Finfjord* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, paragraphs 96–97; and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair* v *Commission*, judgment of 10 December 2010, not yet reported, paragraph 96.

[46] Reference is made to Case C-413/06 P *Bertelsmann AG and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 181; Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35; and Case C-159/01 *the Netherlands* v *Commission* [2004] ECR I-4461, paragraph 65.

of alteration which affects the entire scheme, it is decisive to examine whether the provisions providing for the aid have been altered.[47] In the other case, if the alterations are severable from the original scheme, the existing aid scheme remains existing and the severable part is to be assessed on its own as new aid.[48]

70. The Commission submits that only substantial alterations affect the substance of a scheme,[49] such as changes in the objective pursued,[50] a change of the content of the advantage or the volume of the aid,[51] or the introduction of new conditions for eligibility for the aid as well as new mechanisms of granting the aid.[52] Other examples are the prolongation in time of an aid measure that initially had been limited in time,[53] as well as an increase in the budget of 50%.[54] Generally speaking, Member States must notify the Commission of alterations which, because of the effect that they have on undertakings or their competitive relationship, may influence the Commission's decision. On the

47 Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraphs 28 and 35.

48 Reference is made to Joined Cases 91/83 and 127/83 *Heineken* [1984] ECR 3435, paragraphs 21–22; Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraphs 109–114; Joined cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others* v *Commission* [2008] ECR II-3269, paragraph 362 (pending appeal in Joined Cases C-71/09 P, C-73/09 P und C-76/09 P *Comitato "Venezia vuole vivere"* v *Commission*); Case T-297/02 *ACEA* v *Commission* [2009] ECR II-1683, paragraphs 113, 117 and 127 [*sic*]; Case T-301/02 *AEM* v *Commission* [2009] ECR II-1757, paragraphs 117 and 121; Case T-189/03 *ASM Brescia* v *Commission* [2009] ECR II-1831, paragraphs 97 and 101; and Case T-222/04 *Italy* v *Commission* [2009] ECR II-1877, paragraphs 90 and 94.·

49 Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 23; and Joined cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others* v *Commission* [2008] ECR II-3269, paragraph 362 (pending appeal in Joined Cases C-71/09 P, C-73/09 P und C-76/09 P *Comitato "Venezia vuole vivere"* v *Commission*).

50 Reference is made to Opinion of Advocate General Trabucchi in Case 51/74 *Hulst* [1975] ECR 99, point 7.

51 Reference is made to Opinion of Advocate General Lenz in Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3831, points 77–113.

52 Reference is made to Opinion of Advocate General Fennelly in Joined Cases C-15/98 and C-105/99 *Sardegna Lines* v *Commission* [2000] ECR I-8855, points 66–75.

53 Reference is made to Case C-138/09 *Todaro Nunziatina & C. Snc*, judgment of 20 May 2010, not yet reported, paragraph 47; and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 175.

54 Reference is made to Case C-138/09 *Todaro Nunziatina & C. Snc*, judgment of 20 May 2010, not yet reported, paragraph 47.

other hand, it is not necessary to communicate alterations of a merely formal or administrative nature.[55]

71. Turning to its decision practice, the Commission explains that in general, in line the Opinion of Advocate General Trabucchi in *Hulst*,[56] it takes into account the nature of the benefit, the objective pursued by the measure and the beneficiary institutions or undertakings, the legal basis and the source of financing.[57]

72. In the transport sector, the Commission has dealt with the issue of possible substantial alterations to existing aid in three decisions.[58] The Commission notes that the common feature in these cases is that the State aid was based on certain principles for calculating compensation payments, which were laid down in generally applicable rules. These rules were applicable for an undetermined duration; the actual aid amount was calculated and approved annually on the principles laid down in those rules. These competent authorities enjoyed no discretion but were simply applying predetermined rules. The Commission found that only substantial changes to the rules for calculating the compensation constituted substantial alterations of the aid schemes, but not the application of those rules.

73. Turning to the first part of the first plea, that the renewal of the concession is a substantive alteration of the aid, the Commission

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55 Reference is made to Opinion of Advocate General Mancini in Joined Cases 91 and 127/83 *Heineken* [1984] ECR 3456, point 5; and Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (referred to at point 2 of Protocol 26 to the EEA Agreement).

56 Reference is made to Opinion of Advocate General Trabucchi in Case 51/74 *Hulst* [1975] ECR 99, point 7.

57 Reference is made to Commission Decision of 28 October 2009 in Case E 2/2008 – *Financing of ORF*, point 124; Commission Decision of 24 April 2007 in Case E 3/2005 – *Financing of public service broadcasters in Germany*, point 197; Commission Decision of 20 April 2005 in Case E 10/2005 – *Redevance radiodiffusion*, points 31-33; Commission Decision of 20 April 2005 in Case E 8/2005 – *State aid in favour of the public Spanish broadcaster RTVE*, after point 47.

58 Commission Decision of 20 December 2006 in Case C-58/2006 – *Verkehrsverbund Rhein-Ruhr*; Commission Decision of 10 October 2007 in Case C-42/2007 – *Reform of the pension system of RATP*; and Commission Decision of 28 January 2009 in Case E 4/2007 – *French airport charges*, points 57-60.

submits that in order to determine whether it is well founded, it is necessary to establish whether the aid was initially limited in time. To the Commission, it is ultimately a question of Norwegian law to identify the legal basis for the granting of aid. However, on the basis of the elements submitted by the parties, the Commission considers paragraph 1 of Section 24a of the 1976 Transport Act to constitute the legal basis of the aid. In its view, the concession is rather a criterion for eligibility for compensation payments, rather than the legal basis for the payment itself. Based on that understanding of Norwegian law, it is submitted that the aid scheme was unlimited in time and consequently, that the renewal of the concession constituted a decision to award aid based on an existing aid scheme. Accordingly, the first part of the first plea is considered unfounded.

74. Based on the assumption that the concession is not a part of the aid scheme itself, the Commission submits that also the second part of the first plea must be rejected. The Commission argues that the alleged changes to the concession do not change the provisions providing for the aid and that an expansion of the beneficiary's activities does as such not constitute a material alteration of the aid.[59] Equally, the Commission considers that the reform of the corporate structure of Oslo Sporveier is without any impact on the provisions providing for the aid.[60]

75. Addressing the third part of the first plea, the Commission outlines its understanding of the applicable Norwegian law that the City of Oslo enjoyed discretion in granting concessions and could, on that occasion, decide to reduce or increase the number of unprofitable bus routes which an undertaking was obliged to operate under the concession. However, once the concession was granted, the City was under an obligation to cover losses and

[59] Reference is made to Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 35; Commission Decision of 28 October 2009 in Case E 2/2008 – *Financing of ORF*, points 132–133; Commission Decision of 24 April 2007 in Case E 3/2005 – *Financing of public service broadcasters in Germany*, points 207–211.

[60] Reference is made to Commission Decision of 20 April 2005 in Case E 10/2005 – *Redevance radiodiffusion*, point 33; Commission Decision of 20 April 2005 in Case E 8/2005 – *State aid in favour of the public Spanish broadcaster RTVE*, point 52.

could not, in a discretionary manner, increase, reduce or abolish the yearly payments.

76. Based on that understanding, the Commission considers the present case to be comparable with its decisions in *Verkehrsverbund Rhein-Ruhr* and *Reform of the pension system of RATP* and *French airport charges*.[61] It is argued that as in *Verkehrsverbund Rhein-Ruhr* and *Reform of the pension system of RATP*, the precise amount of the payments was established on an annual basis by the public authority, but in establishing the amount, the authority had no discretion; rather, it was applying mechanically the mechanism established by the statutory provisions. Accordingly, the Commission submits that the third part of the first plea must be rejected.

77. With regard to the fourth part of the first plea, concerning the 2004 capital injections, the Commission submits that any public support to an undertaking in order to finance pension obligations in principle constitutes State aid.[62] The Commission considers that there is no intrinsic link between aid granted to fund the pension deficit and the compensation payments for public service obligations awarded by the City of Oslo by granting licences. Moreover, the Commission notes that Oslo Sporveier and Sporveisbussene provide commercially viable bus services beyond their public service obligations, whereas the capital injection concerned unfunded pension liabilities for all staff of the companies rather than for only those members of staff engaged in the public service activities. Consequently, the Commission

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61 Commission Decision of 20 December 2006 in Case C-58/2006 – *Verkehrsverbund Rhein-Ruhr*; Commission Decision of 10 October 2007 in Case C-42/2007 – *Reform of the pension system of RATP*; Commission Decision of 28 January 2009 in Case E 4/2007 – *French airport charges*.

62 Reference is made to Joined Cases E-5/04 to E-7/04 *Fesil and Finnfjord* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, paragraph 76; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 12; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 34; Case C-256/97 *Déménagements-Manutention Transport* [1999] ECR I-3913, paragraph 19; Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 15; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 41; Commission Decision 2008/722/EC of 10 May 2007 on State aid for OTE, points 90-102; Commission Decision 2008/204/EC of 10 October 2007 on the State aid for La Poste, points 118-148; and Commission Decision 2009/945/EC of 13 July 2009 on State aid for RATP, points 84-105.

contends that the capital injection cannot form part of the existing scheme for annual compensation payments.

78. The Commission draws the conclusion that the capital injection is severable from the annual compensation payments made under the existing aid scheme. In the absence of information that the capital injection is existing aid for other reasons, it is submitted that the 2004 capital injection is new aid and that accordingly, the fourth part of the first plea is well founded. The Commission agrees however with the defendant that due to the severability of that measure, this outcome is without impact on the qualification of the annual compensation payments as existing aid.

79. Concerning the second plea, the Commission supports the findings in the decision that the opening of the market for public passenger transport by bus was not ordered by an act of EEA law, but occurred through voluntary decisions of Member States to open their domestic markets. It argues that accordingly, the second sentence of Article 1(b)(v) of Part II of Protocol 3 SCA does not apply, as that provision requires liberalization by virtue of EEA law.[63]

80. The Commission shares the view of the defendant also with respect to the third plea. It is observed that the contested decision mentions the legislation on the basis of which the aid is granted, namely the 1976 Transport Act and the 2002 Commercial Transport Act, as well as the concessions which made Oslo Sporveier eligible for the aid, and the obligation for the City of Oslo to compensate Oslo Sporveier for the public service obligations imposed upon it by those concessions. Further the contested decision describes why the compensation payments constitute existing aid in application of the first sentence of Article 1(b)(i) and (v) of Part II of Protocol 3 SCA. The Commission concludes from this that the contested decision respects the duty to state reasons.

[63] Reference is made to Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 79.

81. In conclusion, the Commission submits that the Court should annul the contested decision insofar as it qualifies the 2004 capital injection as existing aid, and uphold the remainder of the contested decision.

Carl Baudenbacher

Judge-Rapporteur

Case E-16/10

Philip Morris Norway AS
v
The Norwegian State

CASE E-16/10

Philip Morris Norway AS

v

The Norwegian State

(Free movement of goods – Prohibition on the visual display of tobacco products – Articles 11 and 13 EEA – Measures having equivalent effect to quantitative restrictions – Selling arrangements – Protection of public health – Proportionality)

Summary of the Judgment

1. National measures adopted by an EEA State which have the object or effect of treating products coming from other EEA States less favourably than domestic products are to be regarded as measures having an effect equivalent to quantitative restrictions and thereby caught by Article 11 EEA. The same applies to rules that lay down requirements to be met by imported goods, even if those rules apply to all products alike. Any other measure which hinders access of products originating in one EEA State to the market of another also qualifies as having an equivalent effect for the purposes of Article 11 EEA. The Court notes that the visual display ban at issue in the case at hand is by its nature capable of having a restrictive effect on the marketing of tobacco products on the market in question, especially with regard to market penetration of new products.

2. Provisions concerning selling arrangements do not constitute a restriction if they apply to all relevant traders operating within the national territory and affect the marketing of domestic products and of those from other EEA States in the same manner, both in law and in fact. Taking account of the factual situation in the case at hand, it cannot be ruled out that some imported tobacco products enjoy a more favourable position on the Norwegian market than

SAK E-16/10

Philip Morris Norway AS

v

Staten v/Helse- og omsorgsdepartementet

(Fritt varebytte – forbud mot synlig oppstilling av tobaksprodukter – EØS-avtalen artikkel 11 og 13 –tiltak med tilsvarende virkning som kvantitative importrestriksjoner – salgsordninger – beskyttelse av folkehelsen – forholdsmessighet)

Domssammendrag

1. Nasjonale tiltak vedtatt av en EØS-stat som har som formål eller virkning at produkter fra andre EØS-stater får en mindre gunstig behandling enn innenlandske produkter, betraktes som tiltak med tilsvarende virkning som kvantitative importrestriksjoner, og er dermed omfattet av EØS-avtalen artikkel 11. Det samme gjelder for regler som fastsetter produktkrav for importerte varer, selv om disse regler gjelder likt for alle produkter. Ethvert annet tiltak som hindrer adgang for produkter med opprinnelse i en EØS-stat til markedet i en annen EØS-stat, anses også å ha tilsvarende virkning i henhold til EØS-avtalen artikkel 11. EFTA-domstolen nevner at forbudet mot synlig oppstilling som denne sak gjelder, ikke er ment å regulere varehandelen mellom EØS-stater. Forbudet kan imidlertid etter sin natur ha en begrensende virkning på markedsføringen av tobaksprodukter i det aktuelle marked, særlig for lansering av nye produkter i markedet.

2. Bestemmelser som gjelder salgsordninger, utgjør imidlertid ikke en restriksjon dersom de gjelder for alle berørte næringsdrivende som driver virksomhet på det nasjonale territorium og rettslig og faktisk påvirker markedsføringen av innenlandske produkter og produkter fra andre EØS-stater likt. På bakgrunn av den faktiske situasjon i den foreliggende sak kan det ikke utelukkes at enkelte

other products due to local habits and customs linked to tobacco consumption.

3. It is for the national court to determine whether the application of national law is such as to entail that the national rules on the display of tobacco products affect the marketing of products previously produced in Norway differently than the marketing of products from other EEA States or whether such an effect cannot be clearly verified and, therefore, is too uncertain or indirect to constitute a hindrance of trade.

4. The health and life of humans rank foremost among the assets or interests protected by Article 13 EEA. The States are free to decide what degree of protection they wish to assure within the limits imposed by the EEA Agreement. Tobacco control legislation clearly reflects health concerns recognised by Article 13 EEA. Nevertheless, national rules or practices which restrict a fundamental freedom under the EEA Agreement can be properly justified only if they are appropriate for securing the attainment of the objective in question and do not go beyond what is necessary in order to attain it.

5. Where the EEA State concerned legitimately aims for a very high level of protection, it must be sufficient for the authorities to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the disputed measure, it was reasonable to assume that the measure would be able to contribute to the protection of human health. In the absence of convincing proof to the contrary, a measure of this kind may be considered suitable for the protection of public health.

6. It is for the national authorities to demonstrate that their rules are necessary in order to achieve the declared purpose and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-EEA trade. Review of proportionality and of the effectiveness of the measures taken relies on findings of fact which the referring court is in a better position to make than the Court.

importerte tobakksprodukter har en mer fordelaktig stilling på det norske marked enn andre produkter, som følge av lokal skikk og bruk knyttet til tobakksbruk.

3. Det er den nasjonale domstol som må vurdere om anvendelsen av nasjonal lovgivning innebærer at de nasjonale regler om oppstilling av tobakksprodukter påvirker markedsføringen av varer som tidligere ble produsert i Norge, på en annen måte enn markedsføringen av produkter fra andre EØS-stater, eller om en slik virkning ikke klart kan fastslås og derfor er for usikker eller indirekte til å utgjøre en handelshindring.

4. Menneskers liv og helse står øverst blant de verdier og interesser som beskyttes av EØS-avtalen artikkel 13. Det er EØS-statene, innenfor begrensningene fastsatt i EØS-avtalen, som skal bestemme hvilken grad av beskyttelse de ønsker å gi. Lovgivning som har til formål å kontrollere forbruket av tobakk, gjenspeiler klart hensynet til helse som anerkjennes i EØS-avtalen artikkel 13. Likevel kan nasjonale regler eller praksis som begrenser en grunnleggende frihet etter EØS-avtalen bare være berettiget dersom de er egnet til å nå det aktuelle mål og ikke går lenger enn det som er nødvendig for å nå målet.

5. Der den berørte EØS-stat med rette tar sikte på en svært høy grad av beskyttelse, må det være tilstrekkelig at myndighetene godtgjør at det var rimelig å tro at tiltaket ville kunne bidra til å beskytte menneskers helse, selv om det måtte foreligge en viss vitenskapelig usikkerhet vedrørende det omtvistede tiltaks egnethet og nødvendighet. I mangel av klare bevis for det motsatte, kan et tiltak av denne type ses som egnet til å beskytte folkehelsen.

6. Det er de nasjonale myndigheter som må godtgjøre at reglene er nødvendige for å oppnå det erklærte mål, og at målet ikke kan nås ved bruk av mindre omfattende forbud eller restriksjoner eller ved forbud eller restriksjoner som påvirker samhandelen innenfor EØS-området i mindre grad. Undersøkelsen av forholdsmessigheten og virkningene av tiltakene som er iverksatt, bygger på faktiske forhold som den anmodende domstol har bedre forutsetninger for å foreta enn EFTA-domstolen.

JUDGMENT OF THE COURT

12 September 2011*

(Free movement of goods – Prohibition on the visual display of tobacco products – Articles 11 and 13 EEA – Measures having equivalent effect to quantitative restrictions – Selling arrangements – Protection of public health – Proportionality)

In Case E-16/10,

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 Oslo District Court (Oslo tingrett), Norway, in a case pending before it between

Philip Morris Norway AS

and

The Norwegian State, represented by the Ministry of Health and Care Services,

regarding the interpretation of Articles 11 and 13 of the Agreement on the European Economic Area (EEA), in particular, whether a rule prohibiting the visible display of tobacco products in retail outlets, such as the one established by Norwegian law, constitutes an unlawful restriction pursuant to Article 11 of the EEA Agreement, and, should such a restriction be found to exist, the criteria which are decisive in order to determine if the said display ban is proportionate for the purposes of Article 13 of the EEA Agreement,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Per Christiansen, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

* Language of the request: Norwegian.

EFTA-DOMSTOLENS DOM

12. september 2011*

(Fritt varebytte – forbud mot synlig oppstilling av tobakksprodukter – EØS-avtalen artikkel 11 og 13 – tiltak med tilsvarende virkning som kvantitative importrestriksjoner – salgsordninger – beskyttelse av folkehelsen – forholdsmessighet)

I sak E-16/10,

ANMODNING til EFTA-domstolen i medhold av artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Oslo tingrett, Norge, i en sak for denne domstol mellom

Philip Morris Norway AS

og

Staten v/Helse- og omsorgsdepartementet,

om tolkningen av artikkel 11 og 13 i Avtalen om Det europeiske økonomiske samarbeidsområde ("EØS-avtalen"), særlig med hensyn til et forbud mot synlig oppstilling av tobakksprodukter på utsalgssteder som fastsatt ved norsk lov, innebærer en ulovlig restriksjon etter EØS-avtalen artikkel 11, og dersom en slik restriksjon foreligger, hvilke kriterier som er avgjørende i vurderingen av om nevnte oppstillingsforbud er forholdsmessig i henhold til i EØS-avtalen artikkel 13, avsier

DOMSTOLEN,

sammensatt av Carl Baudenbacher, president, Thorgeir Örlygsson (saksforberedende dommer) og Per Christiansen, dommere,

Justissekretær: Skúli Magnússon,

etter å ha tatt i betraktning de skriftlige innlegg inngitt på vegne av:

* Språket i anmodningen om rådgivende uttalelse: norsk

– Philip Morris Norway AS ("the Plaintiff"), represented by Peter Dyrberg, advokat, Jan Magne JuuhlLangseth, advokat, and Michel Petite, avocat,

– the Norwegian State ("the Defendant"), represented by Ketil Bøe Moen, advokat, and Ida Thue, advokat, Office of the Attorney General (Civil Affairs),

– the Finnish Government, represented by Mervi Pere, Legal Counsellor, Ministry for Foreign Affairs, acting as Agent,

– the Icelandic Government, represented by Íris Lind Sæmundsdóttir, Legal Officer, Ministry for Foreign Affairs, acting as Agent,

– the Portuguese Government, represented by Luís Fernandes, Director of the Legal Service of the Directorate General for European Affairs, and Maria João Palma, Legal Consultant of the Directorate General for Economic Activities, acting as Agents,

– the Romanian Government, represented by Emilian Carlogea, Director of the Directorate for Trade Policy, Ministry of Economy, Trade and Business Environment, acting as Agent,

– the United Kingdom Government, represented by Stefan Ossowski, Treasury Solicitor, Treasury Solicitor's Office, European Division, acting as Agent, and Ian Rogers, barrister,

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, Florence Simonetti, Senior Officer, and Fiona Cloarec, Officer, Department of Legal & Executive Affairs, acting as Agents,

– the European Commission ("the Commission"), represented by Peter Oliver, Legal Advisor, and Günter Wilms, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Peter Dyrberg, the Defendant, represented by Ketil Bøe Moen and Ida Thue, the Finnish Government, represented by Mervi Pere, the United Kingdom Government, represented by Ian Rogers, ESA, represented by Xavier Lewis, and the Commission, represented by Peter Oliver and Günther Wilms, at the hearing on 8 June 2011,

– Philip Morris Norway AS ("saksøker"), representert ved advokat Peter Dyrberg, advokat Jan Magne Juuhl-Langseth og Michel Petite, avocat,

– Staten ("saksøkte"), representert ved advokat Ketil Bøe Moen og advokat Ida Thue, Regjeringsadvokaten, Oslo,

– Finlands regjering, representert ved Mervi Pere, Legal Counsellor, Ministry for Foreign Affairs,

– Islands regjering, representert ved Íris Lind Sæmundsdóttir, Legal Officer, Ministry for Foreign Affairs,

– Portugals regjering, representert ved Luís Fernandes, Director of the Legal Service of the Directorate General for European Affairs, og Maria João Palma, Legal Consultant of the Directorate General for Economic Activities,

– Romanias regjering, representert ved Emilian Carlogea, Director of the Directorate for Trade Policy, Ministry of Economy, Trade and Business Environment,

– Storbritannias regjering, representert ved Stefan Ossowski, Treasury Solicitor, Treasury Solicitor's Office, European Division, og Ian Rogers, barrister,

– EFTAs overvåkningsorgan ("ESA"), representert ved Florence Simonetti, Senior Officer, og Fiona Cloarec, Officer, Department of Legal & Executive Affairs,

– Europakommisjonen ("Kommisjonen"), representert ved Peter Oliver, Legal Adviser, og Günter Wilms, medlem av Kommisjonens juridiske tjeneste,

med henvisning til rettsmøterapporten

og etter å ha hørt muntlige innlegg fra saksøker, representert ved Peter Dyrberg, saksøkte, representert ved Ketil Bøe Moen og Ida Thue, Finlands regjering, representert ved Mervi Pere, Storbritannias regjering, representert ved Ian Rogers, ESA, representert ved Xavier Lewis, og Kommisjonen, representert ved Peter Oliver og Günther Wilms, i rettsmøte 8. juni 2011,

gives the following

JUDGMENT

I FACTS AND PROCEDURE

1 By a letter dated 12 October 2010, registered at the Court on 19 October 2010, Oslo District Court, made a request for an Advisory Opinion in a case pending before it between Philip Morris Norway AS and the Norwegian State, represented by the Ministry of Health and Care Services.

2 A total prohibition on the advertising of tobacco products has been in force in Norway since the introduction of such a ban in 1973. That ban, which is based on the Act of 9 March 1973 No 14 relating to the Prevention of the Harmful Effects of Tobacco (Lov om vern mot tobakksskader 9. mars 1973 nr. 14), is wide in scope as it covers all forms of marketing of tobacco products in all kinds of media.

3 The Plaintiff is a subsidiary company of one of the world's largest tobacco producers and imports tobacco products to Norway. According to information provided by the Plaintiff and the Defendant to the Court at the hearing, there was production of tobacco in Norway until 2008. This production covered cigarettes, rollyourown and cigars. All rollyourown brands were Norwegian brands and trademarks, some of which were not to be found outside Norway. As to cigarettes, the parties appear to agree that local production accounted for a considerable share of the market.

4 In April 2009, following the requisite parliamentary procedure, the Defendant adopted additional legislation which amended the existing legal framework. The new law extended the advertising prohibition to the visible display of tobacco products and smoking devices. The visual display ban allows for one exemption, that is, it does not apply to dedicated tobacco boutiques.

5 The Plaintiff filed a lawsuit before Oslo District Court against the Defendant in order to have the visual display ban set aside

slik

DOM

I FAKTA OG PROSEDYRE

1 Ved brev datert 12. oktober 2010, registrert ved EFTA-domstolen 19. oktober 2010, fremsatte Oslo tingrett en anmodning om rådgivende uttalelse i en sak som står for tingretten mellom Philip Morris Norway AS og staten v/Helse- og omsorgsdepartementet.

2 Et totalforbud mot reklame for tobakksvarer har vært i kraft i Norge siden et slikt forbud ble innført i 1973. Forbudet, som ble innført ved lov om vern mot tobakksskader 9. mars 1973 nr. 14, har et bredt virkeområde ettersom det gjelder alle former for markedsføring i alle typer medier.

3 Saksøker er et datterselskap av en av verdens største tobakksprodusenter og importerer tobakksprodukter til Norge. Ifølge opplysninger gitt EFTA-domstolen av saksøker og saksøkte under rettsmøtet, var det tobakksproduksjon i Norge frem til 2008. Denne produksjon omfattet sigaretter, rulletobakk og sigarer. Alle rulletobakksmerker var norske merker og varemerker, og enkelte av disse ble ikke markedsført utenfor Norge. Når det gjelder sigaretter, synes partene å være enige om at lokal produksjon hadde en betydelig markedsandel.

4 I april 2009 vedtok saksøkte etter den nødvendige stortingsbehandling ytterligere lovgivning som endret gjeldende regler. Den nye lov utvidet reklameforbudet til synlig oppstilling av tobakksvarer og annet røykeutstyr. Forbudet mot synlig oppstilling tillater ett unntak idet det ikke gjelder for spesialforretninger for tobakk.

5 Saksøker reiste søksmål ved Oslo tingrett for å få forbudet mot synlig oppstilling satt til side fordi det er i strid med EØS-avtalen. Saksøker gjorde gjeldende at den nye lovgivning, som innførte

because of its incompatibility with the EEA Agreement. The Plaintiff argued that the new legislation, which introduced the visual display ban on tobacco products, established a restriction which was unlawful pursuant to Article 11 EEA. The Defendant denied this, arguing, in contrast, that the new legislation was compatible with the EEA Agreement.

6 On 25 June 2010, Oslo District Court decided to refer certain questions to the Court for an Advisory Opinion, in particular, concerning the interpretation of Articles 11 and 13 EEA. In its request for an Advisory Opinion, Oslo District Court acknowledged that there is relevant caselaw of the Court and the Court of Justice of the European Union ("ECJ") with regard to traditional marketing. However, it considered it necessary to obtain additional guidance from the Court concerning the lawfulness of a general prohibition on the visible display of tobacco products within the context of Articles 11 and 13 EEA.

7 The following questions were referred to the Court:

1. *Shall Article 11 of the EEA Agreement be understood to mean that a general prohibition against the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods?*

2. *Assuming that there is a restriction, which criteria would be decisive to determine whether a display prohibition, based on the objective of reduced tobacco use by the public in general and especially amongst young people, would be suitable and necessary having regard to public health?*

II LEGAL BACKGROUND

EEA law

8 Article 11 of the EEA Agreement reads:

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

9 Article 13 of the EEA Agreement reads:

forbudet mot synlig oppstilling av tobakksprodukter, innebar en ulovlig restriksjon etter EØS-avtalen artikkel 11. Saksøkte avviste dette og hevdet tvert om at den nye lovgivning var forenlig med EØS-avtalen.

6 Den 25. juni 2010 besluttet Oslo tingrett å anmode EFTA-domstolen om en rådgivende uttalelse, særlig vedrørende tolkningen av EØS-avtalen artikkel 11 og 13. I sin anmodning om rådgivende uttalelse nevnte Oslo tingrett at det foreligger relevant rettspraksis fra EFTA-domstolen og Den europeiske unions domstol ("EU-domstolen") for så vidt gjelder tradisjonell markedsføring. Tingretten mente imidlertid at det er nødvendig med ytterligere veiledning fra EFTA-domstolen om lovligheten av et generelt forbud mot synlig oppstilling av tobakksvarer i lys av EØS-avtalen artikkel 11 og 13.

7 Følgende spørsmål ble forelagt EFTA-domstolen:

1. *Skal EØS-avtalen artikkel 11 forstås slik at et generelt forbud mot synlig oppstilling av tobakksprodukter utgjør et tiltak med tilsvarende virkning som en kvantitativ restriksjon på den frie bevegelighet av varer?*
2. *Forutsatt at det foreligger en restriksjon, hvilke kriterier vil være avgjørende for å fastslå om et oppstillingsforbud begrunnet i målet om redusert tobakksbruk i befolkningen generelt og blant unge spesielt, vil være egnet og nødvendig av hensyn til folkehelsen?*

II RETTSLIG BAKGRUNN

EØS-rett

8 EØS-avtalen artikkel 11 lyder:

Kvantitative importrestriksjoner og alle tiltak med tilsvarende virkning skal være forbudt mellom avtalepartene.

9 EØS-avtalen artikkel 13 lyder:

The provisions of Article 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.

National law

10 In Norwegian law, the total prohibition on the advertising of tobacco products is established in Section 4 of the Act of 9 March 1973 No 14 relating to the Prevention of the Harmful Effects of Tobacco. The section reads:

All forms of advertising of tobacco products are prohibited. The same applies to pipes, cigarette paper, cigarette rollers and other smoking devices.

Tobacco products must not be included in the advertising of other goods or services.

11 The Act of 3 April 2009 No 18, amending the 1973 Act, extended the advertising prohibition. The new legislation, which took effect on 1 January 2010, introduced a ban on the visible display of tobacco products into Section 5 of the 1973 Act. The Section reads:

§ 5 Prohibition against the visible display of tobacco products and smoking devices.

The visible display of tobacco products and smoking devices at retail outlets is forbidden. The same applies to imitations of such products and to token cards which give the customer access to acquire tobacco products or smoking devices from vending machines.

The prohibition in the first paragraph does not apply to dedicated tobacco boutiques.

Bestemmelsene i artikkel 11 og 12 skal ikke være til hinder for forbud eller restriksjoner på import, eksport eller transitt som er begrunnet ut fra hensynet til offentlig moral, orden og sikkerhet, vernet om menneskers og dyrs liv og helse, plantelivet, nasjonale skatter av kunstnerisk, historisk eller arkeologisk verdi eller den industrielle eller kommersielle eiendomsrett. Slike forbud eller restriksjoner må dog ikke kunne brukes til vilkårlig forskjellsbehandling eller være en skjult hindring på handelen mellom avtalepartene.

Nasjonal rett

10 I norsk rett er totalforbudet mot reklame for tobakksprodukter innført ved § 4 i lov 9. mars 1973 nr. 14 om vern mot tobakksskader. Paragrafen lyder:

Alle former for reklame for tobakksvarer er forbudt. Det samme gjelder for piper, sigarettpapir, sigarettrullere og annet røykeutstyr.

Tobakksvarer må ikke inngå i reklame for andre varer eller tjenester.

11 Lov 3. april 2009 nr. 18, som endret 1973-loven, utvidet reklameforbudet. Den nye lov, som trådte i kraft 1. januar 2010, innførte et forbud mot synlig oppstilling av tobakksprodukter i § 5 i 1973-loven. Paragrafen lyder:

§ 5 Forbud mot synlig oppstilling av tobakksvarer og røykeutstyr.

Synlig oppstilling av tobakksvarer og røykeutstyr på utsalgssteder er forbudt. Tilsvarende gjelder for imitasjoner av slike varer og for automatkort som gir kunden adgang til å hente ut tobakksvarer eller røykeutstyr fra automat.

Forbudet i første ledd gjelder ikke for spesialforretninger for tobakk.

At the retail outlets it is allowed to provide neutral information regarding the price and which tobacco products are for sale at the premises. The same applies to smoking devices.

The Ministry can through regulations provide for rules on the implementation and supplementing of these provisions and provide exemptions from such.

12 Section 2 of the 1973 Act defines concepts relevant to the display prohibition as follows:

§ 2 Definitions

By tobacco products it is understood in this Act, products which can be smoked, sniffed, sucked or chewed, provided that they, wholly or partly, consist of tobacco.

By smoking devices it is understood in this Act, products which by design are mainly for use in connection with tobacco products.

By dedicated tobacco boutiques it is understood retail outlets which mainly sell tobacco products or smoking devices.

13 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 insofar as is necessary for the reasoning of the Court.

III THE FIRST QUESTION

14 By its first question, the national court seeks to determine whether a general prohibition on the visible display of tobacco products entails a measure having equivalent effect to a quantitative restriction on the free movement of goods precluded pursuant to Article 11 of the EEA Agreement. In this regard, the national court emphasises that the legal framework under scrutiny does not entail direct discrimination since the framework applies equally to all products subjected thereto. However, the national court indicates that the parties disagree on whether the legal framework entails indirect discrimination.

Det kan på utsalgssteder gis nøytrale opplysninger om pris, og om hvilke tobakksvarer som selges på stedet. Tilsvarende gjelder for røykeutstyr.

Departementet kan gi forskrifter om gjennomføring og utfylling av disse bestemmelser og gjøre unntak fra dem.

12 Paragraf 2 i 1973-loven definerer visse begreper som er relevante for oppstillingsforbudet:

§ 2 Definisjoner

Med tobakksvarer forstås i denne lov varer som kan røykes, innsnuses, suges eller tygges såfremt de helt eller delvis består av tobakk.

Med røykeutstyr forstås i denne lov varer som etter sitt formål hovedsakelig benyttes i forbindelse med tobakksvarer.

Med spesialforretning for tobakk menes utsalgssted som hovedsakelig selger tobakksvarer eller røykeutstyr.

13 Det vises til rettsmøterapporten for en mer utførlig redegjørelse for den rettslige ramme, de faktiske forhold, saksgangen og de skriftlige innlegg inngitt til EFTA-domstolen, som i det følgende bare vil bli omtalt og drøftet så langt dette er nødvendig for domstolens begrunnelse.

III DET FØRSTE SPØRSMÅL

14 Med sitt første spørsmål søker den nasjonale domstol å fastslå hvorvidt et generelt forbud mot synlig oppstilling av tobakksprodukter utgjør et tiltak med tilsvarende virkning som en kvantitativ restriksjon på det frie varebytte, som er forbudt i henhold til EØS-avtalen artikkel 11. Den nasjonale domstol understreker at lovgivningen som her vurderes, ikke innebærer direkte forskjellsbehandling idet lovgivningen anvendes likt på alle produkter som den omfatter. Den nasjonale domstol opplyser imidlertid at partene er uenige om lovgivningen innebærer indirekte forskjellsbehandling.

Observations submitted to the Court

15 The Plaintiff argues that the ban on the visible display of tobacco products constitutes "a measure having equivalent effect to a quantitative restriction" on the free movement of goods. There are two strands to this argument. First, the Plaintiff contends that the ban is inherently discriminatory and, second, that it hinders market access. On these grounds, it argues, the visual display ban is incompatible with Article 11 of the EEA Agreement.

16 According to the Plaintiff, a visual display ban constitutes, in the same way as a total advertising ban, a *per se* restriction on the free movement of goods which is precluded pursuant to Article 11 EEA. It concedes that caselaw acknowledges an exception to this principle, in particular where national legislation restricts certain selling arrangements but, at the same time, applies to all relevant traders and affects the marketing of domestic and imported products in the same manner. That is, however, not the situation in the present case. Here, according to the Plaintiff, a visual display ban is liable to favour domestic products over imported ones because consumers tend to be more familiar with the former.

17 In the Plaintiff's view, the absence of tobacco production in Norway does not undermine the fact that a total visual display ban constitutes a *per se* restriction on the free movement of goods. On the contrary, in cases where there is no domestic production the discrimination is more serious because only imported products are affected. In any event, the absence of tobacco production in Norway has no bearing on the applicability of Article 11 EEA, as follows from ECJ caselaw, most notably Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 17. Therefore, a visual display ban is inherently discriminatory, and the absence of domestic production is either irrelevant or supports the finding of discrimination.

18 The Plaintiff argues that the visual display ban hinders market access and constitutes, as such, a restriction on the free

Innlegg inngitt til EFTA-domstolen

15 Saksøker gjør gjeldende at forbudet mot synlig oppstilling av tobakksprodukter utgjør "et tiltak med tilsvarende virkning som en kvantitativ restriksjon" på det frie varebytte. Denne argumentasjon er todelt: Saksøker gjør for det første gjeldende at forbudet er diskriminerende av natur, og for det andre at det hindrer markedsadgang. På dette grunnlag anfører saksøker at forbudet mot synlig oppstilling er uforenlig med EØS-avtalen artikkel 11.

16 Ifølge saksøker utgjør et forbud mot synlig oppstilling, på samme måte som et totalt reklameforbud, uten videre en restriksjon på det frie varebytte, som er ulovlig etter EØS-avtalen artikkel 11. Saksøker erkjenner at rettpraksis har tillatt et unntak fra dette prinsipp, særlig der nasjonal lovgivning begrenser bestemte former for salg, men samtidig gjelder for alle berørte næringsdrivende og påvirker markedsføringen av innenlandske og importerte produkter på samme måte. Dette er imidlertid ikke tilfellet i den foreliggende sak. Her vil et forbud mot synlig oppstilling ifølge saksøker kunne favorisere innenlandske produkter sammenlignet med importerte, fordi forbrukerne vil kjenne de innenlandske produkter bedre.

17 Etter saksøkers oppfatning endrer ikke fraværet av tobakksproduksjon i Norge det faktum at et totalforbud mot synlig oppstilling uten videre utgjør en restriksjon på det frie varebytte. Tvert imot er forskjellsbehandlingen mer alvorlig i tilfeller der det ikke er innenlandsk produksjon, ettersom det utelukkende er importerte produkter som blir berørt. Det at det ikke er tobakksproduksjon i Norge, har uansett ingen innvirkning på om EØS-avtalen artikkel 11 kommer til anvendelse, slik det følger av rettspraksis fra EU-domstolen, særlig sak C-391/92 *Kommisjonen* mot *Hellas*, Sml. 1995 s. I-1621, avsnitt 17. Derfor er et forbud mot synlig oppstilling diskriminerende av natur, og det at det ikke er innenlandsk produksjon, er enten irrelevant eller vil understøtte konklusjonen om diskriminering.

18 Saksøker gjør gjeldende at forbudet mot synlig oppstilling hindrer markedsadgang og utgjør dermed en restriksjon på det

movement of goods within the meaning of Article 11 EEA. With reference to Cases C-110/05 *Commission* v *Italy* [2009] ECR I-519 and C-142/05 *Mickelsson and Roos* [2009] ECR I-4273, the Plaintiff asserts that any rule that (i) has the aim or effect of discriminating against imported goods; (ii) prescribes additional requirements for imported goods; or (iii) hinders access of imported goods to the market of an EEA State must be considered as a restriction within the meaning of Article 11 EEA. In its view, all of these requirements are satisfied by the legal regime establishing the visual display ban on tobacco products.

19 On the question of how the visual display ban hinders access to the tobacco market, the Plaintiff submits that since the implementation of a total advertising ban the visual display of tobacco products has been the only way for importers to communicate their products to consumers. A visual display ban closes this last channel of communication. This applies, in particular, to new products that are not familiar to domestic consumers. Therefore, while the advertising ban makes marketing difficult, a visual display ban makes all communication to the consumer impossible, especially concerning new tobacco products.

20 Finally, the Plaintiff contends that the World Health Organization Framework Convention of 2003 ("WHO Framework Convention"), to which the Defendant refers, cannot relieve the Defendant of its obligations pursuant to Articles 11 and 13 EEA. Likewise, nor can any guidelines adopted under the auspices of the WHO be used to that effect, in particular as those guidelines are simply nonbinding rules concerning the implementation of various articles of the Framework Convention.

21 The Defendant submits that the visual display ban forms part of a consistent tobacco policy whose purpose is to limit the advertising effect of the visual display of tobacco products and to contribute to a reduction in tobacco consumption and tobaccorelated health problems. The Defendant argues that the purpose of the visual display ban is to reduce the number of smokers in general and amongst children and young people

frie varebytte etter EØS-avtalen artikkel 11. Med henvisning til sak C-110/05 *Kommisjonen mot Italia*, Sml. 2009 s. I-519 og C-142/05 *Mickelsson og Roos,* Sml. 2009 s. I-4273, anfører saksøker at enhver regel som i) har som siktemål eller fører til forskjellsbehandling av importerte varer, ii) fastsetter tilleggskrav for importerte varer, eller iii) hindrer adgang for importerte varer til markedet i en EØS-stat, må betraktes som en restriksjon i henhold til EØS-avtalen artikkel 11. Etter saksøkers oppfatning oppfyller lovgivningen som innfører forbudet mot synlig oppstilling av tobakksprodukter, alle disse kriteriene.

19 Når det gjelder spørsmålet om hvorvidt forbudet mot synlig oppstilling hindrer adgang til tobakksmarkedet, gjør saksøker gjeldende at etter innføringen av det totale reklameforbud har synlig oppstilling av tobakksprodukter vært den eneste måte importørene har kunnet gjøre sine produkter kjent for forbrukerne på. Et forbud mot synlig oppstilling stenger denne siste gjenværende kommunikasjonskanal. Dette gjelder særlig for nye produkter som ikke er kjent for innenlandske forbrukere. Der reklameforbudet gjør markedsføring vanskelig, gjør et forbud mot synlig oppstilling all kommunikasjon mot forbrukeren umulig, da særlig hva gjelder nye tobakksprodukter.

20 Endelig anfører saksøker at Verdens helseorganisasjons rammekonvensjon av 2003 ("WHOs rammekonvensjon"), som saksøkte henviser til, ikke kan løse saksøkte fra sine forpliktelser etter EØS-avtalen artikkel 11 og 13. Likeledes kan ingen retningslinjer vedtatt i regi av WHO påberopes for dette formål, særlig fordi disse retningslinjer simpelthen er ikke-bindende regler for gjennomføring av ulike artikler i rammekonvensjonen.

21 Saksøkte gjør gjeldende at forbudet mot synlig oppstilling er ledd i en konsekvent tobakkspolitikk hvis formål er å begrense reklameeffekten av den synlige oppstilling av tobakksprodukter og bidra til å redusere tobakksbruken og tobakksrelaterte helseproblemer. Saksøkte gjør gjeldende at målet med forbudet mot synlig oppstilling er å redusere antallet røykere i befolkningen generelt og blant barn og unge spesielt. Forbudet vil dermed

in particular. Thus, the ban will have a direct effect on tobacco use by limiting the exposure of tobacco products. In addition, the indirect effect of changing the attitude of the general public through generating a signal effect as no more will tobacco products, whose danger is beyond question, be presented alongside nonrisk products in retail stores. The long term effect will be to denormalise the consumption of tobacco amongst the general public.

22 The Defendant argues that while advertising of tobacco products is regulated by EU and EEA law, the visual display of tobacco products is not. As the prohibition established in EU secondary legislation does not cover the visual display of tobacco products, EEA States enjoy competence to introduce stricter rules. In this regard, according to the Defendant, account must be taken of repeated encouragement from the EU to Member States to implement, within their field of competence, regulations concerning tobacco products more stringent than those prescribed by EU law.

23 In addition, the Defendant argues that the work of the WHO is of importance, in particular, the WHO Framework Convention, whose purpose is to reduce the harm caused to the general public as a result of tobacco consumption. The Defendant observes that a majority of states are parties to this convention, including 26 Member States of the EU and two EEA/EFTA countries, Norway and Iceland. According to Article 13(2) of the WHO Framework Convention, its parties must implement a comprehensive ban of all tobacco advertising, promotion and sponsorship. Furthermore, the Defendant notes, the parties to the abovementioned Convention have adopted Guidelines for the implementation of various articles, including Article 13. In its view, these Guidelines are binding as they represent the parties' own understanding of obligations included in the WHO Framework Convention.

24 As to the first question itself, the Defendant argues that the aim of the visual display ban is not to restrict trade between EEA States but to limit the advertising effect generated from the visibility of tobacco products. Therefore, the present case falls

ha en direkte effekt på bruken av tobakk ved å begrense eksponeringen avtobakksprodukter. Dessuten vil det ha en indirekte effekt ved å endre holdningen i befolkningen generelt ved at det skapes en signaleffekt, ettersom tobakksprodukter, hvis skadevirkninger er hevet over tvil, ikke lenger vil bli stilt sammen med ufarlige produkter på utsalgsstedene. Virkningen på lang sikt vil være at bruken av tobakk avnormaliseres i befolkningen generelt.

22 Saksøkte anfører at reklame for tobakksprodukter er regulert i EU- og EØS-regelverket, men at synlig oppstilling av tobakksprodukter ikke er det. Idet forbudet fastsatt i sekundærretten i EU ikke omfatter synlig oppstilling av tobakksprodukter, har EØS-statene kompetanse til å innføre strengere regler. Det må da ifølge saksøkte tas hensyn til EUs gjentatte oppfordringer til medlemsstatene om å innføre strengere regler innenfor deres kompetanseområder enn det som er fastsatt i EU-retten.

23 Saksøkte gjør dessuten gjeldende at WHOs arbeid er viktig. Særlig viktig er WHOs rammekonvensjon, hvis formål er å redusere skadene som forbruket av tobakk påfører folk. Saksøkte bemerker at de fleste stater har tiltrådt denne konvensjon, herunder 26 EU-medlemsstater og to EØS-stater (Norge og Island). I henhold til artikkel 13 nr. 2 i WHOs rammekonvensjon skal konvensjonspartene innføre et generelt forbud mot alle former for tobakksreklame, salgsfremmende tiltak og sponsing. Saksøkte anfører videre at partene til ovennevnte konvensjon har vedtatt retningslinjer for gjennomføring av ulike artikler, herunder artikkel 13. Etter saksøktes oppfatning er disse retningslinjer bindende, ettersom de representerer partenes egen forståelse av de forpliktelser som WHOs rammekonvensjon inneholder.

24 Når det konkret gjelder det første spørsmål, gjør saksøker gjeldende at målet med forbudet mot synlig oppstilling ikke er å hindre handel mellom EØS-stater men å begrense reklameeffekten som synlige tobakksprodukter representerer.

outside the scope of the principle established by Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649, and, instead, within the ambit of the principle established in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, concerning "selling arrangements".

25 The Defendant submits three main arguments with regard to the first question. First, due to the fact that the visual display ban constitutes a selling arrangement that applies to all trading operations regardless of the nationality of traders, there can be no discrimination in law or in fact. Second, the visual display ban is not constructed to prevent market access of imported or domestic products. In this regard, the Defendant notes that no domestic products exist as there is no tobacco production in Norway. Regardless of that fact, even if the ban were to impede market access in any way, it would only fall within the realm of Article 11 EEA if discrimination could be established. Third, in the event that the Court were to conclude that a nondiscriminatory selling arrangement falls within the scope of Article 11 EEA, there has, at any rate, been no market hindrance. In this regard, according to the Defendant, a very high threshold must be applied, that is, the visual display ban has to prevent or greatly restrict the use of the product in question.

26 The Finnish Government points out that legislation establishing a visual display ban has been adopted by the Finnish Parliament. The new legal regime will take effect in 2012. In its view, in accordance with principles established in caselaw, a visual display ban is to be considered a selling arrangement. Thus, the issue of discrimination is relevant, in particular whether *de jure* or *de facto* discrimination can be proven. Here, the Government stresses that it is for the national court to carry out the substantive assessment, especially with regard to *de facto* discrimination.

27 In addition, the Finnish Government emphasises that, in its view, any references by the Plaintiff to caselaw dealing with

Denne sak faller derfor utenfor området for prinsippet fastsatt i sak 120/78 *Rewe-Zentral (Cassis de Dijon)*, Sml. 1979 s. 649, og faller i stedet inn under området for prinsippet fastsatt i forente saker C-267/91 og C-268/91 *Keck og Mithouard*, Sml. 1993 s. I-6097, om "salgsordninger".

25 Saksøkte anfører tre hovedargumenter i relasjon til det første spørsmål. For det første kan det ikke foreligge noen rettslig eller faktisk forskjellsbehandling ettersom forbudet mot synlig oppstilling utgjør en salgsordning som gjelder alle handelstransaksjoner uten hensyn til de næringsdrivendes nasjonalitet. For det andre er forbudet mot synlig oppstilling ikke ment å hindre markedsadgang for importerte eller innenlandske produkter. I dette henseende anfører saksøkte at det ikke finnes innenlandske produkter ettersom det ikke er tobakksproduksjon i Norge. Uansett dette faktum ville forbudet, om det på noen måte skulle hindre markedsadgang, bare høre inn under virkeområdet for EØS-avtalen artikkel 11 dersom det ble fastslått forskjellsbehandling. For det tredje, dersom EFTA-domstolen skulle konkludere med at en ikke-diskriminerende salgsordning omfattes av EØS-avtalen artikkel 11, foreligger det uansett ikke noen markedshindring. I dette henseende må det ifølge saksøkte anvendes en svært høy terskel, det vil si at forbudet mot synlig oppstilling må forhindre eller sterkt begrense bruken av det aktuelle produkt.

26 Finlands regjering peker på at det finske parlament har vedtatt lovgivning som innfører et forbud mot synlig oppstilling. De nye rettsregler vil tre i kraft i 2012. Etter regjeringens oppfatning og i samsvar med prinsipper fastsatt i rettspraksis, skal et forbud mot synlig oppstilling betraktes som en salgsordning. Følgelig er spørsmålet om forskjellsbehandling relevant, særlig hvorvidt rettslig eller faktisk forskjellsbehandling kan bevises. Her understreker regjeringen at det er den nasjonale domstol som bør gjøre realitetsvurderingen, særlig av om det foreligger faktisk diskriminering.

27 Finlands regjering understreker dessuten at saksøkers henvisninger til rettspraksis vedrørende alkoholreklame etter

prohibitions concerning alcohol advertisements are not relevant to the present case. It contends that tobacco products are not similar to alcoholic beverages – a fact which is mirrored in the different nature of the tobacco market in comparison to the market for alcoholic beverages. Finally, any arguments made by the Plaintiff concerning the market hindrance of imported products to the benefit of domestic ones must be rejected. In this regard, the Government observes, first, that domestic products are not to be found on the market and, second, that the display ban will affect the market access of new domestic products in a similar manner to the market access of imported products.

28 The Icelandic Government states that a general visual display ban has been in force in Iceland since 2001 covering tobacco and tobacco trademarks. An exemption exists for special tobacco shops. The Icelandic Government takes the view that the visual display ban on tobacco products is compatible with EEA law and submits that the ban does not go further than necessary in order to attain the objective pursued.

29 The Portuguese Government takes the view that a visual display ban restricts the free movement of goods and that, in conjunction with an advertising ban, creates an insurmountable obstacle for manufacturers to introduce and market new products. It argues that the visual display ban will also distort competition, the need for which is important, as has been acknowledged in recent caselaw of the ECJ concerning minimum price requirements for tobacco products, cf. Cases C-198/08 *Commission* v *Austria*, judgment of 4 March 2010, not yet reported, paragraph 30, and C-221/08 *Commission* v *Ireland*, judgment of 4 March 2010, not yet reported, paragraph 41.

30 The Portuguese Government further submits that a total visual display ban is inherently discriminatory to the detriment of imported goods. Even if the ban were not deemed discriminatory, it hinders market access of tobacco products imported from other EEA States. Such a distortion will affect the market and limit any transactions to local customs and habits already present. Therefore, if a visual display ban is permitted, this will

dens oppfatning ikke er relevant for den foreliggende sak. Regjeringen anfører at tobakksprodukter ikke kan sammenlignes med alkoholholdige drikker, noe som gjenspeiles i det faktum at tobakksmarkedet og alkoholmarkedet er av forskjellig natur. Endelig må saksøkers argumenter om markedshindringen for importerte produkter til fordel for innenlandske produkter, avvises. I så henseende bemerker regjeringen for det første at det ikke finnes innenlandske produkter på markedet, og for det annet at oppstillingsforbudet vil påvirke markedsadgangen for nye innenlandske produkter på samme måte som for importerte produkter.

28 Islands regjering opplyser at et generelt forbud mot synlig oppstilling av tobakk og tobakksmerker, har vært i kraft i Island siden 2001. Et unntak gjelder for spesialforretninger for tobakk. Islands regjering har det syn at forbudet mot synlig oppstilling av tobakksprodukter er forenlig med EØS-retten, og anfører at forbudet ikke går ut over det som er nødvendig for å nå målet som søkes oppnådd.

29 Portugals regjering hevder at et forbud mot synlig oppstilling begrenser det frie varebytte, og at det, sammen med et reklameforbud, gjør det uoverkommelig for produsenter å lansere og markedsføre nye produkter. Regjeringen understreker behovet for konkurranse og anfører at forbudet mot synlig oppstilling også vil medføre konkurransevridning, som fastslått i nyere rettspraksis fra EU-domstolen vedrørende minstepriskrav for tobakksprodukter, jf. sak C-198/08 *Kommisjonen* mot *Østerrike*, dom av 4. mars 2010, ennå ikke i Sml., avsnitt 30, og sak C-221/08 *Kommisjonen* mot *Irland*, dom av 4. mars 2010, ennå ikke i Sml., avsnitt 41.

30 Portugals regjering anfører videre at et totalforbud mot synlig oppstilling er diskriminerende av natur, til ulempe for importerte produkter. Selv om forbudet ikke skulle bli betraktet som diskriminerende, hindrer det markedsadgang for tobakksprodukter fra andre EØS-stater. En slik konkurransevridning vil påvirke markedet og begrense det til det marked som alt eksisterer etter lokal skikk og bruk. Om et forbud mot synlig oppstilling tillates, vil dette følgelig

set a precedent allowing EEA States to freeze the market and preclude the introduction of new brands and products.

31 The Romanian Government acknowledges that EEA States can at their discretion implement measures protecting public health on the basis of the precautionary principle. In its view, however, states implementing such measures must bear the burden of proof concerning the necessity thereof. In addition, scientific evidence is needed to substantiate the existence of a causal link between the visual display of tobacco products and consumption amongst the general public. Moreover, the state concerned must take account of any possible alternative measures less restrictive of trade.

32 The United Kingdom Government argues that the visual display ban does not constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 11 EEA, but is to be considered as a selling arrangement as defined in caselaw. The stated purpose of the measure, namely, to reduce the sales volume of tobacco products, cannot justify the conclusion that the ban falls within the scope of Article 11 EEA. As regards discrimination, according to the Government, it is impossible to establish any *de jure* or *de facto* discrimination between domestic and imported products for two reasons. First, the visual display ban applies to all traders and tobacco products irrespective of the country from which they originate. Second, no domestic tobacco products can be found because tobacco products are not manufactured in Norway. On this latter point, the Government argues that, even if domestic tobacco products existed, the visual display ban would apply to these products in the same way as it does to imported ones.

33 The United Kingdom Government emphasises the different nature of different markets. Such premise applies, in particular, in relation to the market for alcoholic beverages and the market for tobacco products. Thus, in the Government's view, any reference to caselaw dealing with alcoholic beverages should be assessed critically by the Court. Finally, it argues that Article 11

skape presedens for å tillate EØS-statene å lukke markedet og hindre introduksjon av nye merker og produkter.

31 Romanias regjering erkjenner at tiltak til beskyttelse av folkehelsen kan innføres av EØS-stater med henvisning til føre-var-prinsippet. Etter regjeringens oppfatning påligger det imidlertid stater som innfører slike tiltak, å bevise at tiltakene er nødvendige. I tillegg må det foreligge vitenskapelig dokumentasjon som underbygger en årsakssammenheng mellom den synlige oppstilling av tobakksprodukter og forbruket av tobakksprodukter i befolkningen generelt. Den berørte stat må videre ta hensyn til mulige alternative tiltak som virker mindre begrensende på handelen.

32 Storbritannias regjering hevder at forbudet mot synlig oppstilling ikke er et tiltak med tilsvarende virkning som en kvantitativ restriksjon etter EØS-avtalen artikkel 11, men skal betraktes som en salgsordning etter rettspraksis. Det fastsatte formål med tiltaket, nemlig å redusere salgsvolumet for tobakksprodukter, kan ikke gi grunnlag for den konklusjon at forbudet omfattes av EØS-avtalen artikkel 11. Når det gjelder forskjellsbehandling, er det ifølge regjeringen umulig å fastslå om det foreligger noen rettslig eller faktisk forskjellsbehandling mellom innenlandske og importerte produkter, av to grunner: For det første gjelder forbudet mot synlig oppstilling for alle næringsdrivende og alle tobakksprodukter, uavhengig av hvilket land de har sin opprinnelse i. For det annet finnes det ingen innenlandske tobakksprodukter ettersom det ikke produseres tobakksprodukter i Norge. Når det gjelder sistnevnte punkt, anfører regjeringen at om det hadde eksistert innenlandske tobakksprodukter, ville forbudet mot synlig oppstilling gjelde for disse produkter på samme måte som for importerte produkter.

33 Storbritannias regjering fremhever de ulike markeders ulike natur. Dette gjelder ikke minst for markedet for alkoholholdige drikker og markedet for tobakksprodukter. Etter regjeringens oppfatning bør EFTA-domstolen følgelig vurdere kritisk enhver henvisning til rettspraksis vedrørende alkoholholdige drikker. Endelig gjør regjeringen gjeldende at EØS-avtalen artikkel 11

EEA does not apply to national legislation which satisfies three specific requirements. Namely, national laws (i) which make no distinction between products based on their origin, (ii) which do not regulate trade in goods between EEA States, and (iii) whose restrictive effects are too uncertain and indirect to be considered a hindrance to trade between EEA States do not fall within the scope of Article 11 EEA. According to the Government, the visual display ban fulfils these requirements.

34 ESA submits that, although there is no disagreement on the caselaw of the ECJ which is relevant, note must be taken of those judgments which entail further clarification of the substantive content of Article 34 of the Treaty on the Functioning of the European Union (TFEU). Therefore, the clarifications included in *Keck and Mithouard* are of importance, not least because of the threestage test prescribed there, namely, (i) whether the legislation in question constitutes a "selling arrangement"; (ii) whether the national provision applies to all relevant traders operating within the national territory; and (iii) whether the measures affect in the same manner *de jure* and *de facto* the marketing of domestic and imported products.

35 With regard to the first two elements of the test, ESA argues that the visual display ban fulfils the criteria established by caselaw. It is clear that a visual display is a means of advertising and promoting tobacco products. Any measure which entails that a tobacco product cannot be displayed is, by definition, a selling arrangement. In addition, it follows from the reference made by the national court that the display ban is applicable to all traders within the relevant territory. As regards the final element of the test, ESA submits that, having regard to the approach taken in *Keck and Mithouard*, the question whether there is discrimination *de jure* or *de facto* can only be answered in the negative.

36 The European Commission argues that the visual display ban can be considered as a more radical form of an advertising ban. As a result, caselaw on advertising restrictions, including that concerning "selling arrangements", is relevant to the issue at

ikke får anvendelse på nasjonal lovgivning som oppfyller tre kriterier: Nasjonal lovgivning i) som ikke skiller mellom produkter på grunnlag av deres opprinnelse, ii) som ikke regulerer varehandelen mellom EØS-stater, og iii) hvis begrensende virkning er altfor usikker og indirekte til at den kan anses å hindre handelen mellom EØS-stater, omfattes nemlig ikke av EØS-avtalen artikkel 11. Ifølge regjeringen oppfyller forbudet mot synlig oppstilling disse kriterier.

34 ESA anfører at selv om det ikke foreligger noen uenighet om den relevante rettspraksis fra EU-domstolen, må det tas særlig hensyn til de dommer som gir en nærmere avklaring av realitetsinnholdet i artikkel 34 i traktaten om Den europeiske unions virkemåte ("TEUV"). Derfor er avklaringene i *Keck og Mithouard* viktige, ikke minst på grunn av tre-trinnstesten som fastsettes der, nemlig i) hvorvidt den aktuelle lovgivning utgjør en "salgsordning", ii) hvorvidt den nasjonale bestemmelse gjelder for alle berørte næringsdrivende på det nasjonale territorium, og 3) hvorvidt tiltakene rettslig og faktisk berører markedsføringen av innenlandske og importerte produkter på samme måte.

35 Når det gjelder testens første to elementer, anfører ESA at forbudet mot synlig oppstilling oppfyller kriteriene fastsatt i rettspraksis. Det er klart at synlig oppstilling er et virkemiddel for å reklamere for og markedsføre tobakksprodukter. Ethvert tiltak som innebærer at et tobakksprodukt ikke kan oppstilles, utgjør per definisjon en salgsordning. Det fremgår dessuten av den nasjonale domstols henvisning til rettspraksis at oppstillingsforbudet gjelder for alle næringsdrivende på det aktuelle territorium. Når det gjelder den siste del av testen, gjør ESA gjeldende at etter tilnærmingen i *Keck og Mithouard* kan spørsmålet om det rettslig eller faktisk foreligger noen forskjellsbehandling bare besvares benektende.

36 Europakommisjonen hevder at forbudet mot synlig oppstilling kan betraktes som et reklameforbud i en radikal form. Følgelig er rettspraksis om reklamebegrensninger, herunder om "salgsordninger", relevant i denne sak. I vurderingen av

hand. In determining whether the visual display ban falls within the scope of Article 11 EEA the decisive factor is whether *de jure* or *de facto* discrimination can be found. Consequently, given the fact that no tobacco production exists in Norway, the visual display of tobacco products cannot be considered to constitute a measure having equivalent effect to a quantitative restriction for the purposes of Article 11 EEA.

37 However, the Commission acknowledges the restrictive nature of the visual display ban and the adverse effect which the ban will have on competition between brands already established on the Norwegian market and the ability of traders to penetrate the market with new products. In this context, the Commission concedes, with reference to *Commission* v *Italy*, cited above, that even in the absence of domestic production, a visual display ban might constitute a measure having equivalent effect to a quantitative restriction on imports precluded pursuant to Article 11 EEA. However, in the light of the view it takes on the second question, it argues that the Court need not undertake a substantive examination of that point in the context of the first question.

Findings of the Court

38 In light of the question posed by the referring court and the observations submitted, the Court finds it appropriate to examine first whether and to what extent Article 11 EEA applies to national rules such as the provisions of the Norwegian Act relating to the Prevention of the Harmful Effects of Tobacco.

39 Article 11 EEA prohibits any measure having an effect equivalent to quantitative restrictions on imports. According to settled caselaw, this prohibition applies to all trading rules enacted by EEA States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Economic Area, as such rules are to be considered as measures having an effect equivalent to quantitative restrictions (see Case E-4/04 *Pedicel A/S* v *Sosial- og helsedirektoratet*, [2005] EFTA Ct. Rep. 1,

hvorvidt forbudet mot synlig oppstilling omfattes av EØS-avtalen artikkel 11, er det avgjørende om det rettslig eller faktisk foreligger forskjellsbehandling. Gitt at det ikke finnes noen tobakksproduksjon i Norge, kan forbudet mot synlig oppstilling følgelig ikke ses som et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon etter EØS-avtalen artikkel 11.

37 Kommisjonen erkjenner imidlertid at forbudet mot synlig oppstilling er en begrensning, og at det vil få negativ effekt på konkurransen mellom merker som allerede er etablert på det norske marked, og på næringsdrivendes muligheter til å delta i markedet med nye produkter. I denne sammenheng vedgår Kommisjonen, med henvisning til *Kommisjonen* mot *Italia*, som omtalt over, at et forbud mot synlig oppstilling, selv i fravær av innenlandsk produksjon, kan utgjøre et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon, som er forbudt i henhold til EØS-avtalen artikkel 11. I lys av det syn Kommisjonen inntar vedrørende det andre spørsmål, gjør Kommisjonen imidlertid gjeldende at EFTA-domstolen ikke trenger å realitetsbehandle dette punkt i forbindelse med det første spørsmål.

Rettens bemerkninger

38 I lys av spørsmålet fra den anmodende domstol og innleggene som er lagt frem, finner EFTA-domstolen det hensiktsmessig først å undersøke om og i hvilken grad EØS-avtalen artikkel 11 får anvendelse på slike nasjonale regler som bestemmelsene i norsk lov om vern mot tobakksskader.

39 EØS-avtalen artikkel 11 forbyr alle tiltak med tilsvarende virkning som kvantitative importrestriksjoner. Etter fast rettspraksis får dette forbud anvendelse på alle handelsregler gjennomført av EØS-statene som direkte eller indirekte, aktuelt eller potensielt, kan hindre handelen innenfor Det europeiske økonomiske samarbeidsområde, fordi slike regler er å betrakte som tiltak med tilsvarende virkning som kvantitative importrestriksjoner (se sak E-4/04 *Pedicel AS* mot *Sosial- og helsedirektoratet*, EFTA Ct. Rep.

paragraph 45 and the caselaw cited, and, for comparison, Cases C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 33, and C-108/09, *Ker-Optika*, judgment of 2 December 2010, not yet reported, paragraph 47).

40 In this regard, Article 11 EEA must be understood as an obligation to comply with the EEA principles of nondiscrimination and mutual recognition of products lawfully manufactured and marketed in other EEA States, as well as the principle of ensuring free access of EEA products to national markets (see, for comparison, *Commission* v *Italy*, cited above, paragraph 34, and the caselaw cited, and *Ker-Optika*, cited above, paragraph 48).

41 Accordingly, national measures adopted by an EEA State which have the object or effect of treating products coming from other EEA States less favourably than domestic products are to be regarded as measures having an effect equivalent to quantitative restrictions and thereby caught by Article 11 EEA. The same applies to rules that lay down requirements to be met by imported goods, even if those rules apply to all products alike. Any other measure which hinders access of products originating in one EEA State to the market of another also qualifies as having an equivalent effect for the purposes of Article 11 EEA (see, for comparison, *Commission* v *Italy*, paragraphs 35 and 37, and *Ker-Optika*, cited above, paragraphs 49 to 50).

42 The Court notes that the visual display ban at issue in the case at hand is not designed to regulate trade in goods between EEA States. However, the ban is by its nature capable of having a restrictive effect on the marketing of tobacco products on the market in question, especially with regard to market penetration of new products.

43 It follows from the caselaw cited above that national provisions which apply to products from other EEA States and restrict or prohibit certain selling arrangements must be viewed as generally hindering directly or indirectly, actually or potentially, trade between EEA States.

2005 s. 1, avsnitt 45, og den rettspraksis som det vises til der, jf. sak C-110/05 *Kommisjonen* mot *Italia*, Sml. 2009 s. I-519, avsnitt 33, og sak C-108/09 *Ker-Optika*, dom av 2. desember 2010, ennå ikke i Sml., avsnitt 47).

40 I denne sammenheng må EØS-avtalen artikkel 11 forstås som en forpliktelse til å overholde de EØS-rettslige prinsipper om ikke-diskriminering og gjensidig godkjenning av produkter som er lovlig fremstilt og markedsført i andre EØS-stater, samt prinsippet om fri adgang for EØS-produkter til nasjonale markeder (jf. *Kommisjonen* mot *Italia*, som omtalt over, avsnitt 34, og den rettspraksis som det vises til der, samt *Ker-Optika*, som omtalt over, avsnitt 48).

41 Følgelig skal nasjonale tiltak vedtatt av en EØS-stat som har som formål eller virkning at produkter fra andre EØS-stater får en mindre gunstig behandling enn innenlandske produkter, betraktes som tiltak med tilsvarende virkning som kvantitative importrestriksjoner, og er dermed omfattet av EØS-avtalen artikkel 11. Det samme gjelder for regler som fastsetter produktkrav for importerte varer, selv om disse regler gjelder likt for alle produkter. Ethvert annet tiltak som hindrer adgang for produkter med opprinnelse i en EØS-stat til markedet i en annen EØS-stat, anses også å ha tilsvarende virkning i henhold til EØS-avtalen artikkel 11 (jf. *Kommisjonen* mot *Italia,* avsnitt 35 og 37, og *Ker-Optika*, som omtalt over, avsnitt 49 og 50).

42 EFTA-domstolen nevner at forbudet mot synlig oppstilling som denne sak gjelder, ikke er ment å regulere varehandelen mellom EØS-stater. Forbudet kan imidlertid etter sin natur ha en begrensende virkning på markedsføringen av tobakksprodukter i det aktuelle marked, særlig for lansering av nye produkter i markedet.

43 Det følger av den rettspraksis som er omtalt over, at nasjonale bestemmelser som gjelder for produkter fra andre EØS-stater og som begrenser eller forbyr visse salgsordninger, generelt må anses å hindre, direkte eller indirekte, aktuelt eller potensielt, handelen mellom EØS-stater.

44 However, provisions concerning selling arrangements do not constitute a restriction if they apply to all relevant traders operating within the national territory and affect the marketing of domestic products and of those from other EEA States in the same manner, both in law and in fact. If that is the case, the application of such rules to the sale of products from other EEA States is not by nature such as to prevent their access to the market or to impede such access more than it impedes the access of domestic products (see, for comparison, *Keck and Mithouard*, cited above, paragraphs 16 and 17, and *Commission* v *Italy*, cited above, paragraph 36).

45 National provisions, such as those at issue which provide that products cannot be displayed or only displayed in a certain manner relate to the selling arrangements for those goods in that they lay down the manner in which these products may be presented at venues legally permitted to sell them. The Court thus finds that the display ban in question constitutes a selling arrangement within the meaning of the caselaw cited in paragraphs 40 and 43.

46 Next, it has to be examined whether the national legislation at issue meets the two conditions stated in paragraph 44 above. In other words, it has to be analysed whether the provisions apply to all relevant traders operating within the relevant national territory and whether they affect in the same manner, in law and in fact, the selling of domestic products and the selling of goods from other EEA States.

47 It is not disputed between the parties that no discrimination in law exists in this case since the visual display ban applies to all traders operating in the relevant market and affects all products in the same manner. The parties' disagreement, as described in the reference from the national court, is limited to whether the visual display ban discriminates in fact. In that regard, the Plaintiff submits that, although there is no tobacco production in Norway, there are brands on the Norwegian market which were produced domestically until 2008 but are presently produced abroad and imported to Norway. According to the Plaintiff, these

44 Bestemmelser som gjelder salgsordninger, utgjør imidlertid ikke en restriksjon dersom de gjelder for alle berørte næringsdrivende som driver virksomhet på det nasjonale territorium og rettslig og faktisk påvirker markedsføringen av innenlandske produkter og produkter fra andre EØS-stater likt. I så fall er anvendelsen av slike regler på salg av produkter fra andre EØS-stater ikke av en slik natur at adgangen til markedet hindres eller vanskeliggjøres i større grad for slike produkter enn for innenlandske produkter (jf. *Keck og Mithouard*, som omtalt over, avsnitt 16 og 17, og *Kommisjonen* mot *Italia*, som omtalt over, avsnitt 36).

45 De nasjonale bestemmelser som denne sak gjelder, som fastsetter at produkter ikke kan oppstilles eller bare kan oppstilles på en bestemt måte, gjelder salgsordningene for disse varer ved at de fastsetter måten disse produkter kan oppstilles på steder som har rett til å selge dem. EFTA-domstolen anser følgelig at det aktuelle oppstillingsforbud utgjør en salgsordning etter den rettspraksis som er omtalt i avsnitt 40 og 43.

46 Deretter må det undersøkes om den aktuelle nasjonale lovgivning oppfyller de to vilkår nevnt i avsnitt 44 over. Med andre ord må det analyseres om bestemmelsene gjelder for alle berørte næringsdrivende på det aktuelle nasjonale territorium, og om de rettslig og faktisk påvirker salg av innenlandske produkter og salg av varer fra andre EØS-stater likt.

47 Partene er enige om at det ikke foreligger noen rettslig forskjellsbehandling i dette tilfelle fordi forbudet mot synlig oppstilling gjelder for alle næringsdrivende på det aktuelle marked og berører alle produkter på samme måte. Uenigheten mellom partene, som beskrevet i foreleggelsen fra den nasjonale domstol, er begrenset til spørsmålet om forbudet mot synlig oppstilling innebærer en faktisk forskjellsbehandling. Saksøker anfører at selv om det ikke er tobakksproduksjon i Norge, finnes det merker på det norske marked som frem til 2008 ble produsert innenlands, men som nå produseres i utlandet og

products are less affected by the visual display ban established by the national provisions at issue and, as a result, enjoy in relation to other tobacco products a more favourable position on the relevant market.

48 As the ECJ stated in *Commission* v *Greece*, cited above, paragraph 17, the question whether there is domestic production is not decisive when it comes to determining the effects of a restrictive measure. It cannot be excluded that production in Norway will resume at a later time. Bearing that in mind and taking account of the factual situation in the case at hand, it cannot be ruled out that some imported tobacco products, in particular those that were manufactured in Norway until 2008, enjoy a more favourable position on the Norwegian market than other products due to local habits and customs linked to tobacco consumption (compare *Pedicel*, cited above, paragraph 46).

49 The information available does not enable the Court to establish with certainty whether the national provisions at issue prohibiting the display of tobacco products affect the marketing of products from other EEA States to a greater degree than that of imported products that were, until recently, manufactured in Norway. In order to assess whether that is the case, an analysis of the characteristics of the relevant market and of other facts is necessary. The national court must, in particular, take account of the effects of the display ban on products which are new on the market compared to products bearing an established trademark. In that regard, the Court notes that, depending on the level of brand fidelity of tobacco consumers, the penetration of the market may be more difficult for new products due to the display ban which applies in addition to a total advertising ban.

50 It is for the national court to determine whether the application of national law is such as to entail that the national rules on the display of tobacco products affect the marketing of products previously produced in Norway differently than the marketing of products from other EEA States or whether such an effect cannot be clearly verified and, therefore, is too uncertain or

importeres til Norge. Disse produkter er ifølge saksøker mindre berørt av forbudet mot synlig oppstilling fastsatt ved de nasjonale bestemmelser saken gjelder, og har følgelig en mer fordelaktig stilling på det aktuelle marked enn andre tobakksprodukter.

48 Som EU-domstolen fastslo i *Kommisjonen* mot *Hellas*, som omtalt over, avsnitt 17, er spørsmålet om det finnes innenlandsk produksjon, ikke avgjørende når det gjelder å vurdere virkningene av et restriktivt tiltak. Det kan ikke utelukkes at produksjon i Norge kan bli gjenopptatt på et senere tidspunkt. Ut fra dette og på bakgrunn av den faktiske situasjon i den foreliggende sak kan det ikke utelukkes at enkelte importerte tobakksprodukter, særlig de som ble produsert i Norge frem til 2008, har en mer fordelaktig stilling på det norske marked enn andre produkter, som følge av lokal skikk og bruk knyttet til tobakksbruk (jf. *Pedicel*, som omtalt over, avsnitt 46).

49 Den tilgjengelige informasjon gjør det ikke mulig for EFTA-domstolen å fastslå med sikkerhet om de aktuelle nasjonale bestemmelser som forbyr oppstilling av tobakksprodukter, påvirker markedsføringen av produkter fra andre EØS-stater i større grad enn de påvirker markedsføringen av importerte produkter som inntil nylig ble produsert i Norge. For å kunne fastslå om dette er tilfellet, vil det måtte foretas en analyse av hva som kjennetegner det aktuelle marked, og andre faktiske forhold. Den nasjonale domstol må særlig ta hensyn til virkningen av oppstillingsforbudet for produkter som er nye på markedet, sammenlignet med produkter som bærer et etablert merke. I denne sammenheng peker EFTA-domstolen på at det kan være vanskeligere for nye produkter å komme inn på markedet som følge av oppstillingsforbudet som gjelder i tillegg til et totalforbud mot reklame, avhengig av graden av merkelojalitet blant tobakksbrukerne.

50 Det er den nasjonale domstol som må vurdere om anvendelsen av nasjonal lovgivning innebærer at de nasjonale regler om oppstilling av tobakksprodukter påvirker markedsføringen av varer som tidligere ble produsert i Norge, på en annen måte enn markedsføringen av produkter fra andre EØS-stater, eller om

indirect to constitute a hindrance of trade (see, for comparison, Case C-291/09 *Guarnieri & Cie*, judgment of 7 April 2011, not yet reported, paragraph 17, and the caselaw cited). In this determination, the national court must have regard to the facts of the case and the considerations set forth in paragraphs 39 to 45 and in this paragraph.

51 It follows from the above that the answer to the first question must be that a visual display ban on tobacco products, imposed by national legislation of an EEA State, such as the one at issue, constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 11 EEA if, in fact, the ban affects the marketing of products from other EEA States to a greater degree than that of imported products that were, until recently, produced in Norway.

IV THE SECOND QUESTION

52 The second question from the national court concerns the criteria which are decisive, assuming a restriction contrary to Article 11 EEA is found to exist, for determining whether a visual display ban, whose purpose is to reduce tobacco consumption amongst the public in general and amongst young people in particular, is suitable and necessary on grounds of public health as provided for in Article 13 EEA.

Observations submitted to the Court

53 The Plaintiff asserts that the Court should provide the referring court with guidance with regard to the justification and the proportionality assessment that is required under Article 13 EEA. It takes that position on account of the fact that national courts, left with the task of making the assessment required by Article 13 EEA, have come to diverging results. In its view, that situation has undermined a fundamental objective of the EEA Agreement, namely, the uniform application of its principles. Hence, the Court should provide detailed guidance for the national court.

en slik virkning ikke klart kan fastslås og derfor er for usikker eller indirekte til å utgjøre en handelshindring (jf. sak C-291/09 *Guarnieri & Cie*, dom av 7. april 2011, ennå ikke i Sml., avsnitt 17, og den rettspraksis som det vises til der). I denne vurdering må den nasjonale domstol ta hensyn til de faktiske forhold i saken og betraktningene i avsnitt 39 til 45 og dette avsnitt.

51 Det følger av det ovenstående at svaret på det første spørsmål må være at et forbud mot synlig oppstilling av tobakksprodukter innført ved en EØS-stats nasjonale lovgivning, som det denne sak gjelder, utgjør et tiltak med tilsvarende virkning som en kvantitativ restriksjon etter EØS-avtalen artikkel 11 dersom forbudet faktisk påvirker markedsføringen av produkter fra andre EØS-stater i større grad enn markedsføringen av importerte produkter som inntil nylig ble produsert i Norge.

IV DET ANDRE SPØRSMÅL

52 Det andre spørsmål fra den nasjonale domstol gjelder hvilke kriterier som er avgjørende – gitt at det foreligger en restriksjon i strid med EØS-avtalen artikkel 11 – i vurderingen av om et forbud mot synlig oppstilling, hvis formål er å redusere antallet røykere i befolkningen generelt og blant barn og unge spesielt, er egnet og nødvendig av hensyn til folkehelsen i henhold til EØS-avtalen artikkel 13.

Innlegg inngitt til EFTA-domstolen

53 Saksøker anfører at EFTA-domstolen bør gi den anmodende domstol veiledning med hensyn til begrunnelsen og vurderingen av forholdsmessighet som er nødvendig etter EØS-avtalen artikkel 13. Saksøker mener dette fordi nasjonale domstoler, som jo skal foreta vurderingen som kreves i EØS-avtalen artikkel 13, har kommet til forskjellige resultater. Etter saksøkers oppfatning har dette undergravd et av EØS-avtalens grunnleggende mål, nemlig ensartet anvendelse av avtalens prinsipper. EFTA-domstolen bør derfor gi den nasjonale domstol detaljert veiledning.

54 The Plaintiff argues that an assessment concerning the proportionality of the measures taken by the Norwegian authorities should include the concepts of suitability and necessity. Further, as Article 13 EEA derogates from the principle of free movement of goods, this calls for a strict interpretation when making the proportionality assessment. Therefore, in the Plaintiff's view, it is for the Defendant to show and provide proof supported by scientific evidence that the visual display ban is justified and that the result cannot be attained with less restrictive means.

55 According to the Plaintiff, as regards the matters on which the Defendant must adduce proof, two issues are of particular importance. First, it must be shown that tobacco products actually create a risk to public health and, second, that the visual display ban reduces that risk. The Plaintiff contends that, while there is no disagreement amongst the parties that consumption of tobacco products has a negative effect on public health, the parties disagree whether a visual display ban reduces consumption of tobacco products and whether the effects, which the Defendant seeks to achieve, can be attained with other less restrictive means. The Plaintiff argues that scientific evidence, including case studies from countries that have implemented a visual display ban, does not support the Defendant's position on the effectiveness of a ban.

56 Moreover, the Plaintiff argues that the visual display ban fulfils neither the requirements for suitability nor necessity. With regard to the first issue, the Plaintiff asserts that the ban is not suitable for reducing tobacco consumption. Despite being blocked from view, tobacco products remain available at points of sale. Thus, the visual display ban provides only for greater inconvenience. With regard to the second issue, the Plaintiff submits that the Defendant is under an obligation to consider other less restrictive means that would be equally effective in securing the objective pursued. That has not been done; in contrast, government documents demonstrate that the Defendant has not enforced other control measures.

54 Saksøker anfører at en forholdsmessighetsvurdering av de norske tiltak må omfatte en vurdering av egnethet og nødvendighet. Ettersom EØS-avtalen artikkel 13 utgjør et unntak fra prinsippet om fritt varebytte, er det videre nødvendig med en streng tolkning i forbindelse med forholdsmessighetsvurderingen. Derfor er det etter saksøkers oppfatning saksøkte som må godtgjøre og legge frem bevis underbygget av vitenskapelig dokumentasjon for at forbudet mot synlig oppstilling er berettiget, og at resultatet ikke kan oppnås med mindre inngripende midler.

55 Når det gjelder hvilke forhold saksøkte må legge frem bevis for, er det ifølge saksøker to spørsmål som er av særlig betydning: For det første må det godtgjøres at tobakksprodukter faktisk skaper en risiko for folkehelsen, for det annet at forbudet mot synlig oppstilling reduserer denne risiko. Saksøker anfører at selv om det ikke foreligger noen uenighet mellom partene om at bruken av tobakksprodukter har en negativ innvirkning på folkehelsen, er partene uenige om hvorvidt et forbud mot synlig oppstilling reduserer forbruket, og om den virkning saksøkte tilsikter kan oppnås med andre, mindre inngripende virkemidler. Saksøker gjør gjeldende at saksøktes syn med hensyn til effekten av et forbud ikke er understøttet av vitenskapelig dokumentasjon, herunder case-studier fra land som har innført forbud mot synlig oppstilling.

56 Saksøker anfører at forbudet mot synlig oppstilling verken oppfyller kriteriene for egnethet eller kriteriene for nødvendighet. Når det gjelder det første spørsmål, hevder saksøker at forbudet ikke er egnet til å redusere forbruket av tobakk. Produktene er fremdeles tilgjengelige på utsalgssteder selv om de ikke er synlige. Forbudet mot synlig oppstilling medfører dermed bare en tilleggsulempe. Når det gjelder det andre spørsmål, gjør saksøker gjeldende at saksøkte er forpliktet til å vurdere andre, mindre inngripende virkemidler som ville være like effektive for å oppnå målet som søkes oppnådd. Dette er ikke blitt gjort; tvert imot viser dokumenter fra regjeringen at saksøkte ikke har iverksatt andre kontrolltiltak.

57 The Defendant argues that, should the Court decide to provide a substantive answer to the second question, the visual display ban must be regarded as justified and proportionate within the meaning of Article 13 EEA as it has been implemented to protect public health. That objective has been considered a legitimate objective of the highest order. In that regard, the Defendant stresses that it is for the individual states to determine the level of protection and in what manner that level is to be achieved, provided always that the state's approach is proportionate to the objective pursued.

58 Having regard to the aforementioned approach, the Defendant submits that, although Oslo District Court seeks guidance on the appropriate criteria, it is not for the Court to assess the facts of the case or whether national law is compatible with EEA law. Therefore, any guidance should be in the form of a general discussion identifying the elements which are important for consideration by Oslo District Court.

59 The Defendant argues that the elements of necessity and suitability are inherent in a proportionality assessment made for the purposes of Article 13 EEA. However, on the proportionality test in general, the Defendant stresses that, although the burden of proof is unquestionably incumbent upon the state, the intensity of such burden varies depending on the subjectmatter at hand. Caselaw suggests not only that a cautious approach must be taken regarding judicial review but that the obligation to adduce evidence must not be applied in a way that renders it difficult to adopt new measures for the purposes of reducing tobacco consumption. The approach taken by the Plaintiff concerning documentation requirements would, in effect, if adopted by the Court, make it impossible to adopt any measures with the purpose of reducing tobacco consumption. In contrast, the Defendant argues that document requirements should not be understood as meaning that studies must be submitted supporting the proportionality of a particular measure in advance of its introduction and, moreover, that in relation to future effects that cannot be accurately foreseen a proportionality review should

57 Saksøkte gjør gjeldende at om EFTA-domstolen legger til grunn at det er nødvendig å realitetsbehandle det andre spørsmål, må forbudet mot synlig oppstilling betraktes som berettiget og forholdsmessig i henhold til EØS-avtalen artikkel 13 ettersom det er innført for å beskytte folkehelsen. Dette formål er blitt vurdert som et legitimt mål av største betydning. Saksøkte understreker at det er den enkelte stat selv som skal bestemme beskyttelsesnivå og hvordan dette nivå skal oppnås; dog alltid forutsatt at statens tilnærming står i forhold til målet som søkes oppnådd.

58 Med hensyn til dette anfører saksøkte at selv om Oslo tingrett anmoder om veiledning med hensyn til relevante kriterier, er det ikke EFTA-domstolen som skal vurdere de faktiske forhold i saken eller om nasjonal lovgivning er forenlig med EØS-retten. Derfor bør veiledningen være i form av en generell drøftelse der elementene som er av betydning for Oslo tingretts vurdering, identifiseres.

59 Saksøkte gjør gjeldende at elementene egnethet og nødvendighet inngår naturlig i en forholdsmessighetsvurdering etter EØS-avtalen artikkel 13. Når det gjelder forholdsmessighetstesten generelt, understreker saksøkte imidlertid at selv om bevisbyrden uomtvistelig ligger på staten, varierer intensiteten av denne byrde avhengig av det aktuelle saksforhold. Rettspraksis tilsier ikke bare at en forsiktig tilnærming til rettslig overprøving er påkrevet, men også at plikten til å legge frem bevis ikke må anvendes på en slik måte at det blir vanskelig å vedta nye tiltak med sikte på å redusere forbruket av tobakk. Saksøkers tilnærming til dokumentasjonskrav ville, dersom EFTA-domstolen skulle ta den til følge, faktisk gjøre det umulig å vedta nye tiltak med sikte på å redusere forbruket av tobakk. Saksøkte gjør derimot gjeldende at dokumentasjonskravene ikke bør forstås slik at det må legges frem studier som understøtter forholdsmessigheten av et bestemt tiltak før det innføres, og videre at fremtidige effekter som ikke kan forutses nøyaktig, bør granskes i et

be undertaken only where the disputed measures appear to be manifestly incorrect.

60 With regard to the suitability and necessity tests, the Defendant argues that the contested measure passes both of these. The visual display ban is suitable as it constitutes an adequate measure to reduce tobacco consumption. In this respect, the Defendant has a wide margin of discretion in determining the measures that are most likely to achieve concrete results. In this case, the Defendant has based its assessment on various EU and WHO documents which not only provide extensive arguments substantiating factual points relating to the visual display ban, but also represent legal arguments in support of the ban's suitability. In fact, this element of the case concerns questions of evidence which, in the Defendant's view, points to the conclusion that the Court should refrain from a detailed analysis and simply provide guidance to the national court.

61 On the necessity test, the Defendant submits that the visual display ban is based on a legitimate public interest objective and that the ban is necessary as the legitimate objective cannot be achieved effectively with less restrictive means.

62 The Defendant submits that the reasoning adopted in *Commission* v *Italy*, cited above, should be followed, namely, that a state, which implements measures that affect the free movement of goods for a particular purpose, is not obliged to prove positively that no other conceivable measure could enable that objective to be attained. It stresses that EEA States cannot be denied the possibility of attaining an objective by implementing general and simple rules. In addition, it submits, in accordance with the reasoning adopted by the Court in *Pedicel*, cited above, that where it has been concluded that a disputed measure protecting public health is justified, such measure must be considered lawful, unless it is apparent in law and fact that the protection of public health can be secured by less restrictive measures.

63 The Defendant submits that equally efficient measures for the attainment of the public health objective concerned do not exist

forholdsmessighetsperspektiv bare dersom de omtvistede tiltak er åpenbart feilaktige.

60 Med hensyn til egnethetstesten og nødvendighetstesten gjør saksøkte gjeldende at det omtvistede tiltak består begge disse. Forbudet mot synlig oppstilling er egnet ettersom det utgjør et adekvat tiltak for å redusere forbruket av tobakk. I så henseende har saksøkte en omfattende skjønnsmargin til å vurdere hvilke tiltak som mest sannsynlig vil kunne bidra til konkrete resultater. I dette tilfelle har saksøkte basert sin vurdering på ulike dokumenter fra EU og WHO som ikke bare inneholder omfattende argumenter som underbygger faktiske forhold knyttet til forbudet mot synlig oppstilling, men også rettslige argumenter til støtte for forbudets egnethet. Dette element i saken dreier seg faktisk om bevisspørsmål, noe som etter saksøktes oppfatning har til følge at EFTA-domstolen bør avstå fra å analysere spørsmålet nærmere og nøye seg med å veilede den nasjonale domstol.

61 Når det gjelder nødvendighetstesten, gjør saksøkte gjeldende at forbudet mot synlig oppstilling er basert på et legitimt mål begrunnet i allmenne hensyn, og at forbudet er nødvendig fordi det legitime mål ikke kan nås effektivt med mindre inngripende virkemidler.

62 Saksøkte anfører at resonnementet i *Kommisjonen* mot *Italia*, som omtalt over, bør følges, nemlig at en stat som med et bestemt formål innfører tiltak som har innvirkning på det frie varebytte, ikke plikter positivt å bevise at ingen andre tenkelige tiltak ville kunne gjøre at dets legitime mål ble nådd. Saksøkte understreker at EØS-stater ikke kan nektes muligheten til å nå et mål gjennom å innføre generelle og enkle regler. Saksøkte anfører i tillegg, i samsvar med EFTA-domstolens resonnement i *Pedicel*, som omtalt over, at der det er konkludert med at et omtvistet tiltak som beskytter folkehelsen er berettiget, må dette tiltak betraktes som lovlig med mindre det er åpenbart, både rettslig og faktisk, at beskyttelsen av folkehelsen kan ivaretas ved mindre inngripende tiltak.

63 Saksøkte gjør gjeldende at like effektive tiltak for å sikre oppnåelse av det aktuelle folkehelsemål ikke foreligger i dette tilfelle. Ingen

in the present case. None of the alternatives referred to by the Plaintiff would have the same effect as the visual display ban, namely, to close the final gap in the ban on tobacco advertising. Moreover, the Defendant argues that some of these alternatives would, in effect, have a more restrictive effect on trade than the visual display ban. Furthermore, the Plaintiff's argument that, instead of introducing a visual display ban, measures currently in place should be enforced more strictly must also be rejected. Only the joint effect of several measures, one of which is the visual display ban, will lead to greater protection of public health and denormalise the general public's attitude towards tobacco use.

64 If the Court finds it necessary to answer the second question, the Finnish Government argues that the restriction on the visible display of tobacco products is justifiable on grounds of public health in accordance with Article 13 EEA. In its view, three points are of particular importance within the context of Article 13 EEA. First, the public health grounds on which the visual display ban is based have not been invoked to discriminate against imported goods with a view to protecting national products. Second, the visual display ban is, in the opinion of the Finnish Government, an appropriate measure to protect public health. Third, it is for the national court to determine, having regard to all the circumstances of law and fact, whether the disputed measure goes beyond what is necessary in order to attain the protection of public health. Finally, according to the Government, the less restrictive measures referred to by the Plaintiff should not be considered as alternatives to a visual display ban but as parallel measures that could be introduced to achieve a particular level of protection.

65 The Portuguese Government argues that as Article 13 EEA entails a derogation from Article 11 EEA it should be interpreted restrictively. As a result, a state introducing a restrictive measure must prove that it is appropriate to attain the objective pursued and does not go beyond what is necessary to reach that objective. Evidence or analysis should be submitted in order to substantiate the reasons cited as justification for the restrictive measures

av alternativene saksøker viser til, ville ha samme virkning som forbudet mot synlig oppstilling, nemlig å fylle det siste hull i forbudet mot tobakksreklame. Saksøkte anfører dessuten at enkelte av disse alternativer faktisk ville hatt en mer begrensende innvirkning på handelen enn forbudet mot synlig oppstilling. Videre må saksøkers påstand om at eksisterende tiltak bør håndheves strengere i stedet for å innføre et forbud mot synlig oppstilling, også avvises. Bare den samlede effekt av flere tiltak, deriblant forbudet mot synlig oppstilling, vil føre til økt beskyttelse av folkehelsen og avnormalisere bruken av tobakk i befolkningen generelt.

64 Dersom EFTA-domstolen finner det nødvendig å besvare det andre spørsmål, gjør Finlands regjering gjeldende at restriksjonen på synlig oppstilling av tobakksprodukter er berettiget av hensyn til folkehelsen i henhold til EØS-avtalen artikkel 13. Etter regjeringens oppfatning er tre forhold av særlig betydning i relasjon til EØS-avtalen artikkel 13. For det første er hensynet til folkehelsen som forbudet mot synlig oppstilling er basert på, ikke brukt i den hensikt å forskjellsbehandle importerte varer med sikte på å beskytte nasjonale produkter. For det annet er forbudet mot synlig oppstilling etter Finlands regjerings oppfatning et hensiktsmessig tiltak for å beskytte folkehelsen. For det tredje er det den nasjonale domstol som skal vurdere hvorvidt det omtvistede tiltak under de rettslige og faktiske omstendigheter går ut over det som er nødvendig for å nå målet om å beskytte folkehelsen. Endelig bør de mindre inngripende tiltak saksøker viser til, etter regjeringens oppfatning ikke betraktes som alternativer til et forbud mot synlig oppstilling, men som parallelle tiltak som kan innføres for å oppnå et bestemt beskyttelsesnivå.

65 Portugals regjering gjør gjeldende at EØS-avtalen artikkel 13 utgjør et unntak fra EØS-avtalen artikkel 11 og derfor bør tolkes strengt. Følgelig må en stat som innfører et restriktivt tiltak, bevise at tiltaket er hensiktsmessig for å nå målet som søkes oppnådd, og ikke går ut over det som er nødvendig for å nå det. Det må legges frem dokumentasjon eller en analyse for å underbygge det staten påberoper seg som begrunnelse for de

in question. Although the objective of protecting public health is considered a legitimate objective, no scientific evidence has been presented to support the argument that a visual display ban reduces tobacco use. Such evidence or, indeed, the absence thereof is crucial when it comes to deciding whether the contested measure is proportionate. Four elements are particularly relevant: (i) whether a state has demonstrated that the ban reduces smoking prevalence; (ii) whether the state has considered the effects of bans implemented in other countries; (iii) whether the state has considered potential adverse effects of the ban on competition and illicit trade; (iv) whether the state has demonstrated that no alternative less restrictive measures of achieving its objective of reducing smoking are available. In addition, according to the Government, a visual display ban will have negative effects on intraEEA trade as it will drive consumers to the illicit market. As a result, consumption may increase and undermine efforts to combat tobacco use. On a final point, the Government contends that a visual display ban will infringe the fundamental right to freedom of expression and the freedom to engage in commercial activity.

66 Similarly, the Romanian Government acknowledges the legitimacy of the public health objective. However, at the same time, it emphasises that proof must be submitted by the Defendant in order to establish a causal link between the visual display of tobacco products and tobacco use. Furthermore, it argues that the visual display ban will have a detrimental effect on producers of tobacco products. Producers not currently operating on the Norwegian market will be unable to enter the market through marketing their products. Therefore, in its view, less restrictive measures should be implemented, not least because of the discriminatory effect which the visual display ban has on producers depending on whether or not they were already present on the Norwegian market when the visual display ban entered into force.

67 The United Kingdom Government makes two points with regard to Article 13 EEA. First, it suffices that there are reasonable

aktuelle restriktive tiltak. Selv om målet om å beskytte folkehelsen anses som legitimt, er det ikke lagt frem noen vitenskapelig dokumentasjon til støtte for påstanden om at et forbud mot synlig oppstilling reduserer bruken av tobakk. Slik dokumentasjon, eller fraværet av slik dokumentasjon, er avgjørende i vurderingen av hvorvidt det omtvistede tiltak er forholdsmessig. Fire elementer er særlig relevante: i) hvorvidt staten har godtgjort at forbudet reduserer utbredelsen av røyking, ii) hvorvidt staten har vurdert virkningen av forbud innført i andre stater, iii) hvorvidt staten har vurdert potensielle negative effekter av forbudet på konkurransen og på ulovlig handel, og iv) hvorvidt staten har godtgjort at ingen alternative, mindre inngripende tiltak for å nå målet om å redusere røyking, er tilgjengelig. I tillegg vil et forbud mot synlig oppstilling ifølge regjeringen ha innvirkning på handelen innenfor EØS-området ettersom det vil drive forbrukerne mot det illegale marked. Som et resultat kan forbruket øke og undergrave innsatsen for å bekjempe tobakksbruk. Endelig anfører regjeringen at et forbud mot synlig oppstilling vil krenke den grunnleggende ytringsfriheten og friheten til å drive kommersiell virksomhet.

66 Også Romanias regjering erkjenner folkehelsemålets legitimitet. Imidlertid understreker regjeringen samtidig at det må legges frem bevis som underbygger eksistensen av en årsakssammenheng mellom den synlige oppstilling av tobakksprodukter og bruken av tobakk. Videre gjør regjeringen gjeldende at forbudet mot synlig oppstilling vil ha en negativ effekt for produsenter av tobakksprodukter. Produsenter som ikke allerede er til stede på det norske marked, vil være ute av stand til å komme inn på markedet ved å markedsføre sine produkter. Derfor bør det etter regjeringens oppfatning innføres mindre inngripende tiltak, ikke minst på grunn av den diskriminerende virkning forbudet mot synlig oppstilling har for produsenter, avhengig av hvorvidt de allerede var til stede på det norske marked da forbudet mot synlig oppstilling trådte i kraft.

67 Storbritannias regjering har to bemerkninger til EØS-avtalen artikkel 13. For det første er det tilstrekkelig at det er rimelig å

grounds, having regard to all available sources, to assume that the prohibition of a tobacco products display will further the objective sought. Second, it falls within the jurisdiction of the national court to assess and determine the suitability of the contested measure.

68 The United Kingdom Government submits that any assessment of suitability and necessity of the disputed measure should accord the Defendant considerable discretion in determining the level of protection and that the Court should not interfere in that regard unless the measure could be considered manifestly unreasonable or inappropriate taking into account the objective pursued. In this context, any guidance provided by the Court should take account of the reasoning adopted in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad* [1991] ECR I-4151 which dealt with national rules on alcohol advertising. The Government refers specifically to key propositions developed in that case; first, that advertising acted as an encouragement to consumption and, second, that, in the absence of common rules governing alcohol advertisements, it was for a Member State to decide on the degree of protection afforded to public health and how that degree of protection would be achieved.

69 Although EEA States enjoy wide discretion when deciding on the level of protection, such decisions are subject to judicial scrutiny with regard to their appropriateness and necessity in light of the objective pursued. However, the mere fact that differences of opinion exist as to the benefits which will result from a particular measure, does not lead to the conclusion that the state in question has exceeded its margin of discretion. In addition, differences of opinion on whether other measures may be considered less restrictive cannot be decisive in determining the scope of the discretion accorded to the Defendant. In the present case, the Plaintiff has referred to certain measures which it regards as less restrictive whereas the Defendant has not only argued precisely the opposite but also added that those measures are not as effective in attaining the objective pursued. According to the Government, caselaw dictates that the burden of proof

anta, alt tatt i betraktning, at forbudet mot synlig oppstilling av tobakksprodukter vil fremme det mål som søkes nådd. For det andre er det den nasjonale domstol som skal vurdere og fastslå egnetheten av det omtvistede tiltak.

68 Storbritannias regjering anfører at en vurdering av egnetheten og nødvendigheten av det omtvistede tiltak bør gi saksøkte en vid skjønnsmargin til å fastsette beskyttelsesnivået, og at EFTA-domstolen ikke bør gripe inn med mindre tiltaket kan anses som åpenbart urimelig eller uegnet sett i forhold til målet som søkes oppnådd. I denne sammenheng bør veiledningen som gis av EFTA-domstolen ta hensyn til begrunnelsen i forente saker C-1/90 og C-176/90 *Aragonesa de Publicidad*, Sml. 1991 s. I-4151, som gjaldt nasjonale regler for alkoholreklame. Regjeringen viser særlig til sentrale poeng som ble drøftet i den sak; for det første at reklame fungerer som oppmuntring til forbruk, og for det annet at det i fravær av felles regler som regulerer alkoholreklame er den enkelte medlemsstat som skal fastsette graden av beskyttelse av folkehelsen og hvordan denne grad av beskyttelse skal oppnås.

69 Selv om EØS-statene har et vidt skjønn til å fastsette beskyttelsesnivå, er egnetheten og nødvendigheten av slike bestemmelser i lys av det tilsiktede mål gjenstand for domstolskontroll. Men det at det er forskjellige oppfatninger om fordelene et bestemt tiltak vil gi, medfører ikke at den aktuelle stat har gått ut over grensene for sin skjønnsmyndighet. Dessuten kan forskjellige oppfatninger om andre tiltak kan anses å være mindre inngripende, ikke være avgjørende i vurderingen av omfanget av saksøktes skjønnsmyndighet. I den foreliggende sak har saksøker vist til bestemte tiltak som saksøker betrakter som mindre inngripende, mens saksøkte på sin side ikke bare har argumentert for det motsatte, men også at disse tiltak ikke er like effektive for å oppnå målet. Ifølge regjeringen skal bevisbyrden etter rettspraksis ikke anses som

cannot be considered so extensive that the Defendant must prove that no other measure could enable its legitimate objective to be attained under the same conditions.

70 Conceding that the freedom of market participants will be negatively affected by a visual display ban, the United Kingdom Government argues that the Defendant has a discretion to determine on grounds of public interest how and in what manner public health should be protected. Only if it is shown that the disputed measure could not achieve the public health objectives pursued due to its manifest inappropriateness, should the measure be considered not to fall within the derogation established by Article 13 EEA. As this cannot be shown and having regard to the fact that the Defendant considered a wide range of material prior to adoption of the legislation, in the view of the Government, it must be concluded that the measure is not manifestly inappropriate.

71 ESA submits that if the contested measure is considered a restriction which is precluded pursuant to Article 11 EEA, it can be justified on the basis of Article 13 EEA. Consistent caselaw may be found which acknowledges that restrictions on advertising relating to products harmful to human health may be justified. Furthermore, it falls to the jurisdiction of the EEA States to determine the level of protection accorded to human health.

72 In the area of human health EEA States should enjoy a wide margin of discretion. Accordingly, in the present case, it is not enough for the Plaintiff to allege that no evidence can be produced to support the argument that a visual display ban influences tobacco consumption. Instead, it suffices to show, as the Defendant has done, that there are reasonable grounds to assume that the display ban will have an effect on consumption.

73 Moreover, ESA stresses that the contested measure is only one element of a broader policy to reduce tobacco consumption. In the present case, it appears that the visual display ban is a consistent and logical addition to the advertising ban currently in force in Norway. As regards less restrictive measures, ESA cannot see what other measures could be applied.

så omfattende at saksøkte må bevise at ingen andre tiltak under ellers like vilkår kan føre til at de legitime mål nås.

70 Selv om Storbritannias regjering erkjenner at markedsaktørenes frihet vil påvirkes negativt av et forbud mot synlig oppstilling, anfører regjeringen at saksøkte har skjønnsmyndighet til å fastsette, begrunnet i allmenne hensyn, hvordan og på hvilken måte folkehelsen bør beskyttes. Bare om det er påvist at det omtvistede tiltak ikke kan nå de tilsiktede mål om folkehelse fordi det åpenbart er uegnet, bør tiltaket ikke ses som omfattet av unntaket i EØS-avtalen artikkel 13. Ettersom dette ikke kan godtgjøres, og med henvisning til det faktum at saksøkte har vurdert et bredt spekter av materiale før lovgivningen ble vedtatt, må det etter regjeringens oppfatning konkluderes med at tiltaket ikke er åpenbart uegnet.

71 ESA anfører at dersom det omtvistede tiltak anses å være en restriksjon som er forbudt etter EØS-avtalen artikkel 11, kan det rettferdiggjøres på grunnlag av EØS-avtalen artikkel 13. Det foreligger fast rettspraksis som godtar at begrensninger på reklame for helseskadelige produkter kan være berettiget. Videre er det EØS-statene som fastsetter hvilket beskyttelsesnivå menneskers helse skal ha.

72 EØS-statene bør ha en stor skjønnsmargin når det gjelder saksområdet menneskers helse. Følgelig er det i den foreliggende sak ikke tilstrekkelig for saksøker å hevde at det ikke kan legges frem dokumentasjon til støtte for påstanden om at et forbud mot synlig oppstilling påvirker forbruket av tobakk. Det er imidlertid tilstrekkelig å godtgjøre, slik saksøkte har gjort, at det er rimelig grunn til å tro at forbudet mot synlig oppstilling vil påvirke forbruket.

73 Videre understreker ESA at det omtvistede tiltak bare er ett element i en generell politikk for å redusere forbruket av tobakk. I den foreliggende sak synes forbudet mot synlig oppstilling å være et konsistent og logisk supplement til reklameforbudet som gjelder i Norge. ESA kan ikke se hvilke andre, mindre inngripende tiltak som kunne iverksettes.

74 The Commission submits that the ECJ has in its case-law, in particular in Case 152/78 *Commission* v *France* [1980] ECR 2299 and *Aragonesa*, cited above, acknowledged that restrictions on the advertising of products harmful to health have been considered justified on public health grounds as they aim to reduce consumption.

75 Further, the visual display ban must be considered not only necessary but also proportionate because the same level of protection cannot be achieved by less restrictive means. In this regard, the EEA States enjoy a wide discretion under the exception for public policy. Consequently, it was for the Defendant to decide that it was necessary to limit the visibility of tobacco products.

76 In the Commission's view, the exception to the visual display ban, which applies to dedicated tobacco boutiques, makes no difference as to whether the measure in question is justified. It considers that the display of tobacco products in those boutiques is unlikely to encourage customers to purchase tobacco as they are seriously considering or have already committed themselves to such a purchase before entering the premises in question.

Findings of the Court

77 According to settled caselaw, the health and life of humans rank foremost among the assets or interests protected by Article 13 EEA. It is for the EEA States, within the limits imposed by the EEA Agreement, to decide what degree of protection they wish to assure (see *Pedicel*, cited above, paragraph 52, and, for comparison, Case C-421/09 *Humanplasma*, judgment of 9 December 2010, not yet reported, paragraph 32, and the caselaw cited). Legislation which aims at controlling the consumption of tobacco with a view to preventing the harmful effects caused to the health of humans by tobacco products clearly reflects, in the view of the Court, health concerns recognised by Article 13 EEA.

78 It is for the national court to identify the aims which the legislation at issue is actually intended to pursue (see Case

74 Kommisjonen anfører at EU-domstolen i sin rettspraksis, særlig sak 152/78 *Kommisjonen* mot *Frankrike*, Sml. 1980 s. 2299, og *Aragonesa*, som omtalt over, har erkjent at restriksjoner på reklame for helseskadelige produkter kan rettferdiggjøres av hensyn til folkehelsen fordi de har som mål å redusere forbruket.

75 Forbudet mot synlig oppstilling må videre anses å være ikke bare nødvendig, men også forholdsmessig da det ikke er mulig å oppnå samme grad av beskyttelse med mindre inngripende virkemidler. Her har EØS-statene en bred skjønnsmyndighet hjemlet i unntaket begrunnet i allmenne hensyn. Følgelig hadde saksøkte anledning til å bestemme at det var nødvendig å begrense synligheten av tobakksprodukter.

76 Etter Kommisjonens oppfatning har unntaket fra forbudet mot synlig oppstilling som gjelder for spesialforretninger for tobakk, ingen betydning for spørsmålet om hvorvidt det aktuelle tiltak er berettiget. Kommisjonen anser at oppstilling av tobakksprodukter i slike forretninger ikke kan forventes å oppmuntre kunder til å kjøpe tobakk ettersom kundene alvorlig vurderer eller allerede har bestemt seg for å kjøpe tobakk før de besøker de aktuelle utsalgssteder.

Rettens bemerkninger

77 I henhold til fast rettspraksis står menneskers liv og helse øverst blant de verdier og interesser som beskyttes av EØS-avtalen artikkel 13. Det er EØS-statene, innenfor begrensningene fastsatt i EØS-avtalen, som skal bestemme hvilken grad av beskyttelse de ønsker å gi (se *Pedicel*, som omtalt over, avsnitt 52, jf. sak C-421/09 *Humanplasma*, dom av 9. desember 2010, ennå ikke i Sml., avsnitt 32, og den rettspraksis som det vises til der). Lovgivning som har til formål å kontrollere forbruket av tobakk for å forebygge skadevirkningene av tobakksbruk på menneskers helse, gjenspeiler etter EFTA-domstolens oppfatning klart hensynet til helse som anerkjennes i EØS-avtalen artikkel 13.

78 Det er den nasjonale domstol som identifiserer de mål den aktuelle lovgivning faktisk har (se sak E-3/06 *Ladbrokes*, EFTA Ct.

E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 43). The Court notes, however, that the parties to the present proceedings do not appear to dispute that consumption of tobacco products has a negative effect on public health and that the aim of the national ban on the visual display of tobacco products is to reduce such consumption.

79 However, the parties to the present case disagree as to the effects the ban may have on the consumption of tobacco products and whether the same effects can be attained with other less restrictive means.

80 In accordance with the caselaw set out in paragraph 77 of this judgment, an assessment of whether the principle of proportionality has been observed in the field of public health must take account of the fact that an EEA State has the power to determine the degree of protection that it wishes to afford to public health and the way in which that protection is to be achieved. As EEA States are allowed a certain margin of discretion in this regard, protection may vary from one EEA State to another. Consequently, the fact that one EEA State imposes less strict rules than another does not mean that the latter's rules are disproportionate (see, for comparison, Case C-141/07 *Commission* v *Germany* [2008] ECR I-6935, paragraph 51).

81 Nevertheless, national rules or practices which restrict a fundamental freedom under the EEA Agreement, such as the free movement of goods, or are capable of doing so, can be properly justified only if they are appropriate for securing the attainment of the objective in question and do not go beyond what is necessary in order to attain it (see, inter alia, *Pedicel*, cited above, paragraph 55, and, for comparison, *Humanplasma*, cited above, paragraph 34, and the caselaw cited).

82 However, where there is uncertainty as to the existence or extent of risks to human health, an EEA State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. Furthermore, an EEA State may take the measures that reduce, as far as possible, a public

Rep. 2007 s. 86, avsnitt 43). EFTA-domstolen bemerker imidlertid at partene i denne sak ikke synes å være uenige om at bruk av tobakksprodukter er negativt for folkehelsen, og at målet med det nasjonale forbud mot synlig oppstilling av tobakksprodukter er å redusere dette forbruk.

79 Partene i denne sak er imidlertid uenige om hvilke virkninger forbudet kan få på forbruket av tobakksprodukter, og om de samme virkninger kan oppnås ved andre, mindre inngripende midler.

80 I henhold til den rettspraksis som er nevnt i avsnitt 77 i denne dom, må en vurdering av om forholdsmessighetsprinsippet er overholdt på folkehelseområdet, ta hensyn til det faktum at en EØS-stat har myndighet til å fastsette nivået for beskyttelse av folkehelsen og hvordan denne beskyttelse skal oppnås. Siden EØS-statene har en viss skjønnsmargin i denne sammenheng, kan beskyttelsen variere fra en EØS-stat til en annen. Det at en EØS-stat innfører mindre strenge regler enn en annen, medfører således ikke at sistnevntes regler er uforholdsmessige (jf. sak C-141/07 *Kommisjonen* mot *Tyskland*, Sml. 2008 s. I-6935, avsnitt 51).

81 Likevel kan nasjonale regler eller praksis som begrenser, eller som kan begrense, en grunnleggende frihet etter EØS-avtalen som det frie varebytte, bare være berettiget dersom de er egnet til å nå det aktuelle mål og ikke går lenger enn det som er nødvendig for å nå målet (se bl.a. *Pedicel*, som omtalt over, avsnitt 55, jf. *Humanplasma*, som omtalt over, avsnitt 34, og den rettspraksis som det vises til der).

82 Der det er usikkerhet om eksistensen eller omfanget av risikoer for menneskers helse, bør imidlertid en EØS-stat kunne treffe beskyttelsestiltak uten å måtte vente til det blir helt klart at risikoene er reelle. Videre kan en EØS-stat iverksette de tiltak som

health risk (see, for comparison, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 30).

83 It follows that, where the EEA State concerned legitimately aims for a very high level of protection, it must be sufficient for the authorities to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the disputed measure, it was reasonable to assume that the measure would be able to contribute to the protection of human health.

84 In this regard, the Court finds that a measure banning the visual display of tobacco products, such as the one at issue, by its nature seems likely to limit, at least in the long run, the consumption of tobacco in the EEA State concerned. Accordingly, in the absence of convincing proof to the contrary, a measure of this kind may be considered suitable for the protection of public health.

85 To the extent the legislation at issue is deemed suitable, it must be assessed whether the measures at issue go beyond what is necessary to meet the aims pursued. It follows from caselaw that since Article 13 EEA constitutes an exception to the free movement of goods within the EEA it must be strictly interpreted. Therefore, it is for the national authorities to demonstrate that their rules are necessary in order to achieve the declared purpose and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intraEEA trade (see, for comparison, *Humanplasma*, cited above, paragraph 38, and the caselaw cited).

86 As regards the further assessment of whether measures less restrictive than the visual display ban could ensure a similar result, it is appropriate to leave this to the national court to decide on the basis of all the matters of law and fact before it. Review of proportionality and of the effectiveness of the measures taken relies on findings of fact which the referring court is in a better position than the Court to make (see *Pedicel*, cited

i størst mulig grad reduserer en folkehelserisiko (jf. forente saker C-171/07 og C-172/07 *Apothekerkammer des Saarlandes og andre*, Sml. 2009 s. I-4171, avsnitt 30).

83 Det følger av dette at der den berørte EØS-stat med rette tar sikte på en svært høy grad av beskyttelse, må det være tilstrekkelig at myndighetene godtgjør at det var rimelig å tro at tiltaket ville kunne bidra til å beskytte menneskers helse, selv om det måtte foreligge en viss vitenskapelig usikkerhet vedrørende det omtvistede tiltaks egnethet og nødvendighet.

84 I denne sammenheng legger EFTA-domstolen til grunn at et tiltak som forbyr synlig oppstilling av tobakksprodukter, som er det denne sak gjelder, etter sin art synes egnet til å begrense, i alle fall på lang sikt, forbruket av tobakk i den berørte EØS-stat. I mangel av klare bevis for det motsatte, kan et tiltak av denne type således ses som egnet til å beskytte folkehelsen.

85 I den utstrekning den aktuelle lovgivning anses som egnet, må det vurderes om de aktuelle tiltak går ut over det som er nødvendig for å nå målene som søkes oppnådd. Det følger av rettspraksis at EØS-avtalen artikkel 13 må tolkes strengt fordi den gjør unntak fra det frie varebytte innenfor EØS-området. Derfor er det de nasjonale myndigheter som må godtgjøre at reglene er nødvendige for å oppnå det erklærte mål, og at målet ikke kan nås ved bruk av mindre omfattende forbud eller restriksjoner eller ved forbud eller restriksjoner som påvirker samhandelen innenfor EØS-området i mindre grad (jf. *Humanplasma*, som omtalt over, avsnitt 38, og den rettspraksis som det vises til der).

86 Når det gjelder den videre vurdering av om mindre inngripende tiltak enn forbudet mot synlig oppstilling kunne gi et tilsvarende resultat, bør vurderingen overlates til den nasjonale domstol på grunnlag av alle rettslige og faktiske forhold i saken. Undersøkelsen av forholdsmessigheten og virkningene av tiltakene som er iverksatt, bygger på faktiske forhold som den anmodende domstol har bedre forutsetninger for å foreta enn EFTA-domstolen (se *Pedicel*, som omtalt over, avsnitt 55, og den rettspraksis som

above, paragraph 55, and the caselaw cited, and Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, paragraph 38).

87 In this regard, it should be recalled that in proceedings under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, which is based on a clear separation of functions between the Court and the national courts, it is for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences that they have for the judgment which it is required to deliver.

88 In accordance with the above, the answer to the second question must be that it is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to decide whether the public health objective of reducing tobacco use by the public in general can be achieved by measures less restrictive than a visual display ban on tobacco products.

V COSTS

89 The costs incurred by the Finnish Government, the Icelandic Government, the Portuguese Government, the Romanian Government, the United Kingdom Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Oslo tingrett, any decision on costs for the parties to those proceedings is a matter for that court.

det vises til der, og sak C-434/04 *Ahokainen og Leppik*, Sml. 2006 s. I-9171, avsnitt 38).

87 Her bør det minnes om at det i saker som behandles etter artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkingsorgan og en Domstol, som er basert på et klart skille mellom EFTA-domstolens og de nasjonale domstolers funksjoner, er det den nasjonale domstol som skal bringe på det rene de faktiske forhold som tvisten springer ut av, og fastsette konsekvensene disse har for dommen den skal avsi.

88 I samsvar med det ovenstående må svaret på det andre spørsmål være at det er den nasjonale domstol som skal identifisere de mål den aktuelle lovgivning har og avgjøre om folkehelsemålet om redusert tobakksbruk i befolkningen generelt kan oppnås med mindre inngripende tiltak enn et forbud mot synlig oppstilling av tobakksprodukter.

V SAKSOMKOSTNINGER

89 Omkostninger som er påløpt for Finlands regjering, Islands regjering, Portugals regjering, Romanias regjering, Storbritannias regjering, ESA og Europakommisjonen, som har inngitt innlegg for EFTA-domstolen, kan ikke kreves dekket. Ettersom foreleggelsen for EFTA-domstolen utgjør ledd i behandlingen av saken som står for Oslo tingrett, ligger det til tingretten å ta en eventuell avgjørelse om saksomkostninger for partene.

On those grounds,

THE COURT

in answer to the questions referred to it by Oslo tingrett hereby gives the following Advisory Opinion:

1. **A visual display ban on tobacco products, imposed by national legislation of an EEA State, such as the one at issue in the case at hand, constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 11 EEA if, in fact, the ban affects the marketing of products imported from other EEA States to a greater degree than that of imported products which were, until recently, produced in Norway.**

2. **It is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to decide whether the public health objective of reducing tobacco use by the public in general can be achieved by measures less restrictive than a visual display ban on tobacco products.**

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Delivered in open court in Luxembourg on 12 September 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President

På dette grunnlag avgir

EFTA-DOMSTOLEN

som svar på spørsmålene forelagt den av Oslo tingrett, følgende rådgivende uttalelse:

1. **Et forbud mot synlig oppstilling av tobakksprodukter fastsatt i en EØS-stats nasjonale lovgivning, som det denne sak gjelder, utgjør et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon etter EØS-avtalen artikkel 11, dersom forbudet faktisk påvirker markedsføringen av produkter importert fra andre EØS-stater i større grad enn det påvirker markedsføringen av importerte produkter som inntil nylig ble produsert i Norge.**

2. **Det er den nasjonale domstol som skal klargjøre de mål den aktuelle lovgivning faktisk har til hensikt å fremme, og avgjøre om folkehelsemålet om redusert tobakksbruk i befolkningen generelt kan oppnås gjennom mindre inngripende tiltak enn et forbud mot synlig oppstilling av tobakksprodukter.**

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Avsagt i åpen rett i Luxembourg den 12. september 2011.

Skúli Magnússon
Justissekretær

Carl Baudenbacher
President

REPORT FOR THE HEARING

in Case E-16/10

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 Oslo District Court (Oslo tingrett), Norway, in a case pending before it between

Philip Morris Norway AS

and

the Norwegian State, represented by the Ministry of Health and Care Services,

concerning the interpretation of Articles 11 and 13 of the EEA Agreement, in particular whether they preclude a rule prohibiting the visible display of tobacco products in retail outlets as prescribed by Norwegian law.

I INTRODUCTION

1. By a letter dated 12 October 2010, registered at the EFTA Court on 19 October 2010, Oslo District Court, Norway, made a request for an Advisory Opinion in a case pending before it between Philip Morris Norway AS ("the Plaintiff") and the Norwegian State, represented by the Ministry of Health and Care Services ("the Defendant").

II FACTS AND PROCEDURE

2. The parties disagree whether national legislation that introduces a display ban on tobacco products constitutes an unlawful restriction pursuant to Article 11 of the Agreement on the European Economic Area ("EEA"). It is also disputed, assuming a restriction contrary to Article 11 EEA exists, which criteria are decisive to determine whether a display ban is suitable and necessary on public health grounds pursuant to Article 13 EEA.

3. The Plaintiff is a subsidiary of the world's biggest tobacco producer and imports tobacco products to Norway. As such, the Plaintiff is subject to a total prohibition on the advertising of tobacco products, a ban introduced in 1973. That prohibition

RETTSMØTERAPPORT

i sak E-16/10

ANMODNING til EFTA-domstolen i henhold til artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Oslo tingrett, Norge, i en sak for denne domstol mellom

Philip Morris Norway AS

og

Staten v/Helse- og omsorgsdepartementet,

om tolkningen av EØS-avtalen artikkel 11 og 13, særlig hvorvidt de er til hinder for et forbud mot synlig oppstilling av tobakksvarer på utsalgssteder som fastsatt ved norsk lov.

I INNLEDNING

1. Ved brev datert 12. oktober 2010, registrert ved EFTA-domstolen 19. oktober 2010, fremsatte Oslo tingrett en anmodning om rådgivende uttalelse i en sak som står for tingretten, mellom Philip Morris Norway AS ("saksøker") og staten v/Helse- og omsorgsdepartementet ("saksøkte").

II FAKTA OG PROSEDYRE

2. Partene er uenige om hvorvidt norsk lovgivning som innfører forbud mot synlig oppstilling av tobakksvarer, innebærer en ulovlig restriksjon etter artikkel 11 i Avtalen om Det europeiske økonomiske samarbeidsområde ("EØS-avtalen"). Det er også omtvistet – forutsatt at det foreligger en restriksjon i strid med EØS-avtalen artikkel 11 – hvilke kriterier som skal legges til grunn for å avgjøre spørsmålet om hvorvidt et oppstillingsforbud er egnet og nødvendig av hensyn til folkehelsen i henhold til EØS-avtalen artikkel 13.

3. Saksøker er et datterselskap av verdens største tobakksprodusent og importerer tobakksprodukter til Norge. Som sådan er saksøker underlagt et totalforbud mot å reklamere for tobakksvarer, et forbud som ble innført i 1973. Dette forbud gjelder alle former

entails a ban on all forms of marketing in all kinds of media, including newspapers, radio, television and posters. This general prohibition also applies to direct and indirect advertising, such as using trademarks or logos used to depict tobacco products. The ban also applies to advertising in retail outlets in the form of posters and similar objects at the cash register or in other places in the retail store that depict trademark, logo and/or characteristics of the product.

4. In 2009, the Defendant introduced legislation to amend the existing legal framework establishing an advertising ban on tobacco products. Under the new provisions, the advertising prohibition extends to the visible display of tobacco products and smoking devices. However, the legislation permits one exception to the prohibition on the visible display of tobacco products. Under that exception, the ban does not apply to dedicated tobacco boutiques. The new legislation took effect on 1 January 2010.

5. The Plaintiff filed a lawsuit before Oslo District Court against the Defendant seeking to have the ban set aside on grounds of incompatibility with the EEA Agreement. The Plaintiff argues that the display prohibition entails an unlawful restriction contrary to Article 11 EEA as it hinders the free movement of goods. In contrast, the Defendant argues that the prohibition is compatible with the EEA Agreement.

6. On 25 June 2010, Oslo District Court decided to request an Advisory Opinion from the EFTA Court on the interpretation of Articles 11 and 13 EEA. In its request, Oslo District Court notes that there is relevant case-law from the Court and the Court of Justice of the European Union ("the ECJ") on traditional marketing. However, it considers it necessary to obtain additional guidance from the EFTA Court on the lawfulness of a general prohibition on the visible display of tobacco products within the context of Articles 11 and 13 EEA.

for markedsføring i alle typer medier, herunder aviser, radio, fjernsyn og på plakater. Dette generelle forbud omfatter også direkte og indirekte produktreklame, som bruk av varemerker eller logoer som forbindes med tobakksprodukter. Forbudet gjelder også reklame på utsalgssteder i form av plakater og lignende innretninger ved kassen eller andre steder i utsalgslokalet med avbildning av varemerker, logoer og/eller produktkarakteristika.

4. I 2009 endret saksøkte gjeldende lovgivning om reklameforbud for tobakksvarer. Med de nye bestemmelser ble reklameforbudet utvidet til synlig oppstilling av tobakksvarer og annet røykeutstyr. Lovgivningen tillater imidlertid ett unntak fra forbudet mot synlig oppstilling av tobakksvarer. I henhold til dette unntak gjelder forbudet ikke for spesialforretninger for tobakk. Den nye lovgivning trådte i kraft 1. januar 2010.

5. Saksøker tok ut søksmål mot saksøkte ved Oslo tingrett for å få forbudet tilsidesatt med henvisning til at det er i strid med EØS-avtalen. Saksøker gjør gjeldende at oppstillingsforbudet innebærer en ulovlig restriksjon som er i strid med EØS-avtalen artikkel 11 ettersom det er til hinder for det frie varebytte. Saksøkte gjør derimot gjeldende at forbudet er forenlig med EØS-avtalen.

6. Den 25. juni 2010 besluttet Oslo tingrett å anmode EFTA-domstolen om en rådgivende uttalelse om tolkningen av EØS-avtalen artikkel 11 og 13. I sin anmodning bemerker Oslo tingrett at det foreligger relevant rettspraksis fra EFTA-domstolen og Den europeiske unions domstol ("EU-domstolen") når det gjelder tradisjonell markedsføring. Tingretten mener imidlertid det er nødvendig med ytterligere veiledning fra EFTA-domstolen når det gjelder lovligheten av et generelt forbud mot synlig oppstilling av tobakksvarer i lys av EØS-avtalen artikkel 11 og 13.

III QUESTIONS

7. The following questions were thus referred to the Court:

1. Shall Article 11 of the EEA Agreement be understood to mean that a general prohibition against the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods?

2. Assuming there is a restriction, which criteria would be decisive to determine whether a display prohibition, based on the objective of reduced tobacco use by the public in general and especially amongst young people, would be suitable and necessary having regard to public health?

IV LEGAL BACKGROUND

EEA law

8. Article 11 EEA reads as follows:

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

9. Article 13 EEA reads as follows:

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.

National law[1]

10. In Norway, the total prohibition on the advertising of tobacco products was established in the Law of 9 March 1973 No 14

[1] Translations of national provisions are unofficial and are based on translations contained in the documents of the case.

III SPØRSMÅL

7. Følgende spørsmål ble forelagt EFTA-domstolen:

1. Skal EØS-avtalen artikkel 11 forstås slik at et generelt forbud mot synlig oppstilling av tobakksprodukter utgjør et tiltak med tilsvarende virkning som en kvantitativ restriksjon på den frie bevegelighet av varer?

2. Forutsatt at det foreligger en restriksjon, hvilke kriterier vil være avgjørende for å fastslå om et oppstillingsforbud begrunnet i målet om redusert tobakksbruk i befolkningen generelt og blant unge spesielt, vil være egnet og nødvendig av hensyn til folkehelsen?

IV RETTSLIG BAKGRUNN

EØS-retten

8. EØS-avtalen artikkel 11 lyder:

Kvantitative importrestriksjoner og alle tiltak med tilsvarende virkning skal være forbudt mellom partene.

9. EØS-avtalen artikkel 13 lyder:

Bestemmelsene i artikkel 11 og 12 skal ikke være til hinder for forbud eller restriksjoner på import, eksport eller transitt som er begrunnet ut fra hensynet til offentlig moral, orden og sikkerhet, vernet om menneskers og dyrs liv og helse, plantelivet, nasjonale skatter av kunstnerisk, historisk eller arkeologisk verdi eller den industrielle eller kommersielle eiendomsrett. Slike forbud eller restriksjoner må dog ikke kunne brukes til vilkårlig forskjellsbehandling eller være en skjult hindring på handelen mellom avtalepartene.

Nasjonal rett[1]

10. I Norge ble totalforbudet mot reklame for tobakksvarer innført ved lov 9. mars 1973 nr. 14 om vern mot tobakksskader (Lov om vern

[1] [Fotnoten gjelder oversettelse til engelsk av norsk rett, og er uten relevans i den norske versjonen.].

relating to the prevention of the harmful effects of tobacco (Lov om vern mot tobakksskader 9. mars 1973 nr. 14 – "the Tobacco Act I"). Section 4 reads as follows:

All forms of advertising of tobacco products are prohibited. The same applies to pipes, cigarette paper, cigarette rollers and other smoking devices.

Tobacco products must not be included in the advertising of other goods or services.

11. The Law of 3 April 2009 No 18 (Lov om endringer i lov 9. mars 1973 nr. 14 om vern mot tobakksskader – "the Tobacco Act II") extended the advertising prohibition to the visible display of tobacco products. It took effect on 1 January 2010 and amends various provisions of the Tobacco Act I. Section 5 of the Tobacco Act I, as amended, now reads as follows:

§5. Prohibition against the visible display of tobacco products and smoking devices.

The visible display of tobacco products and smoking devices at retail outlets is forbidden. The same applies to imitations of such products and to token cards which give the customer access to acquire tobacco products or smoking devices from vending machines.

The prohibition in the first paragraph does not apply to dedicated tobacco boutiques.

At the retail outlets it is allowed to provide neutral information regarding the price and which tobacco products are for sale at the premises. The same applies to smoking devices.

The Ministry can through regulations provide for rules on the implementation and supplementing of these provisions and provide exemptions from such.

12. Section 2 of the Tobacco Act II defines certain concepts relevant to the display prohibition:

§2. Definitions

By tobacco products it is understood in this Act, products which can be smoked, sniffed, sucked or chewed, provided that they, wholly or partly, consist of tobacco.

mot tobakksskader 9. mars 1973 nr. 14 – "tobakksskadeloven I"). Paragraf 4 første og andre ledd lyder:

Alle former for reklame for tobakksvarer er forbudt. Det samme gjelder for piper, sigarettpapir, sigarettrullere og annet røykeutstyr.

Tobakksvarer må ikke inngå i reklame for andre varer eller tjenester.

11. Lov 3. april 2009 nr. 18 (Lov om endringer i lov 9. mars 1973 nr. 14 om vern mot tobakksskader – "tobakksskadeloven II") utvidet reklameforbudet til synlig oppstilling av tobakksvarer. Loven trådte i kraft 1. januar 2010 og endrer en rekke bestemmelser i tobakksskadeloven I. Etter endringen lyder § 5 i tobakksskadeloven I:

§ 5. Forbud mot synlig oppstilling av tobakksvarer og røykeutstyr.

Synlig oppstilling av tobakksvarer og røykeutstyr på utsalgssteder er forbudt. Tilsvarende gjelder for imitasjoner av slike varer og for automatkort som gir kunden adgang til å hente ut tobakksvarer eller røykeutstyr fra automat.

Forbudet i første ledd gjelder ikke for spesialforretninger for tobakk.

Det kan på utsalgssteder gis nøytrale opplysninger om pris, og om hvilke tobakksvarer som selges på stedet. Tilsvarende gjelder for røykeutstyr.

Departementet kan gi forskrifter om gjennomføring og utfylling av disse bestemmelser og gjøre unntak fra dem.

12. Tobakksskadeloven II § 2 definerer visse begreper som er relevante for oppstillingsforbudet:

§ 2. Definisjoner

Med tobakksvarer forstås i denne lov varer som kan røykes, innsnuses, suges eller tygges såfremt de helt eller delvis består av tobakk.

By smoking devices it is understood in this Act, products which by design are mainly for use in connection with tobacco products.

By dedicated tobacco boutiques it is understood retail outlets which mainly sell tobacco products or smoking devices.

V WRITTEN OBSERVATIONS

13. 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 Plaintiff, represented by Peter Dyrberg, advokat, Brussels, Jan Magne Juuhl-Langseth, advokat, Oslo, and Michel Petite, avocat, Paris;
- the Defendant, represented by Ketil Bøe Moen, advokat, and Ida Thue, advokat, Office of the Attorney General (Civil Affairs), Oslo;
- the Republic of Finland, represented by Mervi Pere, Legal Counsellor, Ministry for Foreign Affairs, acting as Agent;
- Iceland, represented by Íris Lind Sæmundsdóttir, Legal Officer, Ministry for Foreign Affairs, acting as Agent;
- the Republic of Portugal, represented by Luís Fernandes, Director of the Legal Service of the Directorate General for European Affairs and Maria João Palma, Legal Consultant of the Directorate General for Economic Activities, acting as Agents;
- Romania, represented by Emilian Carlogea, Director for Directorate for Trade Policy, Ministry of Economy, Trade and Business Environment, acting as Agent;
- the United Kingdom, represented by Stefan Ossowski, Treasury Solicitor, Treasury Solicitor's Office, European Division, acting as Agent, and Ian Rogers, barrister;
- the EFTA Surveillance Authority, represented by Florence Simonetti, Senior Officer, and Fiona Cloarec, Officer, Department of Legal & Executive Affairs, acting as Agents;

Med røykeutstyr forstås i denne lov varer som etter sitt formål hovedsakelig benyttes i forbindelse med tobakksvarer.

Med spesialforretning for tobakk menes utsalgssted som hovedsakelig selger tobakksvarer eller røykeutstyr.

V SKRIFTLIGE INNLEGG

13. I medhold av artikkel 20 i EFTA-domstolens vedtekter og artikkel 97 i rettergangsordningen er skriftlige innlegg inngitt av:

- saksøker, representert ved advokat Peter Dyrberg, Brussel, advokat Jan Magne Juuhl-Langseth, Oslo, og advokat Michel Petite, Paris,
- saksøkte, representert ved advokat Ketil Bøe Moen og advokat Ida Thue, Regjeringsadvokaten, Oslo,
- Islands regjering, representert ved Íris Lind Sæmundsdóttir, Legal Officer, Ministry for Foreign Affairs,
- Republikken Finland, representert ved Mervi Pere, Legal Counsellor, Ministry for Foreign Affairs,
- Republikken Portugal, representert ved Luís Inez Fernandes, Director of the Legal Service of the Directorate General for European Affairs and Maria João Palma, Legal Consultant of the Directorate General for Economic Activities,
- Romania, representert ved Emilian Carlogea, Director of the Directorate for Trade Policy, Ministry of Economy, Trade and Business Environment,
- Det forente kongerike Storbritannia og Nord-Irland ("Storbritannia"), representert ved Stefan Ossowski, Treasury Solicitor, Treasury Solicitor's Office, European Division, som partsrepresentant, og Ian Rogers, barrister,
- EFTAs overvåkningsorgan, representert ved Florence Simonetti, Senior Officer, and Fiona Cloarec, Officer, Department of Legal & Executive Affairs,

– the European Commission, represented by Peter Oliver, Legal Advisor, and Günter Wilms, Member of its Legal Service, acting as Agents.

The Plaintiff

The first question

14. The Plaintiff claims that the ban on the visible display of tobacco products constitutes "a measure with equivalent effect to a quantitative restriction" on the free movement of goods within the meaning of Article 11 EEA. This claim is supported by two arguments. First, the plaintiff argues that the total display ban is inherently discriminatory and as such constitutes a restriction on free movement of goods within the meaning of Article 11 EEA. Second, the Plaintiff asserts that the display ban entails a restriction on free movement of goods because it hinders market access.

Restriction on free movement of goods within the meaning of Article 11 EEA

Prohibition of measures capable of restricting free movement

15. With regard to the argument that the display ban constitutes a restriction within the meaning of Article 11 EEA, the Plaintiff argues that guidance is to be found in Article 34 of the Treaty on the Functioning of the European Union ("TFEU"), which includes a provision similar in substance to Article 11 EEA, concerning "measures having equivalent effect to quantitative restrictions" and the interpretation placed on these provisions in EU law.[2] According to established case-law, the concept of "quantitative restrictions" is considered to entail "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[3]

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2 The Plaintiff refers to a legal opinion produced by Sir Francis Jacobs, former Advocate General of the Court of Justice of the European Union, on the questions to be answered in this case. The opinion was submitted to the Court as Annex I to the Plaintiff's written pleadings.

3 For a definition of "quantitative measures", the Plaintiff refers to Article 34 TFEU and Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

– Europakommisjonen, representert ved Peter Oliver, Legal Adviser, og Günter Wilms, medlem av Kommisjonens juridiske tjeneste.

Saksøker

Det første spørsmål

14. Saksøker gjør gjeldende at forbudet mot synlig oppstilling av tobakksvarer utgjør "et tiltak med tilsvarende virkning som en kvantitativ restriksjon" på det frie varebytte i henhold til EØS-avtalen artikkel 11. Denne påstand underbygges av to argumenter. Saksøker gjør for det første gjeldende at totalforbudet mot synlig oppstilling er diskriminerende av natur, og dermed utgjør en restriksjon på det frie varebytte i henhold til EØS-avtalen artikkel 11. Dernest hevder saksøker at oppstillingsforbudet innebærer en restriksjon på det frie varebytte fordi det hindrer markedsadgang.

Restriksjon på det frie varebytte i henhold til EØS-avtalen artikkel 11

Forbud mot tiltak som kan begrense den frie bevegelighet

15. Når det gjelder anførselen om at oppstillingsforbudet utgjør en restriksjon i henhold til EØS-avtalen artikkel 11, gjør saksøker gjeldende at veiledningen er å finne i artikkel 34 i traktaten om Den europeiske unions virkemåte ("TEUV"), som inneholder en bestemmelse som i det vesentlige er lik EØS-avtalen artikkel 11, om "tiltak med tilsvarende virkning som kvantitative restriksjoner", og i EU-rettens tolkning av disse bestemmelser.[2] I henhold til fast rettspraksis betraktes begrepet "kvantitative restriksjoner" å omfatte "[e]nhver af medlemsstaternes bestemmelser for handelen, som direkte eller indirekte, øjeblikkeligt eller potentielt, kan hindre samhandelen i Fællesskabet".".[3]

[2] Saksøker viser til en juridisk betenkning av Sir Francis Jacobs, tidligere generaladvokat ved EF-domstolen, om spørsmålene som skal besvares i denne saken. Betenkningen ble forelagt EFTA-domstolen som Vedlegg I til saksøkers skriftlige innlegg.

[3] For en definisjon av "kvantitative tiltak" viser saksøker til TEUV artikkel 34 og sak 8/74 *Procureur du Roi* mot *Benoît og Gustave Dassonville*, Sml. 1974 s. 837(avsnitt 5).

16. Notwithstanding the importance of measures that actually restrict free movement of goods, the Plaintiff emphasises the need to go further. Thus, the potential effects of the legislation in question are also relevant. The Plaintiff submits that if the legislation is capable of having restrictive effects, it must be regarded as having an effect equivalent to a quantitative restriction.[4]

Discriminatory Measures

17. The Plaintiff argues that national legislation that restricts or prohibits certain selling arrangements is not, as such, a direct or indirect hindrance to trade between Member States, if the legislation applies to all relevant traders and it affects the marketing of domestic products and imported products in the same manner.[5] However, in the Plaintiff's view, a total advertising ban is considered to constitute a *per se* restriction on the free movement of goods in EU law.[6] Further, according to established case-law, a total ban on the advertising of alcoholic products may be considered a restriction on the free movement of goods, without any need for an analysis of the factual effects of such a ban on a particular market.[7] In addition, the Plaintiff submits that a total advertising ban, as prescribed by national law, is liable to favour domestic products over imported products because consumers tend to be more familiar with domestic products than imported ones.[8]

18. The Plaintiff contends that the absence of tobacco production in Norway does not alter that the ban on visual display of tobacco

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4 The Plaintiff refers to Case C-184/96 *Commission* v *France* [1998] ECR I-6197, paragraph 17, Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraph 13, and Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649.

5 The Plaintiff refers to Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16.

6 The Plaintiff refers to the Opinion of Advocate General Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, point 50.

7 Case C-405/98 *Gourmet International* [2001] ECR I-1795, paragraphs 18, 20 and 21, and Case C-239/02 *Douwe Egberts* [2004] ECR I-7007, paragraphs 53-54.

8 The Plaintiff refers to *Douwe Egberts*, cited above, paragraph 53.

16. Uten hensyn til viktigheten av tiltak som faktisk begrenser det frie varebytte, understreker saksøker nødvendigheten av å gå lengre. Dermed er de potensielle virkningerav den aktuelle lovgivning også relevante. Saksøker gjør gjeldende at dersom lovgivningen kan ha begrensende virkninger, må den anses å ha tilsvarende virkning som en kvantitativ restriksjon.[4]

Diskriminerende tiltak

17. Saksøker gjør gjeldende at nasjonal lovgivning som begrenser eller forbyr visse salgsordninger ikke som sådan utgjør en direkte eller indirekte hindring for handelen mellom medlemsstatene dersom lovgivningen gjelder for alle berørte næringsdrivende og den påvirker markedsføringen av innenlandske produkter og importerte produkter på samme måte.[5] Slik saksøker ser det, må imidlertid et totalt reklameforbud i seg selv betraktes som en restriksjon på det frie varebytte etter EU-retten.[6] I henhold til fast rettspraksis kan videre et totalforbud mot reklame for alkoholprodukter betraktes som en restriksjon på det frie varebytte, uten at det trengs noen analyse av de faktiske virkninger av et slikt forbud på et bestemt marked.[7] Saksøker gjør dessuten gjeldende at et totalt reklameforbud fastsatt i nasjonal lovgivning vil kunne favorisere innenlandske produkter i forhold til importerte produkter fordi forbrukerne vil kjenne de innenlandske produkter bedre enn de importerte.[8]

18. Saksøker anfører at det at det ikke er tobakksproduksjon i Norge, ikke endrer at forbudet mot synlig oppstilling av tobakksproduk-

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4 Saksøker viser til sak C-184/96 *Kommisjonen* mot *Frankrike*, Sml. 1998 s. I-6197 (avsnitt 17); forente saker 177/82 og 178/82 *Van de Haar* og Kaveka de Meern BV, Sml. 1984 s. 1797 (avsnitt 13); og sak 120/78 *Rewe-Zentral* mot *Bundesmonopolverwaltung für Branntwein "Cassis de Dijon"*, Sml. 1979 s. 649.

5 Saksøker viser til forente saker C-267/91 og C-268/91 *Keck og Mithouard*, Sml. 1993 s. I-6097 (avsnitt 16).

6 Saksøker viser til uttalelse fra generaladvokat Jacobs i sak C-412/93 *Société d'importation Edouard Leclerc-Siplec* mot *TF1 Publicité SA, M6 Publicité SA*, Sml. 1995 s. I-179 (avsnitt 50).

7 Sak C-405/98 *Gourmet International*, Sml. 2001 s. I-1795 (avsnitt 18, 20 og 21); og sak C-239/02 *Douwe Egberts NV* mot *Westrom Pharma NV og Christophe Souranis*, Sml. 2004 s. I-7007 (avsnitt 53–54).

8 Saksøker viser til *Douwe Egberts*, som sitert over (avsnitt 53).

products constitutes a *per se* restriction on the free movement of goods. The absence of domestic production is irrelevant to the applicability of Article 11 EEA. In the Plaintiff's view, such absence simply results in the situation that the challenged national measure disadvantages only imported products and is, as such, a discriminatory restriction on free movement of goods.[9]

19. Thus, the Plaintiff argues that a ban on visual display of tobacco products is inherently discriminatory and the absence of domestic production is either irrelevant or supports the finding of discrimination.

Advertising ban and its extension as a display ban

20. The Plaintiff asserts that the total advertising ban constitutes a *per se* restriction on free movement of goods within the meaning of Article 11 EEA. According to the Plaintiff, that principle applies *a fortiori* to the dispute in the present case. The additional visual display ban eliminates the only remaining means of communication left to tobacco producers in order to convey characteristics of tobacco products to consumers. As the advertising ban enables consumers only to acquaint themselves with information relating to tobacco products at points of sale, the visual display ban closes this last remaining channel of communication, making the entry of new imported brands impossible.

21. This also discriminates in particular against imported brands. Norwegian tobacco brands date as far back as 1885 and were produced in Norway until 2008. These brands enjoy a strong presence due to local habits and customs. The display ban distorts the position of new imported brands – many of which are unfamiliar to consumers.

[9] The Plaintiff refers to Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 17, Case C-416/00 *Morellato* [2003] ECR I-9343, paragraph 37, and the Opinion of Advocate General Mengozzi in Case C-108/09 *Ker-Optika*, not yet reported, point 67.

ter utgjør en hindring av det frie varebytte. Det faktum at det ikke er innenlandsk produksjon, er irrelevant for hvorvidt EØS-avtalen artikkel 11 kommer til anvendelse. Etter saksøkers oppfatning fører dette simpelthen til en situasjon der det omtvistede nasjonale tiltak bare går ut over importerte varer og dermed er en diskriminerende restriksjon på det frie varebytte.[9]

19. Følgelig gjør saksøker gjeldende at et forbud mot synlig oppstilling av tobakksvarer av natur er diskriminerende, og at det at det ikke er innenlandsk produksjon, enten er irrelevant eller vil understøtte konklusjonen om diskriminering.

Reklameforbudet og utvidelsen av dette til et forbud mot synlig oppstilling

20. Saksøker hevder at et totalt reklameforbud i seg selv utgjør en restriksjon på det frie varebytte i henhold til EØS-avtalen artikkel 11. Ifølge saksøker gjelder dette prinsipp desto mer i tvisten i den foreliggende sak. Utvidelsen til et forbud mot synlig oppstilling fjerner den eneste gjenværende muligheten for kommunikasjon som tobakksprodusentene hadde for å formidle egenskapene ved tobakksprodukter til forbrukerne. Ettersom reklameforbudet innebærer at forbrukerne bare har mulighet til å få informasjon om tobakksprodukter på utsalgsstedene, innebærer forbudet mot synlig oppstilling at denne siste gjenværende kommunikasjonskanal stenges, slik at det blir umulig for nye importerte merker å etablere seg.

21. Dette innebærer også særlig forskjellsbehandling av importerte merker. De første norske tobakksmerker kom i 1885 og ble produsert i Norge frem til 2008. Lokal skikk og bruk gjør at disse merkerhar en sterk tilstedeværelse. Oppstillingsforbudet fører til konkurransevridning når det gjelder stillingen for nye importerte merker, da mange av disse er ukjente for forbrukerne.

[9] Saksøker viser til sak C-391/92 *Kommisjonen* mot *Hellas*, Sml. 1995 s. I-1621 (avsnitt 17); sak C-416/00 *Morellato og Comune di Padova*, Sml. 2003 s. I-9343 (avsnitt 37); og uttalelse fra generaladvokat Mengozzi i sak C-108/09 *Ker-Optika bt* mot ÀNTSZ Dél-dunántúli Regionális Intézete, dom av 2. desember 2010, ennå ikke i Sml. (avsnitt 67).

The display ban and specialist Internet websites selling tobacco

22. In the view of the Plaintiff, the display ban applies to specialist Internet websites exclusively selling tobacco. In contrast, the display ban does not apply to specialist tobacco shops that sell tobacco products to consumers. Therefore, specialist tobacco websites are unable to display their products.

23. The Plaintiff contends that this framework constitutes unequal treatment of sales depending on whether they are made in a shop or over the Internet. The Plaintiff points out that even though Norwegian tobacco shops are also not permitted to display products on their websites, they are able to do so in their stores. Such treatment constitutes indirect discrimination against imported products and has an effect comparable to a quantitative restriction within the meaning of Article 11 EEA.[10] Therefore, the display ban is more of an obstacle to foreign tobacco shops than to domestic ones.

The display ban restricts free movement as it hinders market access

Measures that hinder market access of products from other EEA States constitute a restriction within the meaning of Article 11 EEA

24. According to the Plaintiff, case-law has established that national measures which hinder market access of products from other Member States amount to a restriction on the free movement of goods.[11] Case-law has clarified, therefore, the extent to which rules may be considered restrictions on free movement for the purposes of Article 11 EEA.

25. It follows from this case-law, the Plaintiff continues, that any rules that (i) have the aim or effect of discriminating against imported goods; (ii) lay down requirements for imported goods, or (iii)

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10 Reference is made to Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887 and *Ker-Optika*, cited above.

11 Reference is made to Case C-110/05 *Commission* v *Italy* [2009] ECR I-519 and Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273. In addition, the Plaintiff refers to the Opinion of Advocate General Bot in *Commission* v *Italy*, points 77-84, and the Opinion of Advocate General Geelhoed in *Douwe Egberts*, cited above, point 71.

Oppstillingsforbudet og spesialiserte internettsider som selger tobakk

22. Etter saksøkers oppfatning gjelder oppstillingsforbudet spesialiserte internettsider som utelukkende selger tobakk. Derimot gjelder oppstillingsforbudet ikke spesialforretninger for tobakk som selger tobakksprodukter til forbrukere. Derfor kan spesialiserte internettsider ikke vise sine produkter.

23. Saksøker hevder at denne ramme innebærer at salget behandles forskjellig alt etter om det skjer i en forretning eller på Internett. Saksøker peker på at selv om heller ikke norske tobakksforretninger har tillatelse til å vise produkter på sine nettsider, så kan de gjøre det i forretningene. Slik behandling innebærer indirekte forskjellsbehandling av importerte produkter og har en tilsvarende virkning som en kvantitativ importrestriksjon i henhold til EØS-avtalen artikkel 11.[10] Følgelig er oppstillingsforbudet en større hindring for utenlandske tobakksforretninger enn for norske.

Oppstillingsforbudet er en restriksjon på det frie varebytte ettersom det forhindrer markedsadgang

Tiltak som hindrer markedsadgang for produkter fra andre EØS-stater, utgjør en restriksjon i henhold til EØS-avtalen artikkel 11

24. Ifølge saksøker følger det av rettspraksis at nasjonale tiltak som forhindrer markedsadgang for produkter fra andre medlemsstater, innebærer en restriksjon på det frie varebytte.[11] Rettspraksis har derfor klarlagt i hvilket omfang regler kan betraktes som restriksjoner på det frie varebytte i henhold til EØS-avtalen artikkel 11.

25. Det følger av denne rettspraksis, fortsetter saksøker, at enhver regel som i) har som siktemål eller fører til forskjellsbehandling av importerte varer; ii) fastsetter kriterier for importerte varer,

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[10] Det vises til sak C-322/01 *Deutscher Apothekerverband eV og 0800 DocMorris NV, Jacques Waterval*, Sml. 2003 s. I-14887; og *Ker-Optika*, som sitert over.

[11] Det vises til sak C-110/05 *Kommisjonen* mot *Italia*, Sml. 2009 s. I-519 og sak C-142/05 *Mickelsson og Roos*, Sml. 2009 s. I-4273. Saksøker viser dessuten til uttalelse fra generaladvokat Bot i *Kommisjonen* mot *Italia* (avsnitt 77–84), og uttalelse fra generaladvokat Geelhoed i *Douwe Egberts*, som sitert over (avsnitt 71).

hinder access of imported goods to the market of a Member State must be considered restrictive for the purposes of Article 11 EEA. In the light of that analysis, a total visual display ban must be considered a restriction on the free movement of goods because it is inherently discriminatory[12] and because it hinders market access of imported products.[13]

Display ban and market hindrance

26. With regard to how the ban hinders market access from other EEA States, the Plaintiff argues that the display ban effectively forecloses one part of the EEA to entry of new brands from other EEA States. With such a restriction imposed on the tobacco market, it is difficult for producers to develop recognition of new brands.[14]

27. The Plaintiff asserts that the ban prohibits the use of brands to such an extent that they cannot be advertised or displayed in shops or on websites in a meaningful way. Thus, any possibility of communicating brands prior to sale is made not only difficult but also impossible, in particular for products not familiar to domestic customers. The communication of brands, the Plaintiff argues, is of particular importance when marketing of tobacco products through advertising is banned – a position supported by an earlier Commission decision pertaining to the tobacco industry.[15] Thus, whilst the advertising ban makes market entry difficult, the visual display ban forecloses market entry of foreign brands and, as such, is contrary to Article 11 EEA.

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12 The Plaintiff refers to *Keck and Mithouard*, *Gourmet International*, and *Douwe Egberts*, all cited above.

13 The Plaintiff refers to *Commission* v *Italy* and *Mickelsson and Roos*, both cited above.

14 Reference is made to Commission Decision Case COMP/M.2779 – *Imperial Tobacco/ Reemtsma Cigarettenfabriken* of 8 May 2002, paragraph 54.

15 The Plaintiff refers to Commission Decision Case COMP/M.4581 – *Imperial Tobacco/ Altadis* of 18 October 2007, paragraph 68, in support of its position.

eller iii) hindrer adgang for importerte varer til markedet i en medlemsstat, må betraktes som en restriksjon i henhold til EØS-avtalen artikkel 11. I lys av denne analyse må et totalforbud mot synlig oppstilling betraktes som en restriksjon på det frie varebytte fordi det av natur er diskriminerende[12] og forhindrer markedsadgang for importerte produkter.[13]

Oppstillingsforbud og markedshindring

26. Med hensyn til hvordan forbudet hindrer markedsadgang fra andre EØS-stater, gjør saksøker gjeldende at oppstillingsforbudet effektivt hindrer nye merker fra andre EØS-stater i å etablere seg i en del av EØS-området. Når en slik restriksjon pålegges tobakksmarkedet, er det vanskelig for produsentene å bygge opp anerkjennelse for nye merker.[14]

27. Saksøker hevder at forbudet hindrer bruken av merker i en slik grad at de ikke kan reklameres for eller fremvises i forretninger eller på nettsteder på noen meningsfull måte. Dermed er det ikke bare vanskelig, men til og med umulig å kommunisere merker før salg, særlig for produkter som de innenlandske forbrukere ikke er kjent med. Merkekommunikasjon, hevder saksøker, er av særlig betydning når markedsføring av tobakksprodukter gjennom reklame er forbudt, et standpunkt som har støtte i en tidligere kommisjonsbeslutning om tobakksindustrien.[15] Der reklameforbudet gjør etableringen på markedet vanskelig, gjør forbudet mot synlig oppstilling det med andre ord umulig for utenlandske merker å etablere seg på markedet, og det er derfor i strid med EØS-avtalen artikkel 11.

[12] Saksøker viser til *Keck og Mithouard*, *Gourmet International*, og *Douwe Egberts*, alle som sitert over.
[13] Saksøker viser til *Kommisjonen* mot *Italia* og *Mickelsson og Roos*, begge som sitert over.
[14] Det vises til kommisjonsbeslutning i sak COMP/M.2779 – *Imperial Tobacco/Reemtsma Cigarettenfabriken* av 8. mai 2002 (avsnitt 54).
[15] Saksøker viser til kommisjonsbeslutning i sak COMP/M.4581 – *Imperial Tobacco/Altadis* av 18. oktober 2007 (avsnitt 68) til støtte for dette syn.

28. The Plaintiff proposes that the first question be answered as follows:

Article 11 EEA must be understood to mean that a general prohibition against the visible display of tobacco products constitutes a measure with equivalent effect to a quantitative restriction on the free movement of goods.

The second question

29. On the second question, the Plaintiff argues that the EFTA Court should, as follows from case-law, provide the referring court with guidance pertaining to the justification or proportionality assessment needed according to Article 13 EEA.[16] However, the Plaintiff notes that earlier decisions left the referring national court without any guidance on the assessment of proportionality.[17]

30. Rulings given by national courts as a result of answers provided by the ECJ and the Court have produced diverging results. According to the Plaintiff, such conflict is inconsistent with the fundamental objective of the EEA Agreement, that is, to ensure the uniform application of the rules of the internal market throughout the EEA. Consequently, the Court should provide guidance in the form of detailed criteria for the proportionality assessment.

31. The Plaintiff submits that the proportionality assessment should include as fundamental concepts the notions of suitability and necessity. Consequently, the state concerned must prove that the restriction is suitable and no greater than necessary to meet the aims of general public importance.[18]

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16 The Plaintiff refers to Case C-73/08 *Bressol*, not yet reported, paragraph 65, and the Opinion of Advocate General Maduro in Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, point 32.

17 Reference is made, *inter alia*, to *Gourmet International*, cited above, and the subsequent decision of the national court.

18 The Plaintiff cites *Rewe-Zentral*, cited above, paragraph 8; Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraph 42; *Ahokainen and Leppik*, cited above, paragraph 39; Case C-170/04 *Rosengren* [2007] ECR I-4071, paragraph 47; and Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 47.

28. Saksøker foreslår følgende som svar på det første spørsmål:

EØS-avtalen artikkel 11 må forstås slik at et generelt forbud mot synlig oppstilling av tobakksprodukter utgjør et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon.

Det andre spørsmål

29. Når det gjelder det andre spørsmål, gjør saksøker gjeldende at EFTA-domstolen bør – slik det følger av rettspraksis – gi den anmodende domstol veiledning med hensyn til begrunnelsen eller vurderingen av forholdsmessighet som er nødvendig etter EØS-avtalen artikkel 13.[16] Imidlertid anfører saksøker at tidligere avgjørelser ikke har gitt den anmodende nasjonale domstol noen veiledning med hensyn til forholdsmessighetsvurderingen.[17]

30. Avgjørelser truffet av nasjonale domstoler som følge av svarene fra EU-domstolen og EFTA-domstolen har gitt forskjellige resultater. Ifølge saksøker er slik motstrid uforenlig med EØS-avtalens grunnleggende mål, nemlig å sikre ensartet anvendelse av reglene for det indre marked i hele EØS-området. Følgelig bør EFTA-domstolen legge frem veiledning i form av detaljerte kriterier for proporsjonalitetsvurderingen.

31. Saksøker mener at proporsjonalitetsvurderingen må omfatte de grunnleggende begreper egnethet og nødvendighet. Følgelig må den berørte stat bevise at restriksjonen er egnet og ikke mer inngripende enn det som er berettiget ut fra allmenne hensyn.[18]

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[16] Saksøker viser til sak C-73/08 *Bressol m.fl., Chaverot m.fl.* mot *Gouvernement de la Communauté française*, dom av 13. april 2010, ennå ikke i Sml. Rep (avsnitt 65), samt uttalelse fra generaladvokat Maduro i sak C-434/04 *Ahokainen og Leppik*, Sml. 2006 s. I-9171 (avsnitt 32).

[17] Det vises bl.a. til *Gourmet International*, som sitert over, og den nasjonale domstolens etterfølgende avgjørelse.

[18] Saksøker siterer *Rewe-Zentral*, som sitert over (avsnitt 8); forente saker C-388/00 og C-429/00 *Radiosistemi Srl* mot *Prefetto di Genovai,* Sml. 2002 s. I-5845 (avsnitt 42); *Ahokainen og Leppik*, som sitert over (avsnitt 39); sak C-170/04 *Rosengren m.fl.* mot *Riksåklagaren*, Sml. 2007 s. I-4071 (avsnitt 47); og forente saker C-34/95, C-35/95 og C-36/95 *Konsumentombudsmannen (KO) og De Agostini (Svenska) Förlag AB og Konsumentsombudsmannen (KO) og TV-Shop i Sverige AB*, Sml. 1997 s. I-3843 (avsnitt 47).

32. In addition, the Plaintiff emphasises that other factors are relevant to the assessment for the purposes of Article 13 EEA. The Article must be interpreted strictly as it derogates from the principle of free movement of goods.[19] The burden of proof is on the state to show that the measures are justified and that their benefits cannot be achieved with less restrictive alternatives.[20] Moreover, the justification for the derogation permitted by Article 13 EEA must not be based on speculation but on scientific evidence.[21]

33. Finally, the Plaintiff emphasises the need for the measures implemented to serve a legitimate aim. Although it accepts that reducing smoking is a legitimate objective, on its view, that does not relieve the state from the burden of showing that the ban serves its aim and that the benefits of the measure in question cannot be achieved with less restrictive means. Therefore, according to the Plaintiff, if a measure restricts trade in tobacco products but does not reduce tobacco consumption and achieve its stated public health objective, this cannot constitute legitimate justification for the elimination of the use of tobacco brands as the Defendant has done in the present case.

Criteria for proportionality assessment

34. According to the Plaintiff, the state has to produce evidence showing that the circumstances addressed by a measure actually create a risk to public health and that the contested measure reduces that risk.[22]

35. The Plaintiff asserts that there is no disagreement on the first issue, i.e. that tobacco products have a negative effect on public

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19 The Plaintiff refers to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep., p. 4, paragraph 53, and the Opinion of Advocate General Maduro in *Ahokainen and Leppik*, cited above, point 21.

20 Reference is made to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep., p. 89; Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep., p. 167, paragraph 88; Case E-1/06 *ESA* v *Norway* [2007] EFTA Ct. Rep., p. 11, paragraph 50; and Case E-3/05 *ESA* v *Norway* [2006] EFTA Ct. Rep., p. 104, paragraph 61.

21 Reference is made to Case E-3/00 *ESA* v *Norway* [2000-2001] EFTA Ct. Rep., p. 75.

22 In support of this viewpoint the Plaintiff refers to *Bressol*, cited above, paragraph 71, Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 51, and Case C-254/05 *Commission* v *Belgium* [2007] ECR I-4269, paragraph 36.

32. I tillegg understreker saksøker at andre faktorer er relevante for vurderingen i henhold til EØS-avtalen artikkel 13. Denne bestemmelse må undergis en streng fortolkning ettersom den fraviker prinsippet om fritt varebytte.[19] Det er staten som må bevise at tiltakene er berettiget og at formålet med dem ikke kan oppnås med mindre inngripende alternativer.[20] Videre må begrunnelsen for et unntak i henhold til EØS-avtalen artikkel 13 ikke være basert på spekulasjon, men på vitenskapelige bevis.[21]

33. Endelig understreker saksøker behovet for at tiltakene som gjennomføres, skal ha et legitimt mål. Selv om saksøker går med på at å redusere røyking er et legitimt mål, fritar ikke dette etter saksøkers mening staten fra å måtte bevise at forbudet tjener sitt mål, og at formålet med det aktuelle tiltaket ikke kan nås med mindre inngripende virkemidler. Dersom et tiltak begrenser handelen med tobakksprodukter, men ikke begrenser forbruket av tobakk eller bidrar til å oppnå statens fastsatte folkehelsemål, kan dette – ifølge saksøker – dermed ikke utgjøre en rettmessig begrunnelse for å fjerne bruken av tobakksmerker slik saksøkte har gjort i den foreliggende sak.

Kriterier for vurderingen av forholdsmessighet

34. Ifølge saksøker må staten legge frem bevis for at de omstendigheter et tiltak retter seg mot, faktisk skaper en risiko for folkehelsen, og på at det omtvistede tiltaket reduserer denne risiko.[22]

35. Saksøker gjør gjeldende at det ikke foreligger noen uenighet om det første punktet, altså at tobakksprodukter har en negativ innvirkning på folkehelsen. Når det gjelder det andre punktet, kon-

[19] Saksøker viser til sak E-4/04 *Pedicel AS og Sosial- og helsedirektoratet*, EFTA Ct. Rep. 2005 s. 4 (avsnitt 53), og uttalelse fra generaladvokat Maduro i *Ahokainen og Leppik*, som sitert over (avsnitt 21).

[20] Det vises til sak E-3/06 *Ladbrokes Ltd. og Den norske stat ved Kultur- og kirkedepartementet, Landbruks- og matdepartementet*, EFTA Ct. Rep. 2007 s. 89; sak E-2/06 *ESA* mot *Norge*, EFTA Ct. Rep. 2007 s. 167 (avsnitt 88); sak E-1/06 *ESA* mot *Norge*, EFTA Ct. Rep. 2007 s. 11 (avsnitt 50); og sak E-3/05 *ESA* mot *Norge*, EFTA Ct. Rep. 2006 s. 104 (avsnitt 61).

[21] Det vises til sak E-3/00 *ESA* mot *Norge*, EFTA Ct. Rep. 2000-2001 s. 75.

[22] Til støtte for dette synspunktet viser saksøker til *Bressol*, som sitert over (avsnitt 71); sak C-319/06 *Kommisjonen* mot *Luxembourg*, Sml. 2008 s. I-4323 (avsnitt 51); og sak C-254/05 *Kommisjonen* mot *Belgia*, Sml. 2007 s. I-4269 (avsnitt 36).

health. With regards to the second issue, the Plaintiff observes that the parties disagree, in that the Plaintiff considers that the display of tobacco products is not a risk to public health unless it increases tobacco consumption. Therefore, in its view, the relevant issue in the present case is, first, whether a ban on the display of tobacco at point of sale will reduce consumption, and, second, if so, whether such an effect can be achieved by other less restrictive means.

Criteria for suitability

36. The Plaintiff contends that the visual display ban is unsuitable for reducing tobacco consumption. According to the contested measure, tobacco products must be blocked from view at points of sale. That will, however, not affect their availability, as they will be stored in closed cabinets labelled "tobacco". Therefore, in the Plaintiff's view, the measure is only an additional inconvenience that will have only marginal effect on consumption.[23] As positive effects of the display ban cannot be assumed, the Defendant should be obliged to present evidence showing that the display of tobacco products actually creates health risks and that the elimination of the visible display of tobacco reduces such risks.

Insufficiency of evidence adduced by the state

37. The Plaintiff argues that the Defendant has not produced sufficient evidence in support of the visual display ban. Before introducing the ban, the Defendant requested a government agency to prepare a report on the existing literature in favour of a display ban – a request that resulted in a report that provided little support for display bans. Therefore, the Defendant has not fulfilled the requirement to produce evidence supporting the visual display ban.

38. In contrast, the Plaintiff submits that there is no evidentiary basis to assume that the visual display ban on tobacco products at

[23] Reference is made to *Rosengren*, cited above, and Case E-9/00 *ESA* v *Norway* [2002] EFTA Ct. Rep., p. 74, paragraphs 56-57.

staterer saksøker at partene er uenige i den forstand at saksøker mener at synlig oppstilling av tobaksprodukter ikke utgjør noen risiko for folkehelsen med mindre det fører til økt forbruk av tobakk. Etter saksøkers mening er det relevante spørsmålet i foreliggende sak derfor for det første om et forbud mot oppstilling av tobakk på utsalgssteder vil redusere forbruket, og dernest, om så er tilfellet, om denne effekt kan oppnås med andre, mindre inngripende virkemidler.

Egnethetskriterier

36. Saksøker anfører at forbudet mot synlig oppstilling er uegnet for å redusere forbruket av tobakk. I henhold til det omtvistede tiltaket skal tobaksprodukter ikke være synlige på utsalgssteder. Det vil imidlertid ikke berøre deres tilgjengelighet i og med at de vil være lagret i lukkede skap merket "tobakk". Derfor mener saksøker at tiltaket utelukkende er en tilleggsulempe som kun vil ha marginal innvirkning på forbruket.[23] Ettersom det ikke kan antas at oppstillingsforbudet vil ha noen positive effekter, bør saksøkte pålegges å legge frem bevis for at det å vise tobaksprodukter faktisk skaper en helserisiko, og at det å fjerne synlig oppstilling av tobakk reduserer denne risiko.

Utilstrekkelig bevisførsel fra statens side

37. Saksøker gjør gjeldende at saksøkte ikke har fremlagt tilstrekkelig bevis til støtte for forbudet mot synlig oppstilling. Før forbudet ble innført, anmodet saksøkte et offentlig organ om å utarbeide en rapport om eksisterende litteratur som støtter et oppstillingsforbud, en anmodning som resulterte i en rapport som ga lite støtte til et oppstillingsforbud. Saksøkte har derfor ikke oppfylt kravet om å fremlegge bevis til støtte for forbudet mot synlig oppstilling.

38. Derimot anfører saksøker at det ikke finnes noe kunnskapsgrunnlag for å anta at forbudet mot synlig oppstilling av tobaksprodukter på utsalgssteder vil redusere forbruket av tobakk, eller endog

[23] Det vises til *Rosengren*, som sitert over, og sak E-9/00 *ESA* mot *Norge*, EFTA Ct. Rep. 2002 s. 74 (avsnitt 56–57).

points of sale will reduce tobacco consumption, or even if there is any causal relationship between point of sale display of tobacco products and smoking initiation or prevalence.[24]

The experience of other jurisdictions

39. The Plaintiff points out that display bans have been implemented in other countries, such as Australia, Canada, Iceland, Ireland and Thailand. These measures and their effect have been the subjects of various academic studies that have consistently concluded that no empirical evidence can be found to support the view that visual display bans reduce smoking. Therefore, the experience from other jurisdictions shows that display bans have not been successful in reducing tobacco consumption.

40. Furthermore, the Plaintiff refers to studies undertaken in countries which have implemented visual display bans in which the effectiveness of total visual bans have been researched. Analysis of smoking prevalence before and after the introduction of such visual display bans has not demonstrated a relationship between the bans and smoking consumption. In particular, the Plaintiff submits that these studies have concluded that an introduction of a visual display ban has not accelerated the decline in smoking rates.[25]

Considerations of countervailing factors

41. The Plaintiff asserts that the visual display ban has unintended consequences, encouraging the illicit trade of tobacco products, that is, illegal tobacco, contraband and counterfeit brands of

[24] The Plaintiff refers to the report of Dr James J. Heckman, Professor of Economics at the University of Chicago, concerning whether reliable evidence could be found supporting the existence of a causal link between points of sale displays of cigarettes and smoking initiation. The report was submitted to the Court as Annex 2 to the Plaintiff's written pleadings.

[25] Reference is made to reports of Dr Jose Padilla, Research Fellow of the Centre for Economic Policy Research (London) and the Centro de Estudios Monetarios y Financieros (Madrid), and of Dr Gorm Grønnevet, Doctoral Fellow at the Norwegian School of Economics and Business Administration, which researched total visual display bans introduced in various parts of Canada and Iceland. These reports were submitted to the Court as Annexes 3 to 5 to the Plaintiff's written pleadings.

at det finnes noe årsakssammenheng mellom oppstilling av tobakksprodukter på utsalgssteder og oppstart av røyking eller utbredelsen av røyking.[24]

Erfaringen fra andre jurisdiksjoner

39. Saksøker peker på at oppstillingsforbud har vært innført i andre land, f.eks. Australia, Canada, Island, Irland og Thailand. Disse tiltak og virkningen av dem har vært gjenstand for ulike akademiske studier, som alle har konkludert med at det ikke finnes noe empirisk bevis for at forbud mot synlig oppstilling fører til mindre røyking. Erfaringen fra andre jurisdiksjoner viser derfor at oppstillingsforbud ikke har ført til en reduksjon i forbruket av tobakk.

40. Saksøker viser videre til studier gjennomført i land som har innført forbud mot synlig oppstilling, som har undersøkt effekten av dette. Analysen av utbredelsen av røyking før og etter innføringen av slike forbud mot synlig oppstilling har ikke vist noen forbindelse mellom forbudet og forbruket av tobakk. Særlig gjør saksøker gjeldende at studiene har konkludert med at innføringen av et forbud mot synlig oppstilling ikke har ført til raskere reduksjon i forekomsten av røyking.[25]

Vurdering av motargumenter

41. Saksøker hevder at forbudet mot synlig oppstilling har utilsiktede konsekvenser idet det oppmuntrer til ulovlig handel med tobakksprodukter, dvs. ulovlig tobakk, smuglervarer og falske

[24] Saksøker viser til rapporten fra dr. James J. Heckman, Professor of Economics ved University of Chicago, om hvorvidt det er mulig å finne pålitelig dokumentasjon for at det finnes et årsaksforhold mellom oppstilling av sigaretter på utsalgsstedet og oppstart av røyking. Rapporten ble forelagt EFTA-domstolen som Vedlegg 2 til saksøkers skriftlige innlegg.

[25] Det vises til rapporter fra dr. Jose Padilla, Research Fellow ved Centre for Economic Policy Research (London) og Centro de Estudios Monetarios y Financieros (Madrid), og fra dr. Gorm Grønnevet, post.doc. ved Norges Handelshøyskole, som undersøkte totalforbudet mot synlig oppstilling i ulike deler av Canada og Island. Disse rapportene ble lagt frem for EFTA-domstolen som Vedlegg 3–5 til saksøkers skriftlige innlegg.

tobacco. These consequences and their effects on legitimate tobacco trade have not been recognised by the Defendant.

42. The Plaintiff argues that the Defendant has failed to show that the alleged benefits of the visual display ban are not offset by an increase in illicit trade. According to the Plaintiff, one of the negative effects of visual display bans is the fact that cheaper unregulated tobacco products become more accessible to young smokers. Therefore, public health initiatives to curb tobacco consumption are undermined as cheap tobacco products are sold to adolescents in an unregulated environment.

Criteria for necessity

Obligation to examine less restrictive measures

43. The Plaintiff stresses that the Court should provide guidance on what the burden of justification on the Defendant entails. That is, according to the Plaintiff, the Defendant must demonstrate that the benefits from a display ban cannot be met through alternative measures less restrictive of trade. This is of particular importance as the Defendant has acknowledged that other methods of reducing tobacco consumption exist. Therefore, so the Plaintiff argues, the state is under an obligation to examine the possibility of using measures less restrictive of the free movement of tobacco products.[26]

44. The Plaintiff submits that less restrictive measures could consist in regulations limiting the size of retail displays, effective enforcement of existing age restrictions and retail licensing. It contends, however, that such measures have either not been adopted or are unenforced by the Defendant.

[26] The Plaintiff refers to Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraph 87, the Opinion of Advocate General Kokott in Case C-198/08 *Commission* v *Austria*, not yet reported, points 61, 62 and 64, and Case C-216/98 *Commission* v *Greece* [2000] ECR I-8921, paragraphs 30-33.

tobakksmerker. Disse konsekvenser og virkningen av dem på den lovlige handel med tobakk har ikke blitt innrømmet av saksøkte.

42. Saksøker anfører at saksøkte ikke har klart å vise at de påståtte fordeler ved forbudet mot synlig oppstilling ikke blir utlignet av en økning i den ulovlige handel. Ifølge saksøker er en av de negative effekter av forbudet mot synlig oppstilling at billigere, uregulerte tobakksprodukter blir lettere tilgjengelig for unge røykere. Derfor blir folkehelseinitiativer for å redusere forbruket av tobakk undergravd ettersom billige tobakksprodukter blir solgt til ungdom i et uregulert miljø.

Nødvendighetskriteriene

Forpliktelse til å utrede mindre inngripende tiltak

43. Saksøker understreker at EFTA-domstolen bør gi veiledning med hensyn til hva bevisbyrden som ligger på saksøkte innebærer. Dette er, ifølge saksøker, at saksøkte må bevise at fordelene ved et oppstillingsforbud ikke kan oppnås ved bruk av alternative tiltak som virker mindre begrensende på handelen. Dette er spesielt viktig ettersom saksøkte har erkjent at det finnes andre metoder for å redusere tobakksforbruket. Saksøker hevder derfor at staten er forpliktet til å utrede muligheten for å bruke tiltak som virker mindre begrensende på det frie varebytte når det gjelder tobakksprodukter.[26]

44. Saksøker gjør gjeldende at mindre inngripende tiltak kan bestå av forskrifter som begrenser størrelsen på utstillingen på utsalgssteder, effektiv håndhevelse av eksisterende aldersgrenser og lisens for forhandlerne. Det anføres imidlertid at slike tiltak enten ikke er vedtatt eller ikke blir håndhevet av saksøkte.

[26] Saksøker viser til sak C-320/03 *Kommisjonen* mot Østerrike, Sml. 2005 s. I-9871 (avsnitt 87); uttalelse fra generaladvokat Kokott i sak C-198/08 *Kommisjonen mot Østerrike*, dom av 4. mars 2010, ennå ikke i Sml. (avsnitt 61, 62 og 64); og sak C-216/98 *Kommisjonen* mot *Hellas*, Sml. 2000 s. I-8921 (avsnitt 30–33).

Less restrictive measures to reduce consumption of tobacco products

45. While acknowledging that the main objective of the visual display ban is to reduce tobacco consumption amongst children and adolescents, the Plaintiff emphasises that the important question is whether the ban is effective in securing that objective and whether less restrictive alternatives can be implemented in pursuit of the same objective.

46. With regard to the obligation to demonstrate the necessity of the measure, the Plaintiff emphasises that the burden of justifying the restriction falls on the Defendant, in particular where other alternatives are available.[27] In this context, the Plaintiff highlights that proper enforcement of age restrictions is a less restrictive measure for the purposes of preventing youth consumption.[28] However, in its view, as shown by research undertaken by Norwegian government agencies, the Defendant does not sufficiently enforce age restrictions.

47. In addition, the Plaintiff asserts that the Defendant has failed to adopt a retail licensing system. In such a system, a retail shop would have to obtain a licence to sell tobacco products. Any violations of the licence's conditions would result in its revocation. The Plaintiff contends that such a system would be less restrictive than the visual display ban in the present case.

The extremity of the Norwegian law and the WHO Framework Convention

48. The Plaintiff argues that even if a visual display ban were to be considered justified, the contested measure is needlessly extreme as it bans any use of brands or packages at points of sale. Thus, the ban goes further than similar bans in other countries such as Finland and the United Kingdom.

49. Here, the Plaintiff refers to the position taken by the Finnish Parliament. When considering whether to adopt a similar ban on visual display of tobacco products, the Finnish Parliament

[27] Reference is made to *Rosengren*, cited above, paragraphs 50 and 55-57.
[28] The Plaintiff refers to Case E-9/00 *ESA* v *Norway*, cited above, paragraph 56.

Mindre inngripende tiltak for å redusere forbruket av tobakksprodukter

45. Samtidig som saksøker erkjenner at hovedmålet med forbudet mot synlig oppstilling er å redusere tobakksforbruket blant barn og unge, understreker saksøker at det viktigste spørsmål er om forbudet faktisk sikrer dette mål, og om mindre inngripende alternativer kan gjennomføres for å nå det samme mål.

46. Når det gjelder forpliktelsen til å godtgjøre at tiltaket er nødvendig, understreker saksøker at bevisbyrden med hensyn til restriksjonens berettigelse ligger hos saksøkte, særlig dersom andre alternativer er tilgjengelige.[27] I denne sammenheng understreker saksøker at streng håndhevelse av aldersgrensen er et mindre inngripende tiltak når målet er å hindre forbruk blant unge.[28] Etter saksøkers mening viser imidlertid forskning gjennomført av norske offentlige institusjoner at saksøkte ikke håndhever aldersgrensen i tilstrekkelig grad.

47. I tillegg gjør saksøker gjeldende at saksøkte har unnlatt å innføre en lisensordning for forhandlere. Med en slik ordning ville utsalgsstedene måtte ha lisens for å selge tobakksprodukter. Ethvert brudd på lisensvilkårene ville medført tilbaketrekking av lisensen. Saksøker hevder at en slik ordning ville vært mindre inngripende enn forbudet mot synlig oppstilling.

Norsk retts ytterliggående enhet og WHOs rammekonvensjon

48. Saksøker gjør gjeldende at selv om et forbud mot synlig oppstilling skulle betraktes som berettiget, så er det omtvistede tiltak unødvendig ytterliggående ettersom det forbyr enhver bruk av merker eller pakker på utsalgssteder. Dermed går forbudet lengre enn tilsvarende forbud i andre land, som Finland og Storbritannia.

49. På dette punkt viser saksøker til holdningen inntatt av det finske parlament. I vurderingen av hvorvidt et tilsvarende forbud mot synlig oppstilling av tobakksprodukter skulle vedtas, konkluderte

[27] Det vises til *Rosengren*, som sitert over (avsnitt 50 og 55–57).
[28] Saksøker viser til sak E-9/00 *ESA* mot *Norge*, som sitert over (avsnitt 56).

concluded that such a ban would be unnecessarily strict as it would restrain entrepreneurs' freedom of expression in marketing their products and restrict the right of holders of trademarks to exploit their property rights in their business operations. Those considerations resulted in a measure that authorises the use of colour catalogues including images of packs and trademarks at point of sale.

50. With regard to the WHO Framework Convention of 2003 ("WHO Convention"),[29] the Plaintiff observes that the Convention does not relieve the Defendant of its obligations under Articles 11 and 13 EEA. Furthermore, in its view, the Convention prescribes, in general, no obligation to adopt laws contrary to a state's constitutional order, and, in particular, no obligation to enact a visual display ban on tobacco products. Consequently, no measure that includes a visual display prohibition may be regarded as required to satisfy the advertising ban established in Article 13 of the WHO Convention. Although a visual display prohibition was discussed amongst parties to the Convention, these discussions only resulted in the adoption of non-binding guidelines for the implementation of Article 13 of the WHO Convention. Thus, no obligation exists to enact a visual display ban. If an EU State implements measures in its jurisdiction based on those guidelines, according to the Plaintiff, that state must justify its measures as suitable and show that benefits derived from those measures cannot be met by less restrictive measures.[30]

51. The Plaintiff proposes that the Court should answer the second question as follows:

Articles 11 and 13 EEA must be interpreted so as to preclude a general prohibition against the visible display of tobacco products such as that at issue in the main proceedings, unless the referring court, having assessed all the supporting evidence, finds the

[29] WHO Framework Convention on Tobacco Control of 21 May 2003.

[30] The Plaintiff refers to Case C-197/08 *Commission* v *France,* not yet reported, paragraph 45. Further reference is made to Case C-221/08 *Commission* v *Ireland*, not yet reported and Case C-198/08 *Commission* v *Austria*, cited above.

det finske parlament med at et slikt forbud ville være unødvendig strengt ettersom det ville begrense de næringsdrivendes ytringsfrihet i markedsføringen av deres produkter og begrense varemerkeinnehavernes rett til å utnytte sine eiendomsretter i forretningsdriften. Disse vurderinger resulterte i et tiltak som tillater bruk av fargekataloger som inneholder bilder av pakker og varemerker på utsalgssteder.

50. Når det gjelder WHOs rammekonvensjon av 2003 ("WHO-konvensjonen"),[29] anfører saksøker at konvensjonen ikke løser saksøkte fra sine forpliktelser i henhold til EØS-avtalen artikkel 11 og 13. Videre fastsetter konvensjonen etter saksøkers mening generelt ikke noen forpliktelse til å vedta lover som er i strid med en stats konstitusjonelle orden og særlig ingen forpliktelse til å innføre et forbud mot synlig oppstilling av tobaksprodukter. Følgelig kan det ikke anses som påkrevd å innføre et forbud mot synlig oppstilling av tobaksprodukter, for å etterkomme reklameforbudet fastsatt i WHO-konvensjonen artikkel 13. Selv om et forbud mot synlig oppstilling ble drøftet mellom konvensjonspartene, førte disse diskusjoner kun til at det ble vedtatt ikke-bindende retningslinjer for gjennomføring av artikkel 13 i WHO-konvensjonen. Dermed foreligger det ingen forpliktelse til å vedta et forbud mot synlig oppstilling. Dersom en EU-stat gjennomfører tiltak innen sin jurisdiksjon på grunnlag av disse retningslinjer, må denne stat, ifølge saksøker, dokumentere at tiltakene er egnet, og at fordelene ved tiltakene ikke kan oppnås ved mindre inngripende tiltak.[30]

51. Saksøker anmoder EFTA-domstolen om å besvare det andre spørsmål på følgende måte:

EØS-avtalen artikkel 11 og 13 må fortolkes slik at de er til hinder for et generelt forbud mot synlig oppstilling av tobaksprodukter slik som tilfellet er i saken, med mindre den anmodende domstol, etter å ha

[29] WHOs rammekonvensjon om tobakksbekjempelse av 21. mai 2003.

[30] Saksøker viser til sak C-197/08 *Kommisjonen* mot *Frankrike*, dom av 4. mars 2010, ennå ikke i Sml. (avsnitt 45). Det vises videre til sak C-221/08 *Kommisjonen* mot *Irland*, dom av 4. mars 2010, ennå ikke i Sml., og sak C-198/08 *Kommisjonen* mot Østerrike, som sitert over.

prohibition justified in light of the objective of reducing consumption of tobacco products.

It is for the national authorities to submit substantial and specific evidence to show that:

– *the prohibition is suitable for attaining that objective, i.e. that the prohibition will reduce consumption of tobacco products and that the benefits of the prohibition are not offset by its unintended consequences; and*

– *the prohibition does not go beyond what is necessary to attain that objective and that the actual benefits of the measure (if any) cannot be attained by less restrictive alternatives, such as a retail licensing scheme, proper enforcement of a ban on underage tobacco sales, or limitations on the size and/or placement of retail displays.*

The Defendant

Elements of the Defendant's tobacco policy

52. The Defendant observes that for several decades it has pursued a consistent and strict tobacco policy and is considered among the leading nations in forming policy measures with the purpose of reducing tobacco consumption. The reason for such a policy is the fact that the use of tobacco represents one of the biggest health risks in the world, with approximately 15% of all deaths in Europe being caused by active smoking.[31] These adverse effects of tobacco use make it the largest avoidable cause of premature deaths worldwide.[32]

53. The Defendant emphasises that its comprehensive and diversified policy has been implemented through legislative measures to

[31] The Defendant refers to various sources with regard to deaths related to tobacco use, including RAND Europe, *Assessing the Impacts of Revising the Tobacco Products Directive*, September 2010, and WHO, *Global Health Risks. Mortality and burden of disease attributable to selected major risks* (2009). These reports were submitted to the Court as Annexes 2 and 3 to the Defendant's written pleadings.

[32] Reference is made to WHO, *Report on the Global Tobacco Epidemic* (2008) and Council Recommendation 2003/54/EC, OJ 2003 L 22, p. 31, included as Annex 4 to the Defendant's written pleadings submitted to the Court.

vurdert alle bevisene i saken, kommer til at forbudet er berettiget i lys av formålet om å redusere forbruket av tobaksprodukter.

Det er de nasjonale myndigheter som skal legge frem tilstrekkelig bevismateriale som underbygger at:

– *forbudet er egnet til å oppnå dette mål, dvs. at forbudet vil redusere forbruket av tobaksprodukter, og at fordelene ved forbudet ikke blir mindre enn dets utilsiktede konsekvenser; og*

– *at forbudet ikke går lenger enn det som er nødvendig for å oppnå dette mål, og at de faktiske fordeler av tiltaket (om det er noen) ikke kan oppnås med mindre inngripende alternativer, som en lisensordning for forhandlere, streng håndhevelse av forbudet mot salg til mindreårige, eller begrensninger knyttet til størrelsen og/eller plasseringen av utstyr for vareplassering hos forhandlerne.*

Saksøkte

Elementer i saksøktes tobakkspolitikk

52. Saksøkte gjør gjeldende at man i flere tiår har hatt en konsekvent, streng tobakkspolitikk og betraktes som en av de ledende nasjoner *når det gjelder å utforme politiske tiltak for å redusere forbruket av tobakk. Grunnen til denne politikk er at bruk av tobakk representerer en av de største helserisikoer* i verden, idet ca. 15 % av alle dødsfall i Europa skyldes aktiv røyking.[31] Disse skadevirkninger gjør tobakksbruk til den største unngåelige årsak til tidlig død i verden.[32]

53. Saksøkte understreker at den har brukt lovgivningsmessige tiltak for å gjennomføre sin helhetlige og mangfoldige politikk for å

[31] Saksøkte viser til ulike kilder når det gjelder dødsfall relatert til tobakksbruk, herunder RAND Europe, *Assessing the Impacts of Revising the Tobacco Products Directive*, September 2010, og WHO, *Global Health Risks. Mortality and burden of disease attributable to selected major risks* (2009). Disse rapportene ble lagt frem for EFTA-domstolen som Vedlegg 2 og 3 til saksøktes skriftlige innlegg.

[32] Det vises til WHO, *Report on the Global Tobacco Epidemic* (2008) og rådsrekommandasjon 2003/54/EF, EUT 2003 L 22, s. 31, inntatt som Vedlegg 4 til saksøktes skriftlige innlegg for EFTA-domstolen.

reduce tobacco use. These include a ban on advertising tobacco products, an age threshold of 18 years for the purchase of tobacco and mandatory labelling on tobacco products. The latest measure was introduced following public hearings and research undertaken by and as summarized by SIRUS on the anticipated effects of the proposed visual display ban.[33]

54. The Defendant submits that the visual display ban is an integral part of the Defendant's tobacco policy. The main objective of the ban is to limit the advertising effect of the display of tobacco products and to contribute to a reduction in tobacco use and tobacco-related health problems. Thus, the purpose of the prohibition is to reduce the number of smokers in the population in general and amongst children and young people in particular. In addition, the prohibition may make it easier for people who are trying to quit or have quit smoking tobacco to overcome their addiction.

55. The Defendant points out that the ban will not only have a direct effect on tobacco use, but also an indirect effect by changing the attitude of the general public towards tobacco products. The placement of dangerous products alongside non-risk products in retail stores can give misleading messages where customers might believe that tobacco products are not dangerous. Thus, the signal effect, which the visual display ban will ultimately generate, will denormalise the use of tobacco over time amongst the general public.

Advertising of tobacco within the EU/EEA and the WHO

Current legislation and encouragement by the EU legislature

56. The Defendant observes that the advertising of tobacco products is regulated under EU and EEA law. Although legislative

[33] SIRUS (Statens Institutt for Rusmiddelforskning) is according to the Defendant a research institute that is wholly independent from the Government as concerns research matters, albeit formally organized under the Ministry of Health. In addition, the Defendant refers to Lund & Rise, *Kunnskapsgrunnlaget for forslaget om et forbud mot synlig oppsitilling av tobakksvarer* (2008), submitted to the Court as Annex 6 to the Defendant's written pleadings.

redusere bruken av tobakk. Disse tiltak omfatter et forbud mot reklame for tobaksprodukter, en aldersgrense på 18 år for kjøp av tobakk og påbudt merking av tobaksprodukter. Det siste tiltak ble innført etter offentlige høringer og forskning gjennomført av SIRIUS *på de forventede virkninge*r av det foreslåtte forbud mot synlig oppstilling.[33]

54. Saksøkte gjør gjeldende at forbudet mot synlig oppstilling utgjør en integrert del av saksøktes tobakkspolitikk. Hovedhensikten med forbudet er å begrense reklameeffekten av oppstillingen av tobaksprodukter og bidra til å redusere tobaksbruken og tobakksrelaterte helseproblemer. Følgelig er målet med forbudet å redusere antallet røykere i befolkningen generelt og blant barn og unge spesielt. Dessuten kan forbudet gjøre det lettere for folk som prøver å slutte å røyke, eller som har sluttet, å overvinne avhengigheten.

55. Saksøkte peker på at forbudet ikke bare vil ha en direkte effekt på bruken av tobakk, men også ha en indirekte effekt ved å endre holdningen til tobaksprodukter i befolkningen generelt. Plasseringen av farlige produkter sammen med ufarlige produkter på utsalgsstedene kan gi villedende budskap som kan få kundene til å tro at tobaksprodukter ikke er farlige. Dermed vil signaleffekten som forbudet mot synlig oppstilling i siste instans vil føre til, avnormalisere bruken av tobakk over tid i befolkningen generelt.

Tobakksreklame i EU/EØS og WHO

Dagens lovgivning og oppfordring fra lovgiverne i EU

56. Saksøkte anfører at reklame for tobaksprodukter er regulert i EU- og EØS-regelverket. Selv om regelverket verken krever eller

[33] SIRUS (Statens Institutt for Rusmiddelforskning) er ifølge saksøkte et forskningsinstitutt som i forskningsspørsmål er uavhengig av offentlige myndigheter, men som formelt sett er underlagt Helse- og omsorgsdepartementet. I tillegg viser saksøkte til Lund & Rise, *Kunnskapsgrunnlaget for forslaget om et forbud mot synlig oppstilling av tobakksvarer* (2008), forelagt EFTA-domstolen som Vedlegg 6 til saksøktes skriftlige innlegg.

instruments neither require nor prohibit visual display bans, the repeated encouragement from EU institutions to Member States is of particular interest.

57. The Defendant points out that most forms of traditional marketing of tobacco products are banned in the EU and EEA. According to EU and EEA secondary legislation, tobacco products cannot be advertised on television or by using audiovisual services or in written publications and radio.[34] It is important to emphasise that the prohibitions prescribed in EU and EEA legislative instruments are minimum requirements. Therefore, Member States are competent to introduce stricter regulations provided that EU law in general is respected. In fact, both the Council and the Commission have applauded Member States for introducing more stringent regulations than those prescribed by EU law.[35]

58. In addition, when commenting on issues pertaining to the prevention of smoking, the Council has acknowledged the need for comprehensive prohibitions and called upon Member States to implement stricter regulations than those prescribed in various directives.[36] These declarations of the Commission and the Council coincide with the EU's active participation in the work of the WHO.[37] The Defendant argues that the recommendations of the Council, in particular, should be understood as

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[34] The Defendant refers to Article 13 of Council Directive 1989/552/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, OJ 1989 L 298, p. 23; Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 2003 L 152, p. 16, and Articles 5, 7 and 8 of Directive 2001/37/EC of the European Parliament and the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, OJ 2001 L 194, p. 26.

[35] Reference is made to European Commission, *Report on the implementation of the EU Tobacco Advertising Directive* COM(2008) 330 final, pp. 5-6, and European Commission, *Green Paper Towards a Europe free from smoke: policy options at EU level*, COM(2007) 27 final, p. 3.

[36] Reference is made to Council Recommendation 2003/54/EC of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control, OJ 2003 L 22, p. 31.

[37] Reference is made to recitals 7 and 17 in the preamble to Council Recommendation 2003/54/EC, cited above.

forbyr forbud mot synlig oppstilling, er EU-institusjonenes gjentatte oppfordringer til medlemsstatene av spesiell interesse.

57. Saksøkte peker på at de fleste former for tradisjonell markedsføring av tobakksprodukter er forbudt i EU og EØS. I henhold til sekundærretten i EU og EØS kan det ikke reklameres for tobakksprodukter på fjernsyn, ved bruk av audiovisuelle tjenester, i skriftlige publikasjoner eller på radio.[34] Det er viktig å understreke at forbudene fastsatt i EU- og EØS-regelverket er minstekrav. Derfor har medlemsstatene myndighet til å innføre strengere regler forutsatt at EU-retten generelt overholdes. Faktisk har både Rådet og Kommisjonen gitt sitt bifall til medlemsstater som har innført strengere regler enn det som er fastsatt i EU-retten.[35]

58. Dessuten har Rådet, i sine kommentarer til spørsmål i forbindelse med forebygging av røyking, erkjent behovet for omfattende forbud og oppfordret medlemsstatene til å innføre strengere regler enn det som er fastsatt i de ulike direktiver.[36] Kommisjonens og Rådets erklæringer er i tråd med EUs aktive deltakelse i WHOs arbeid.[37] Saksøkte anfører at særlig Rådets rekommandasjoner

[34] Saksøkte viser til artikkel 13 i rådsdirektiv 1989/552/EØF av 3. oktober 1989 om samordning av visse bestemmelser om utøvelse av fjernsynsvirksomhet, fastsatt ved lov eller forskrift i medlemsstatene, EFT 1989 L 298, s. 23; europaparlaments- og rådsdirektiv 2003/33/EF av 26. mai 2003 om tilnærming av lovene og forskriftene i medlemsstatane om reklame for og sponsing av tobakksvarer, EUT 2003 L 152, s. 16, og artikkel 5, 7 og 8 i europaparlaments- og rådsdirektiv 2001/37/EF av 5. juni 2001 om tilnærming av medlemsstatenes lover og forskrifter om fremstilling, presentasjon og salg av tobakksvarer, EFT 2001 L 194, s. 26.

[35] Det vises til Europakommisjonen, *Report on the implementation of the EU Tobacco Advertising Directive* COM(2008) 330 final, s. 5-6, og Europakommisjonen, *Green Paper Towards a Europe free from smoke: policy options at EU level*, COM(2007) 27 final, s. 3.

[36] Det vises til rådsrekommandasjon 2003/54/EF av 2. desember 2002 om forebygging av røyking og initiativer for en strengere tobakkskontroll, EFT 2003 L 22, s. 31.

[37] Det vises til betraktning 7 og 17 i fortalen til rådsrekommandasjon 2003/54/EF, som sitert over.

encouragement to prohibit, *inter alia*, the advertising resulting from the visibility of tobacco products in retail outlets.[38]

59. The Defendant points out that the Commission has initiated a consultation on the revision of the existing legislative instruments concerning tobacco products.[39] That consultation describes three options available with regard to access to tobacco products: (1) no change (Member States remain competent in limiting the access); (2) controlled supply and access (age verification, access to vending machines restricted and tobacco display at points of sale restricted); and (3) ban (cross-border sales via the Internet banned, vending machines banned, vending machines banned and displays in retail stores banned). Moreover, the consultation acknowledges that Member States are competent to decide what option to take, including whether or not to adopt a display ban.

Visual display bans in other countries

60. The Defendant emphasises that other countries have implemented a ban on the visible display of tobacco products. Iceland, Ireland, Finland and the United Kingdom have all introduced visual display bans. These prohibitions share the common approach of considering the visible display of tobacco products as advertisement. Therefore, the display ban is considered to be a natural and integral part of the advertising ban that previously existed in those countries.

61. According to the Defendant, any reference made by the Plaintiff to the fact that other states have not implemented a visual display ban should be considered irrelevant in the present case, as arguments based on such a reference have no bearing on the legality of the display ban. As discussed earlier, the competence to implement a visual display ban lies, according to EU law, with individual Member States. In addition, references made by the Plaintiff to Sweden and Denmark are, from the Defendant's

[38] Recommendation 2(a)-(f) in Council Recommendation 2003/54/EC, cited above.

[39] The Defendant refers to European Commission, DG SANCO 2010, *Possible revision of the Tobacco Product Directive 2001/37/EC*, Public Consultation Document, available at: http://ec.europa.eu/health/tobacco/docs/tobacco_consultation_en.pdf.

bør forstås som en oppfordring til blant annet å forby den reklame som følger av synlige tobaksprodukter på utsalgssteder.[38]

59. Saksøkte viser til at Kommisjonen har sendt ut et høringsdokument om revisjon av eksisterende rettsakter vedrørende tobaksprodukter.[39] Høringsdokumentet beskriver tre mulige alternativer vedrørende tilgangen til tobaksprodukter: 1) Ingen endringer (medlemsstatene beholder sin kompetanse til å begrense tilgangen), 2) kontroll av tilbud og tilgang (alderskontroll, begrenset adgang til salgsautomater og begrenset oppstilling av tobakk på utsalgssteder), og 3) forbud (forbud mot salg på internett til andre land, forbud mot salgsautomater, forbud mot salgsautomater og forbud mot oppstilling på utsalgssteder). Høringsdokumentet erkjenner videre at medlemsstatene har kompetanse til å bestemme hvilket alternativ de ønsker, herunder om de vil vedta et oppstillingsforbud eller ikke.

Forbud mot synlig oppstilling i andre land

60. Saksøkte understreker at andre land har innført forbud mot synlig oppstilling av tobaksprodukter. Island, Irland, Finland og Storbritannia har alle innført forbud mot synlig oppstilling. Disse forbud har det til felles at de betrakter synlig oppstilling av tobaksprodukter som reklame. Derfor betraktes oppstillingsforbudet som en naturlig, integrert del av reklameforbudet som disse land allerede hadde.

61. Ifølge saksøkte bør enhver henvisning fra saksøker til det faktum at andre stater ikke har gjennomført et forbud mot synlig oppstilling betraktes som irrelevant i foreliggende sak, i og med at dette ikke har noen betydning for lovligheten av oppstillingsforbudet. Som tidligere drøftet følger det av EU-retten at den enkelte medlemsstat har kompetanse til å innføre et forbud mot synlig oppstilling. Saksøkers henvisninger til Sverige og Danmark er etter saksøktes oppfatning dessuten feilaktige ettersom saksøkte ikke

[38] Rekommandasjon 2a)–f) i rådsrekommandasjon 2003/54/EF, som sitert over.
[39] Saksøkte viser til Europakommisjonen, DG SANCO 2010, *Possible revision of the Tobacco Product Directive 2001/37/EC*, offentlig høringsdokument, tilgjengelig på: http://ec.europa.eu/health/tobacco/docs/tobacco_consultation_en.pdf.

perspective, inaccurate as it is unaware of any work being undertaken by those countries to introduce a visual display ban.

WHO Framework Convention

62. The Defendant stresses that the WHO is a vital player in the effort to reduce the harm caused to the general public as a result of tobacco consumption. The WHO Convention is a cornerstone in that effort. Although the Convention only entered into force in 2005, the majority of states have become parties to it. As of January 2011, there are 172 States Parties to the Convention, including two EFTA States, Iceland and Norway, and 26 Member States of the EU.

63. The Defendant points out that Article 13(2) of the WHO Convention includes an obligation to implement a comprehensive ban of all tobacco advertising, promotion and sponsorship. The concept of advertising is defined broadly in Article 1(c) of the Convention; it is understood as covering any form of communication, recommendation or action with the aim, effect or likely effect of promoting directly or indirectly a tobacco product. Various Guidelines accompany the Convention; some are non-binding, whereas others carry more weight as they represent the parties' own understanding of the obligations imposed and implementation required under the Convention. The Defendant argues that the Guidelines for the implementation of Article 13 to the WHO Convention are of this latter category.

64. The Defendant argues that the work undertaken under the auspices of the WHO, including the formulation of Article 13 and the Guidelines that further clarify the content of the Article, underlines the fact that an advertising ban must have a broad scope to be effective. The Guidelines address the display of tobacco products at points of sale and prescribe the adoption of a total ban at points of sale. According to the Guidelines, such a ban falls under Article 13 of the Convention and within the scope of the obligation to implement a comprehensive ban on the visible display of tobacco products.

er kjent med at det har pågått arbeid i disse land for å innføre et forbud mot synlig oppstilling.

WHOs rammekonvensjon

62. Saksøkte understreker at WHO er en særlig viktig aktør i arbeidet for å redusere skadene som forbruket av tobakk påfører befolkningen. WHO-konvensjonen er en hjørnestein i dette arbeid. Selv om konvensjonen først trådte i kraft i 2005, har de fleste stater tiltrådt den. Per januar 2011 er 172 stater parter til konvensjonen, herunder to EFTA-stater, Island og Norge, og 26 EU-medlemsstater.

63. Saksøker viser til at artikkel 13 nr. 2 i WHO-konvensjonen fastsetter en forpliktelse til å innføre et generelt forbud mot alle former for tobakksreklame, salgsfremmende tiltak og sponsing. Begrepet reklame er bredt definert i artikkel 1 bokstav c) i konvensjonen; det dekker enhver form for meddelelse, anbefaling eller påvirkning som har som formål å fremme omsetningen av et tobakksprodukt, enten direkte eller indirekte, eller som har slik virkning eller sannsynlig virkning. Konvensjonen er ledsaget av en rekke retningslinjer; noen er ikke-bindende, andre mer tungtveiende, ettersom de representerer partenes egen forståelse av de forpliktelser de pålegges og den gjennomføring som kreves i forbindelse med den aktuelle artikkel. Saksøkte mener retningslinjene for gjennomføring av artikkel 13 i WHO-konvensjonen faller inn under den sistnevnte kategori.

64. Saksøkte gjør gjeldende at arbeidet som er igangsatt i regi av WHO, herunder formuleringen av artikkel 13 og retningslinjene som klargjør innholdet i artikkelen, understreker det faktum at et reklameforbud må være bredt anlagt for å være effektivt. Retningslinjene tar for seg oppstilling av tobakksprodukter på utsalgssteder og anbefaler vedtakelse av et totalforbud på utsalgssteder. Ifølge retningslinjene faller et slikt forbud inn under konvensjonen artikkel 13 og omfattes av forpliktelsen til å innføre et omfattende forbud mot synlig oppstilling av tobakksprodukter.

The first question

65. The Defendant draws attention to the fact that the aim of the ban on the visual display of tobacco products is to limit the advertising effect stemming from the visibility of cigarette packages and other tobacco products. Therefore, the display ban does not relate to tobacco products as such but addresses one specific form of advertising. This leads to the conclusion that the current case falls outside the scope of the principle concerning product requirements established in *Cassis de Dijon*.[40] Instead, the case must be assessed under case-law dealing with "national provisions restricting or prohibiting certain selling arrangements", in particular *Keck and Mithouard*.[41] This approach has been followed both by the Court[42] and the ECJ[43] in numerous cases.

66. The Defendant bases its arguments on two main points. First, the Defendant emphasises that the visual display ban applies to all relevant trading operations irrespective of the nationality of the parties involved. Therefore, no discrimination can be found in the contested ban. Given that there is no *de jure* discrimination, the question remains whether *de facto* discrimination can be found. The Defendant argues that no such discrimination can be found in the present case.[44] Second, the Defendant holds that selling arrangements may possibly also be subject to a test of prevention of market access. The contested measure is, however, in the Defendant's view clearly not designed to prevent market access. Should the Plaintiff be successful in submitting that non-discriminatory selling arrangement are subject to a market hindrance test, which the Defendant rejects, it is in an alternative and subsidiary line of reasoning held that such a possible test

40 *Rewe-Zentral*, cited above.

41 *Keck and Mithouard*, cited above, paragraph 16.

42 Reference is made to Case E-5/96 *Ullensaker kommune* [1997] EFTA Ct. Rep., p. 32, paragraphs 2327; Case E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep., p. 56, paragraph 45; Case E-9/00 *ESA* v *Norway*, cited above, paragraph 50; and *Pedicel*, cited above, paragraphs 45-46.

43 Reference is made, for example, to *Leclerc-Siplec*, paragraph 21; *De Agostini and TV-Shop*, paragraph 40; *Commission* v *Italy*, paragraph 36; and *Ker-Optika*, paragraphs 51-52, all cited above.

44 The Defendant refers to *Keck and Mithouard*, cited above, paragraph 17.

Det første spørsmål

65. Saksøkte henleder oppmerksomheten mot det faktum at målet med forbudet mot synlig oppstilling av tobakksprodukter er å begrense reklameeffekten som synligheten av sigarettpakker og andre tobakksprodukter representerer. Derfor gjelder ikke oppstillingsforbudet tobakksprodukter som sådan, men en bestemt form for reklame. Dette leder til den konklusjon at foreliggende sak faller utenfor virkeområdet til prinsippet om produktkrav fastsatt i *Cassis de Dijon*.[40] Denne sak må snarere vurderes i henhold til rettspraksis som gjelder "nasjonale bestemmelser som begrenser eller forbyr bestemte former for salg", særlig *Keck og Mithouard*.[41] Denne tilnærming har vært fulgt av EFTA-domstolen[42] og EU-domstolen[43] i en rekke saker.

66. Saksøkte baserer sitt syn på to hovedpoenger. For det første understreker saksøkte at forbudet mot synlig oppstilling gjelder for alle berørte handelsoperasjoner uten hensyn til de berørte parters nasjonalitet. Derfor innebærer det omtvistede forbud ingen forskjellsbehandling. Gitt at det rettslig sett ikke foreligger noen forskjellsbehandling, gjenstår spørsmålet om det faktisk foreligger forskjellsbehandling. Saksøkte gjør gjeldende at det ikke foreligger noen slik forskjellsbehandling i denne sak.[44] Dernest gjør saksøkte gjeldende at salgsordninger muligens også må underlegges en test vedrørende hindring av markedsadgang. Etter saksøktes oppfatning er imidlertid det omtvistede tiltak klart ikke utformet for å hindre markedsadgang. Skulle saksøker få medhold i anførselen om at ikke-diskriminerende salgsordninger må underlegges en test vedrørende markedshindring, noe saksøkte er uenig i, anfører saksøkte subsidiært at en slik mulig test har betydelig snevrere grenser enn hva saksøker anfører. Under

40 *Rewe-Zentral*, som sitert over.
41 *Keck og Mithouard*, som sitert over (avsnitt 16).
42 Det vises til sak E-5/96 *Ullensaker kommune m.fl.* mot *Nille AS*, EFTA Ct. Rep. 1997 s. 32 (avsnitt 23–27); sak E-6/96 *Tore Wilhelmsen AS* mot *Oslo kommune*, EFTA Ct. Rep. 1997 s. 56 (avsnitt 45); sak E-9/00 *ESA* mot *Norge*, som sitert over (avsnitt 50); og *Pedicel*, som sitert over (avsnitt 45–46).
43 Det vises f.eks. til *Leclerc-Siplec* (avsnitt 21); *De Agostini og TV-Shop* (avsnitt 40); *Kommisjonen* mot *Italia* (avsnitt 36); og *Ker-Optika* (avsnitt 51–52), alle som sitert over.
44 Saksøkte viser til *Keck og Mithouard*, som sitert over(avsnitt 17).

would have a considerable narrower scope than the Plaintiff asserts. It should in any event be limited to situations where the possibility of using tobacco products would be greatly restricted.

67. The Defendant observes that it is not for the Court to assess the facts of the case or assess if national law is compatible with EEA law. Therefore, it falls to the national court to determine whether the visual display ban constitutes a restriction contrary to Article 11 EEA.[45] If the Court does not follow this line of argument, the Defendant contends that as there has been limited submission of evidence in the present case the Court should confine itself to providing guidance on the relevant arguments and criteria.

Lack of discrimination

68. The Defendant asserts that, according to case-law, the relevant test is whether some form of indirect discrimination can be found.[46] Discrimination is a fundamental element to the prohibition established by Article 11 EEA. If neither *de jure* nor *de facto* discrimination can be found, a selling arrangement cannot be considered to constitute a measure having equivalent effect to a quantitative restriction for the purposes of Article 11 EEA.

69. The Defendant argues that if the visual display ban is found to constitute a selling arrangement, there is a presumption that as such it falls outside the scope of Article 11 EEA. In addition, the Defendant asserts that it falls to the Plaintiff to provide proof that the visual display ban contains discriminatory elements contrary to Article 11 EEA.[47]

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45 Reference is made to Case E-1/10 *Periscopus*, judgment of 10 December 2010, not yet reported, paragraph 28, Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraphs 21-24, and Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de la Rioja* [2008] ECR I-6747, paragraph 77.

46 Reference is made, *inter alia*, to *Keck and Mithouard* .

47 Reference is made to *De Agostini and TV-Shop*, cited above, paragraph 44.

enhver omstendighet må anvendelsen begrenses til situasjoner hvor muligheten for å bruke tobakksprodukter er blitt betydelig redusert.

67. Saksøkte anfører at det ikke er EFTA-domstolen som skal vurdere de faktiske forhold i saken eller vurdere om nasjonal lovgivning er forenlig med EØS-retten. Derfor er det den nasjonale domstol som skal vurdere hvorvidt forbudet mot synlig oppstilling utgjør en restriksjon i strid med EØS-avtalen artikkel 11.[45] Saksøkte anfører at dersom EFTA-domstolen ikke følger denne argumentasjon, bør den, ettersom bevisførselen i denne sak har vært begrenset, begrense seg til å gi veiledning med hensyn til relevante argumenter og kriterier.

Fravær av forskjellsbehandling

68. Saksøkte gjør gjeldende at ifølge rettspraksis er den relevante test hvorvidt det foreligger noen form for indirekte forskjellsbehandling.[46] Forskjellsbehandling er et grunnleggende element i forbudet fastsatt ved EØS-avtalen artikkel 11. Dersom det verken rettslig eller faktisk foreligger forskjellsbehandling, kan en salgsordning ikke anses å utgjøre et tiltak som har tilsvarende virkning som en kvantitativ importrestriksjon etter EØS-avtalen artikkel 11.

69. Saksøkte hevder at dersom det legges til grunn at forbudet mot synlig oppstilling utgjør en salgsordning, vil det foreligge en presumpsjon om at det som sådan faller utenfor virkeområdet til EØS-avtalen artikkel 11. I tillegg hevder saksøkte at det er saksøker som må legge frem dokumentasjon på at forbudet mot synlig oppstilling inneholder diskriminerende elementer i strid med EØS-avtalen artikkel 11.[47]

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45 Det vises til sak E-1/10 *Periscopus AS* mot *Oslo Børs ASA og Erik Must AS*, EFTA Ct. Rep. 2009-2010 s. 198 (avsnitt 28); sak C-421/01 *Traunfellner GmbH og Österreichische Autobahnen- und Schnellstraβen-Finanzierungs-AG (Asfinag)*, Sml. 2003 s. I-11941 (avsnitt 21–24); og forente saker C-428/06 til C-434/06 *Unión General de Trabajadores de la Rioja (UGT-Rioja) m.fl.* mot *Juntas Generales del Territorio Histórico de Vizcaya m.fl.*, Sml. 2008 I-6747 (avsnitt 77).

46 Det vises bl.a. til *Keck og Mithouard*.

47 Det vises til *De Agostini* og *TV-Shop*, som sitert over (avsnitt 44).

70. The Defendant holds that in many cases the ECJ leaves this assessment to the natonal court, in line with the general principles for division of competence between the Community courts and national courts.[48] In some cases the Courts have nevertheless had the factual basis to draw the conclusion that there are indeed no discriminatory elements present.[49] The Defendant further holds that the ECJ has more readily acknowledged the possibility of discriminatory elements if there is a restrictive selling regulation that only applies to one out of several competing products or only to a particular sales method that is more significant for imported products. However, according to the Defendant, these cases can be distinguished from the display ban at issue in the present case as the ban applies to all products competing with each other and to all sales channels in an equal manner.

71. The Defendant accepts that judgments can be found where it has been held that, under certain conditions, strict marketing regulations may imply disadvantages to imported products and notes that the Plaintiff bases its arguments primarily on these cases. However, in the Defendant's view, although the strictness of measure is a relevant factor in determining whether in fact there is discrimination, it does not of itself bring the selling arrangement within the scope of Article 11 EEA. Discrimination can only be found if the strict national measure does not affect foreign and domestic products in the same manner.[50]

72. The Defendant points out that practices or customs within a particular state can play a role in the assessment of discrimination, in particular where these elements are linked to the consumption of the product in question. This issue has been relevant in cases dealing with alcoholic beverages, where it was

[48] Reference is made to Case C-20/03 *Burmanjer* [2005] ECR I-4133 and Case C-441/04 *A-punkt Schmuckhandels* [2006] ECR I-2093.

[49] Reference is made to Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025, paragraph 42, and *Nille*, cited above, paragraph 27 .

[50] Reference is made to *Keck and Mithouard*, paragraph 16, and *De Agostini and TV-Shop*, paragraphs 43-44, both cited above.

70. Saksøkte anfører at i mange saker overlater EU-domstolen denne vurdering til den nasjonale domstol, i samsvar med de generelle prinsipper for kompetansefordeling mellom felleskapsdomstolene og nasjonale domstoler.[48] I noen saker har riktignok EU-domstolen hatt et tilstrekkelig faktagrunnlag til å konkludere med at det ikke foreligger noen diskriminerende elementer.[49] Saksøkte anførere videre at EU-domstolen lettere har akseptert muligheten for et diskriminerende element dersom restriksjonen i form av salgsordninger eller ordninger vedrørende en bestemt salgsmetode har hatt større betydning for importerte produkter. Ifølge saksøkte skiller disse saker seg imidlertid fra oppstillingsforbudet i den foreliggende sak, idet forbudet rammer alle salgskanaler på samme måte.

71. Saksøkte vedgår at det finnes dommer som fastsetter at strenge regler for markedsføring under visse betingelser kan innebære ulemper for importerte produkter, og anfører at saksøker primært baserer sine anførsler på disse saker. Saksøkte er imidlertid av den oppfatning at selv om tiltakets strenghet er en relevant faktor i vurderingen av hvorvidt det foreligger forskjellsbehandling, gjør ikke dette automatisk at salgsordningen faller inn under virkeområdet til EØS-avtalen artikkel 11. Forskjellsbehandling foreligger bare dersom det strenge nasjonale tiltak ikke berører utenlandske og innenlandske produkter på samme måte.[50]

72. Saksøkte peker på at praksis eller skikk og bruk i en bestemt stat kan spille en rolle i vurderingen av forskjellsbehandling, særlig dersom disse elementer er knyttet til forbruket av det aktuelle produkt. Dette spørsmål har vært relevant i saker som har dreid seg om alkoholholdige drikker, der det ble lagt til grunn at et totalforbud mot alle former for reklame kunne hemme

[48] Det vises til Sak C-20/03 *Burmanjer*, Sml. 2005 I-4133, og Sak C-441/04 *A-punkt Schmuckhandels*, Sml. 2006 I-2093.

[49] Det vises til Sak C-71/02 *Herbert Karner Industrie-Auktionen GmbH* mot *Troostwijk GmbH*, Sml. 2004 I-3025 (avsnitt 42), og *Nille*, sitert over (avsnitt 27).

[50] Det vises til *Keck og Mithouard* (avsnitt 16), og *De Agostini og TV-Shop* (avsnitt 43–44), begge som sitert over.

held that a total ban on all forms of advertising could be liable to impede access to the market by products from other Member States.[51] The Defendant is not aware of any such practices or customs in the Norwegian tobacco market. In addition, in its view, the tobacco market is different to the market for alcoholic beverages, not least because alcoholic beverages are produced in almost all Member States whereas tobacco is not. Therefore, it is impossible for a visual display ban on tobacco products to favour domestic products as there is no production of tobacco in Norway.

73. The Defendant argues, therefore, that the basic premise of the Plaintiff's case, namely, that discrimination can be found despite the objective fact of no comparable domestic products, is unsound. Instead, the opposite principle applies, namely, that the lack of comparable products leads to the conclusion that there is no discrimination.[52] At the same time, the Defendant concedes that the absence of Norwegian tobacco production does not as such exclude the possibility that there may be discriminatory elements where similar domestic products can be found.[53] However, in its view, there are no similar domestic products treated more favourably in the present case.

74. With regard to the significance of trademarks, the Defendant agrees with the Plaintiff that tobacco packaging, including trademarks of tobacco brands, form an important part of the tobacco producers' communication with customers. That said, the Defendant argues that there is no indication that a display ban will primarily lead to less intensive competition between brands and not to a lower total sale of tobacco products. As for the Plaintiff's argument concerning the effect on new products, the Defendant asserts that such an argument disregards the need for an element of discrimination between foreign and domestic

51 Reference is made to *Gourmet International* and *Pedicel*, paragraph 46, both cited above.
52 Case C-383/01 *Danske Bilimportører* [2003] ECR I-6065, paragraph 42.
53 Case C-391/92 *Commission* v *Greece*, paragraphs 16-17, and *Morellato*, paragraph 18, both cited above.

markedsadgangen for produkter fra andre medlemsstater.[51] Saksøkte er ikke kjent med noen slik praksis eller skikk og bruk på det norske tobakksmarked. Dessuten er tobakksmarkedet etter saksøktes oppfatning annerledes enn markedet for alkoholholdige drikker, ikke minst fordi alkoholholdige drikker blir produsert i nesten alle medlemsstater, noe som ikke er tilfellet for tobakk. Når det ikke er tobakksproduksjon i Norge, kan følgelig et forbud mot synlig oppstilling av tobakksprodukter umulig begunstige innenlandske produkter.

73. Saksøkte gjør derfor gjeldende at grunnforutsetningen for saksøkers sak, nemlig at det foreligger forskjellsbehandling til tross for det objektive faktum at det ikke finnes noen sammenlignbare nasjonale produkter, er uholdbar. I stedet er det det motsatte prinsippet som gjelder, nemlig at fraværet av sammenlignbare produkter fører til den konklusjon at det ikke foreligger forskjellsbehandling.[52] Samtidig vedgår saksøkte at fraværet av norsk tobakksproduksjon ikke som sådan utelukker muligheten for at det kan finnes diskriminerende elementer i en situasjon der det finnes tilsvarende innenlandske produkter.[53] Etter saksøktes oppfatning foreligger det i denne sak imidlertid ingen tilsvarende innenlandske produkter som behandles gunstigere.

74. Når det gjelder betydningen av varemerker, er saksøkte enig med saksøker i at tobakksemballasje, herunder varemerker for tobakksmerker, utgjør en viktig del av tobakksprodusentenes kommunikasjon med forbrukerne. Når det er sagt, anfører saksøkte at det er ingen indikasjon på at oppstillingsforbudet først og fremst vil føre til en mindre intens konkurranse mellom merker snarere enn et lavere totalsalg av tobakksprodukter. Når det gjelder saksøkers påstand om virkningen for nye produkter, fastholder saksøkte at et slikt argument ser bort fra at det må foreligge et element av forskjellsbehandling mellom utenlandske

51 Det vises til *Gourmet International* og *Pedicel* (avsnitt 46), begge som sitert over.
52 Sak C-383/01 *De Danske Bilimportører og Skatteministeriet, Told- og Skattestyrelsen*, Sml. 2003 s. I-6065 (avsnitt 42).
53 Sak C-391/92 *Kommisjonen* mot *Hellas* (avsnitt 16–17), og *Morellato* (avsnitt 18), begge som sitert over.

products. It observes that both existing and new products may be imported from other states.[54]

Market access not prevented

75. The Defendant observes that in cases on selling arrangements the crucial issue is whether or not these arrangements entail *de jure* or *de facto* discrimination. It concedes, however, that in exceptional circumstances, where market access is prevented, selling arrangements which do not discriminate may potentially infringe Article 11 EEA.[55]

76. With regard to non-discriminatory selling arrangements and market access, the Defendant emphasises two points. First, the ECJ has understood the concept of market access restrictively. Thus, this exception to the requirement for discrimination is limited to situations where market access *de jure* or *de facto* is more or less closed and, as a result, limited to very few cases.[56] Second, this exception has never been used directly by the ECJ. On the contrary, it has held that national selling arrangements that are likely to limit the total volume of sales and, consequently, reduce the volume of sales of goods from other Member States do not bring the measure within the scope of Article 34 TFEU, if non-discriminatory in law and in fact. Therefore, according to the Defendant, this exception is only relevant in extraordinary cases of *de jure* or *de facto* market closure.[57]

77. The Defendant objects to the Plaintiff's argument suggesting that the test applied should not take account of prevention of market access but should be substituted by a different test focusing on market hindrance. The Defendant rejects that view and contends

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54 Reference is made to *Gourmet International*, paragraph 21, and *Pedicel*, paragraph 46, both cited above.

55 *Keck and Mithouard*, cited above, paragraph 17.

56 Reference is made to *Gourmet International*, paragraph 18, *Karner*, paragraph 51, and *Ullensaker kommune*, paragraph 23, all cited above.

57 Reference is made, for example, to *Leclerc-Siplec*, cited above, paragraph 20, *Karner* cited above, paragraph 42, and *A-punkt Schmuckhandels*, cited above, paragraphs 23-24.

og innenlandske produkter. Saksøkte bemerker at både eksisterende og nye produkter kan importeres fra andre stater.[54]

Markedsadgangen forhindres ikke

75. Saksøkte bemerker at i saker som gjelder salgsordninger, er det avgjørende spørsmål hvorvidt disse ordninger rettslig eller faktisk innebærer forskjellsbehandling. Saksøkte innrømmer imidlertid at under ekstraordinære omstendigheter, der adgangen til markedet forhindres, kan salgsordninger som ikke innebærer forskjellsbehandling potensielt være i strid med EØS-avtalen artikkel 11.[55]

76. Når det gjelder markedsadgang og salgsordninger som ikke innebærer forskjellsbehandling, understreker saksøkte to forhold. For det første har EU-domstolen lagt til grunn en restriktiv forståelse av begrepet markedsadgang. Dette unntak fra kriteriet om forskjellsbehandling er følgelig begrenset til situasjoner der markedsadgangen rettslig og faktisk er mer eller mindre stengt, og er dermed begrenset til nokså få saker.[56] Dernest har EU-domstolen aldri brukt dette unntak direkte. Tvert imot har den slått fast at nasjonale salgsordninger som vil kunne begrense det totale salgsvolum og følgelig redusere salgsvolumet av varer fra andre medlemsstater, ikke medfører at tiltaket omfattes av TEUV artikkel 34 dersom det rettslig og faktisk ikke innebærer forskjellsbehandling. Ifølge saksøkte er dette unntak derfor bare relevant i ekstraordinære tilfeller der markedet rettslig og faktisk er stengt.[57]

77. Saksøkte er uenig i saksøkers anførsel om at testen som skal anvendes, ikke skal ta hensyn til hvorvidt adgangen til markedet forhindres, men bør bestå i en annen test med fokus på markedshindring. Saksøkte avviser dette synspunkt og hevder

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54 Det vises til *Gourmet International* (avsnitt 21), og *Pedicel* (avsnitt 46), begge som sitert over.

55 *Keck og Mithouard*, som sitert over (avsnitt 17).

56 Det vises til *Gourmet International* (avsnitt 18), *Karner* (avsnitt 51), og *Ullensaker kommune* (avsnitt 23), alle som sitert over.

57 Det vises f.eks. til *Leclerc-Siplec*, som sitert over (avsnitt 20), *Karner*, som sitert over (avsnitt 42), og sak C-441/04 *A-punkt Schmuckhandels*, Sml. 2006 s. I-2093 (avsnitt 23–24).

that the Plaintiff's assertions are based on a misinterpretation of the judgments in *Commission* v *Italy* and *Mickelsson and Roos*.[58] With regard to the former judgment, the Defendant argues that this case supports the notion that in the context of selling arrangements prevention of market access and not market hindrance, as contended by the Plaintiff, is the test which must be used. With respect to the latter case, the Defendant argues that the case is not relevant because it did not deal with selling arrangements, but prohibitions on the use of personal watercrafts.

No hindrance to market access

78. In the event that the Court holds non-discriminatory selling arrangements hindering market access to fall within the prohibition established by Article 11 EEA, the Defendant argues, in the alternative, that the display ban does not lead to such market hindrance.

79. The Defendant submits that the test of market hindrance results from *Commission* v *Italy* and *Mickelsson and Roos*. However, in its view, these cases demonstrate that a high threshold exists for market hindrance, similar to that applied in the test for prevention of market access. Therefore, market hindrance only exists where consumers have practically no interest in buying the relevant product and the measure in question prevents a demand from existing in the market.[59] Furthermore, the Defendant continues, non-discriminatory measures are only considered to hinder access to the market for the purposes of Article 11 EEA, if they prevent or greatly restrict the use of the product in question.[60] It follows, therefore, that lesser measures fall outside the scope of Article 11 EEA.

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58 The Defendant refers to *Commission* v *Italy*, cited above, paragraphs 33-36, and criticises in particular how paragraph 37 is understood by the Plaintiff. In addition, the Defendant refers to *Mickelsson and Roos*, cited above.

59 Reference is made to *Commission* v *Italy*, cited above, paragraphs 52, 53 and 57.

60 The Defendant refers to *Mickelsson and Roos*, cited above, paragraphs 25, 26 and 28.

at saksøkers syn er basert på en misforståelse av dommene i sakene *Kommisjonen* mot *Italia* og *Mickelsson og Roos*.[58] Når det gjelder den første dom gjør saksøkte gjeldende at denne sak underbygger at når det gjelder salgsordninger, er det hindring av markedsadgang, og ikke hvorvidt det foreligger markedshindring, som saksøker påstår, som er den test som må brukes. Når det gjelder den sistnevnte sak, hevder saksøkte at saken ikke er relevant ettersom den ikke gjaldt salgsordninger for, men forbud mot bruk av vannscootere.

Ingen markedshindring

78. Dersom EFTA-domstolen legger til grunn at ikke-diskriminerende salgsordninger som utgjør en markedshindring omfattes av forbudet fastsatt i EØS-avtalen artikkel 11, gjør saksøkte gjeldende at oppstillingsforbudet ikke fører til slik markedshindring.

79. Saksøkte anfører at testen vedrørende markedshindring fremgår av *Kommisjonen* mot *Italia* og *Mickelsson og Roos*. Etter saksøktes mening viser disse saker imidlertid at terskelen for markedshindring er høy, tilsvarende den som gjelder ved spørsmålet om adgangen til markedet forhindres. Det foreligger derfor bare markedshindring dersom forbrukerne praktisk talt ikke har noen interesse av å kjøpe det aktuelle produkt, og vedkommende tiltak forhindrer etterspørsel i markedet.[59] Videre, fortsetter saksøkte, anses ikke-diskriminerende tiltak å utgjøre en markedshindring i henhold til EØS-avtalen artikkel 11 bare om de forhindrer eller sterkt begrenser bruken av det aktuelle produkt.[60] Det følger av dette at mildere tiltak faller utenfor virkeområdet til EØS-avtalen artikkel 11.

[58] Saksøkte viser til *Kommisjonen* mot *Italia*, som sitert over (avsnitt 33–36), og kritiserer særlig saksøkers forståelse av avsnitt 37. Dessuten viser saksøkte til *Mickelsson og Roos*, som sitert over.
[59] Det vises til *Kommisjonen* mot *Italia*, som sitert over (avsnitt 52, 53 og 57).
[60] Saksøkte viser til *Mickelsson og Roos*, som sitert over (avsnitt 25, 26 og 28).

80. Taking account of established case-law, the Defendant argues that the threshold inherent in the market hindrance test is very high. It submits that the display ban does not imply any hindrance of market access.

81. The Defendant proposes that the Court should answer the first question as follows:

A ban on the display of tobacco products in retail outlets such as the one laid down in Section 5 of the Norwegian Tobacco Control Act does not constitute a measure having equivalent effect to a quantitative restriction on the free movement of goods under Article 11 EEA.

The second question

82. As, in the Defendant's view, the first question should be answered in the negative, it contends that the Court should hold that it is unnecessary to provide an answer to the second question.

83. If, however, the Court considers it necessary to answer the second question in substantive terms, the Defendant argues that the display ban is justified on grounds of public health and must be regarded as proportionate. The Defendant stresses that public health has been considered by the ECJ and the Court to be a legitimate objective of the highest order. This entails that it is for individual states to determine the level of protection and how that level is to be achieved, while the measure chosen must at the same time be proportionate to the aim pursued.[61]

84. The Defendant emphasises the two-fold importance of the EU and WHO recommendations mentioned previously. First, the recommendations provide arguments and research substantiating the fact that advertising is effective in increasing tobacco sales, that the display of tobacco products entails advertising, that bans on advertising must be comprehensive and that the ban will contribute to the reduction of tobacco used by adolescents and adults. Second, the recommendations present legal

[61] The Defendant cites *Ker-Optika*, paragraph 58, and *Pedicel*, paragraph 56, both cited above.

80. Saksøkte viser til fast rettspraksis og gjør gjeldende at terskelen for en markedshindring er svært høy. Saksøkte anfører at oppstillingsforbudet ikke innebærer noen markedshindring.

81. Saksøkte anmoder EFTA-domstolen om å besvare det første spørsmål på følgende måte:

Et oppstillingsforbud for tobakksprodukter på utsalgssteder som fastsatt i tobakkskadeloven paragraf 5, utgjør ikke et tiltak som har tilsvarende virkning som en kvantitativ importrestriksjon i henhold til EØS-avtalen artikkel 11.

Det andre spørsmål

82. Ettersom det første spørsmål etter saksøktes mening bør besvares benektende, gjør saksøkte gjeldende at EFTA-domstolen bør komme til at det er unødvendig å besvare det andre spørsmål.

83. Om EFTA-domstolen derimot legger til grunn at det er nødvendig å realitetsbehandle det andre spørsmål, gjør saksøkte gjeldende at oppstillingsforbudet er berettiget av hensyn til folkehelsen og må betraktes som forholdsmessig. Saksøkte understreker at EU-domstolen og EFTA-domstolen har vurdert folkehelsen som en legitim målsetning av største betydning. Dette innebærer at det er den enkelte stat selv som skal bestemme beskyttelsesnivå og hvordan dette nivå skal oppnås, samtidig som tiltaket som velges, må stå i forhold til det fastsatte målet.[61]

84. Saksøkte understreker at de tidligere omtalte anbefalinger fra EU og WHO har betydning i to relasjoner. For det første inneholder disse anbefalinger argumenter og forskning som underbygger at reklame effektivt øker salget av tobakk, at oppstilling av tobaksprodukter innebærer reklame, at forbud mot reklame må være omfattende, og at forbudet vil bidra til å redusere bruken av tobakk blant ungdom og voksne. Dernest inneholder anbefalingene rettslige argumenter som gjør det vanskelig å se

[61] Saksøkte siterer fra *Ker-Optika* (avsnitt 58), og *Pedicel* (avsnitt 56), begge som sitert over.

arguments that make it difficult to see how a display ban could be disproportionate. In addition, the documents support the view that a comprehensive ban is crucial within the context of tobacco advertising.

85. According to the Defendant, it is clear from the questions posed by Oslo District Court, which seeks guidance regarding relevant criteria, that it is not for the EFTA Court to assess the facts of the case or whether national law is compatible with EEA law. Therefore, the Court should only give general guidance on the elements which are to be taken into account.[62] Accordingly, the Defendant has furnished the Court with comments on the relevant public health objectives, on the proportionality test in general, and on the relevant tests of suitability and necessity of the display ban more specifically.

Legitimate objectives

86. The visual display ban seeks to achieve a legitimate objective, namely, to reduce tobacco use and the severe health problems caused by tobacco use. Such use constitutes a fundamental risk to human life. The Defendant expects that there will be an immediate effect of the display ban, but also that there can be a further longer term effect in that the display ban may contribute to change the general attitude towards tobacco products by generating a signal that tobacco products are not normal products in the same way as other products available at retail outlets. Such signal effect is noted in the preparatory works formulated prior to the implementation of the visual display ban and is accepted internationally.[63]

Proportionality test

87. The Defendant contends that the principle of proportionality incorporates the notions of suitability and necessity.

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62 *Pedicel*, cited above, paragraph 57.

63 Reference is made to WHO Global Tobacco Epidemic Report 2009, p. 52, and the legislative proposal for the Tobacco Advertising Directive, COM(2001) 283 final, p. 9.

hvordan et oppstillingsforbud kan være uforholdsmessig. I tillegg underbygger dokumentene standpunktet om at et omfattende forbud er avgjørende når det gjelder tobakksreklame.

85. Ifølge saksøkte er det klart ut fra spørsmålene som stilles av Oslo tingrett, som anmoder om veiledning med hensyn til relevante kriterier, at det ikke er EFTA-domstolen som skal vurdere de faktiske forhold i saken eller hvorvidt nasjonal lovgivning er forenlig med EØS-retten. Derfor bør EFTA-domstolen bare gi generell veiledning med hensyn til de elementer som skal tas i betraktning.[62] Av denne grunn har saksøkte lagt frem for EFTA-domstolen momenter vedrørende de relevante folkehelsemål, vedrørende forholdsmessighetstesten generelt, og mer spesifikt vedrørende de relevante tester om oppstillingsforbudets egnethet og nødvendighet.

Legitime mål

86. Forbudet mot synlig oppstilling søker å nå et legitimt mål, nemlig å redusere bruken av tobakk og de alvorlige helseproblemer som tobakksbruk forårsaker. Denne bruk utgjør en grunnleggende risiko for menneskers liv. Saksøkte forventer at oppstillingsforbudet vil ha en umiddelbar effekt, men også at det kan være en ytterligere langtidseffekt i form av at oppstillingsforbudet kan bidra til å endre den generelle holdning til tobakksprodukter, ved å skape et signal om at tobakksprodukter ikke er vanlige produkter på lik linje med andre produkter som er tilgjengelige på utsalgsstedene. Denne signaleffekt er omtalt i forarbeidene som ble formulert i forkant av innføringen av forbudet mot synlig oppstilling og er internasjonalt anerkjent.[63]

Forholdsmessighetstesten

87. Saksøkte anfører at forholdsmessighetsprinsippet innbefatter egnethets- og nødvendighetskriteriene. Følgelig er de spørsmål

[62] *Pedicel*, som sitert over (avsnitt 57).
[63] Det vises til WHO Global Tobacco Epidemic Report 2009, s. 52, og forslaget til tobakksreklamedirektivet, COM(2001) 283 final, s. 9.

Consequently, the issues which must be addressed are whether the measure in question actually is suitable to ensure the public health objectives pursued and whether or not other means can be considered equally effective but less restrictive of EEA trade.

88. The Defendant observes that while the parties appear to agree on the basic elements of proportionality as set out above, they seem to disagree on the EEA law requirements governing the presentation of proof necessary to demonstrate the proportionality of legislative measures. This disagreement results from the fact that, although it follows from established case-law that it is incumbent on the national authorities to demonstrate that a restriction is suitable and necessary, the burden of proof can vary depending on the sector and case concerned. This should also, in the Defendant's view, be seen in relation to the intensity of judicial review where caution should be exercised in a case like the present one.

89. According to the Defendant, case-law of the ECJ and the Court addressing restrictions on alcohol advertising suggests a cautious approach to judicial review is warranted.[64] Thus, the obligation to adduce evidence must not be applied in a way that renders it difficult to adopt new measures aimed at reducing tobacco consumption. The effect of tobacco control measures typically appears gradually and over time. Thus, in its view, documentation requirements should not be strict and future effects that cannot be accurately foreseen should be scrutinised from a proportionality perspective only when appearing manifestly incorrect.[65]

90. Therefore, the Defendant emphasises that "hard" evidence cannot be required of the state but simply that the measure is likely to

[64] Reference is made to *Aragonesa de Publicidad Exterior*, paragraph 16, and *Pedicel*, paragraph 61, both cited above.

[65] Reference is made to Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 38.

som skal behandles, hvorvidt angjeldende tiltak faktisk er egnet til å sikre de aktuelle folkehelsemål, og hvorvidt andre virkemidler kan vurderes som like effektive men mindre restriktive for handelen i EØS-området.

88. Saksøkte bemerker at selv om partene synes å være enige om de grunnleggende elementer ved forholdsmessighetsprinsippet som fastsatt i det ovenstående, synes de å være uenige om EØS-rettens kriterier for hvilken bevisførsel som kreves for å godtgjøre forholdsmessigheten av lovgivningsmessige tiltak. Denne uenighet skyldes at selv om det følger av fast rettspraksis at det påligger nasjonale myndigheter å bevise egnetheten og nødvendigheten av en restriksjon, kan bevisbyrden variere avhengig av hvilken sektor og sak det er tale om. Etter saksøktes oppfatning bør dette også ses i sammenheng med intensiteten i den rettslige prøving, hvor det bør utvises varsomhet i saker som den foreliggende.

89. Ifølge saksøkte tilsier rettspraksis både fra EU-domstolen og EFTA-domstolen vedrørende restriksjoner på alkoholreklame at en forsiktig tilnærming til rettslig overprøving er påkrevet.[64] Følgelig må plikten til å legge frem bevis ikke anvendes på en slik måte at det blir vanskelig å vedta nye tiltak med sikte på å redusere forbruket av tobakk. Effekten av tobakkskontrolltiltak viser seg typisk gradvis og over tid. Etter saksøktes mening bør dokumentasjonskravene følgelig ikke være strenge, og fremtidige effekter som ikke kan forutses nøyaktig, bør granskes i et forholdsmessighetsperspektiv bare dersom de er åpenbart feilaktige.[65]

90. Følgelig understreker saksøkte at staten ikke kan avkreves sikre bevis, bare bevis for at tiltaket sannsynligvis vil bidra effektivt til

[64] Det vises til forente saker C-1/90 og C-176/90 *Aragonesa de Publicidad Exterior SA og Publivía SAE* mot *Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, Sml. 1991 s. I-4151 (avsnitt 16), og *Pedicel* (avsnitt 61), som sitert over.

[65] Det vises til sak C-504/04 *Agrarproduktion Staebelow GmbH* mot *Landrat des Landkreises Bad Doberan*, Sml. 2006 s. I-679 (avsnitt 38).

make an effective contribution to attaining the relevant aim.[66] In addition, although conceding that relevant documentation must be furnished, the Defendant asserts that the ECJ has rejected the notion that national authorities must be able to produce a particular study supporting the proportionality of a restrictive measure prior to its adoption.[67]

Suitability test

91. The Defendant argues that the display ban is suitable if it constitutes an adequate measure to reduce tobacco use in the groups targeted by the legislation. Therefore, in its view, the test of suitability is a question of evidence, or, in other words, is it reasonable to assume that the display ban will have some kind of effect?

92. The Defendant contends that the obligation to adduce evidence should be understood in a way that does not hinder the adoption of legitimate public health measures. The state enjoys a wide margin of discretion, which includes a margin of discretion in determining the measures which are likely to achieve concrete effect.[68] In addition, case-law indicates that a partial effect on one or more target groups suffices.[69] Therefore, according to the Defendant, the ECJ appears to have rejected the suitability of a measure only in cases where its effect is considered purely theoretical.[70]

93. The Defendant notes that in assessing suitability the ECJ and the Court considered in some cases whether the national measure

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66 Joined Opinion of Advocate General Fennelly in Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419 and Case C-74/99 *Imperial Tobacco* [2000] ECR I-8599, points 159-160; Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paragraph 129; Opinion of Advocate General Tizzano in Case C-262/02 *Commission* v *France* [2004] ECR I-6569, point 81; and Case E-1/06 *ESA* v *Norway*, cited above, paragraph 51.

67 Reference is made to Joined Cases C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß,* not yet reported, paragraphs 70-72.

68 Reference is made to Case C-394/97 *Heinonen* [1999] ECR I-3599, paragraph 43, and the Opinion of Advocate General Saggio in that case, point 32, and *Ahokainen and Leppik*, cited above, paragraph 32.

69 The Defendant refers to *Ahokainen and Leppik*, cited above, paragraph 39, and the Opinion of Advocate General Maduro in that case, point 24.

70 The Defendant refers to Case C-366/04 *Schwarz* [2005] ECR I-10139, paragraphs 35-36.

å nå det aktuelle mål.[66] I tillegg, selv om det medgis at relevant dokumentasjon må legges frem, gjør saksøkte gjeldende at EU-domstolen har forkastet synet om at nasjonale myndigheter må være i stand til å legge frem en konkret studie som underbygger forholdsmessigheten av et restriktivt tiltak, før det vedtas.[67]

Egnethetstesten

91. Saksøkte gjør gjeldende at oppstillingsforbudet er egnet om det utgjør et adekvat tiltak for å redusere bruken av tobakk i de gruppene lovgivningen retter seg mot. Egnethetstesten er derfor etter saksøktes oppfatning et bevisspørsmål, eller med andre ord: Er det rimelig å anta at oppstillingsforbudet vil ha en viss effekt?

92. Saksøkte hevder at plikten til å legge frem bevis bør forstås på en måte som ikke er til hinder for at legitime folkehelsetiltak kan vedtas. Staten nyter en omfattende skjønnsmargin, herunder til å vurdere hvilke tiltak som sannsynligvis vil kunne bidra til å oppnå en konkret effekt.[68] I tillegg tilsier rettspraksis at en delvis effekt i en eller flere målgrupper er tilstrekkelig.[69] Ifølge saksøkte synes EU-domstolen derfor å ha underkjent et tiltaks egnethet bare i saker der effekten av tiltaket vurderes som rent teoretisk.[70]

93. Saksøkte anfører at i vurderingen av egnethet har EU-domstolen og EFTA-domstolen i enkelte tilfeller sett på hvorvidt det nasjonale

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66 Uttalelse fra generaladvokat Fennelly i sak C-376/98 *Tyskland* mot *Parlamentet og Rådet*, Sml. 2000 s. I-8419 og sak C-74/99 *The Queen* mot *Secretary of State for Health m.fl., ex parte Imperial Tobacco Ltd m.fl.*, Sml. 2000 s. I-8599 (avsnitt 159–160); sak C-491/01 *The Queen* mot *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd og Imperial Tobacco Ltd.*, Sml. 2002 s. I-11453 (avsnitt 129); uttalelse fra generaladvokat Tizzano i sak C-262/02 *Kommisjonen* mot *Frankrike*, Sml. 2004 s. I-6569 (avsnitt 81); og sak E-1/06 *ESA* mot *Norge*, som sitert over (avsnitt 51).

67 Det vises til forente saker C-316/07, C-358/07, C-360/07, C-409/07 og C-410/07 *Markus Stoß, Avalon Service-Online-Dienste GmbH, Olaf Amadeus Wilhelm Happel* mot *Wetteraukreis og Kulpa Automatenservice Asperg GmbH, SOBO Sport & Entertainment GmbH, Andreas Kunert* mot *Land Baden-Württemberg*, dom av 8. september 2010, ennå ikke i Sml. (avsnitt 70–72).

68 Det vises til sak C-394/97 *Heinonen*, Sml. 1999 s. I-3599 (avsnitt 43), uttalelse fra generaladvokat Saggio i samme sak (avsnitt 32), og *Ahokainen og Leppik*, som sitert over (avsnitt 32).

69 Saksøkte viser til *Ahokainen og Leppik*, som sitert over (avsnitt 39), og uttalelse fra generaladvokat Maduro i samme sak (avsnitt 24).

70 Saksøkte viser til sak C-366/04 *Schwarz* mot *Bürgermeister der Landeshauptstadt Salzburg*, Sml. 2005 s. I-10139 (avsnitt 35–36).

forms a part of a consistent and coherent policy. On its view, it is unnecessary to pursue this point in the present case as, in factual terms, the visual display ban forms a part of a consistent and coherent policy on tobacco use.

94. As the suitability test in the present case turns on questions of evidence, the Defendant argues that the Court should refrain from analysing this question in detail. Instead, a reference to the test set out above should provide sufficient guidance for the national court. The Defendant nevertheless describes existing research and knowledge-based assessments that according to the Defendant shows that a display ban will be effective and therefore fulfill the suitability test.[71]

Necessity test

95. The Defendant argues that if a national restriction is based on a legitimate public interest objective and is considered suitable to achieve its aim, the final test according to EEA law is whether the measure is also necessary in the sense that the same objectives cannot be achieved equally effectively with less restrictive means.

96. The basic elements of the necessity test have already been set out by the Court and the ECJ in earlier cases. However, according to the Defendant, these basic elements and their specific application will vary depending on the particularities of the case in question. The same applies in relation to the intensity and level of the judicial review involved. In any event, if it appears that less restrictive means exist, in the Defendant's view, it is for the national court to make the substantive assessment.[72]

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[71] The Defendant refers to, in particular, the WHO document *Global Health Risks. Mortality and burden of disease attributable to selected major risks* (2009); RAND Europe, *Assessing the Impacts of Revising the Tobacco Product Directive* (2010); and Lund et al, *Updated report on the knowledge base concerning the prohibition on the display of tobacco products* (SIRUS 2010). The reports or relevant sections thereof were submitted to the Court as Annexes 2, 3 and 10 to the Defendant's written pleadings.

[72] The Defendant refers to *Pedicel*, cited above, paragraphs 57 and 61.

tiltak er et ledd i en konsistent, helhetlig politikk. Etter saksøktes oppfatning er det unødvendig å forfølge dette spørsmål i denne sak ettersom forbudet mot synlig oppstilling objektivt sett er et ledd i en konsistent, helhetlig tobakkspolitikk.

94. Ettersom egnethetstesten i den foreliggende sak dreier seg om bevisspørsmål, gjør saksøkte gjeldende at EFTA-domstolen bør avstå fra å analysere dette spørsmål nærmere. I stedet bør en henvisning til testen behandlet over utgjøre tilstrekkelig veiledning for den nasjonale domstol. Under enhver omstendighet beskriver saksøkte eksisterende forskings- og kunnskapsbaserte vurderinger som ifølge saksøkte viser at et oppstillingsforbud vil være effektivt og derfor tilfredsstille egnethetstesten.[71]

Nødvendighetstesten

95. Saksøkte gjør gjeldende at om en nasjonal restriksjon er basert på et legitimt mål begrunnet i allmenne hensyn og betraktes som egnet til å oppnå dette mål, vil den endelige test i henhold til EØS-retten være hvorvidt tiltaket også er nødvendig i den forstand at samme mål ikke kan nås like effektivt med mindre inngripende virkemidler.

96. EFTA-domstolen og EU-domstolen har i tidligere saker allerede redegjort for grunnelementene i nødvendighetstesten. Men ifølge saksøkte vil disse grunnelementer og den særskilte anvendelse av dem variere avhengig av enkelthetene i den aktuelle sak. Det samme gjelder nivået og intensiteten i prøvingen. Uansett er det etter saksøktes oppfatning slik at om det viser seg at det finnes mindre inngripende virkemidler, er det nasjonale domstoler som skal foreta denne realitetsvurdering.[72]

[71] Saksøkte viser særlig til WHO-rapporten *Global Health Risks. Mortality and burden of disease attributable to selected major risks* (2009); RAND Europe, *Assessing the Impacts of Revising the Tobacco Product Directive* (2010); og Lund *et al*, *Updated report on the knowledge base concerning the prohibition on the display of tobacco products* (SIRUS 2010). Disse rapporter eller relevante deler av dem ble fremlagt for EFTA-domstolen som Vedlegg 2, 3 og 10 til saksøktes skriftlige innlegg.

[72] Saksøkte viser til *Pedicel*, som sitert over (avsnitt 57 og 61).

97. The Defendant emphasises two points regarding the burden of proof. First, the burden of proof does not imply that national authorities must provide positive proof that no other conceivable measure could be equally effective. In addition, when considering the availability of other conceivable measures, a state's need to achieve its legitimate objectives through general and simple rules is relevant.[73] Second, where the national authorities have shown that a measure in the sector of public health is suitable, it will be justified unless it is apparent that the public health objective can be secured equially effective with less restrictive measures.[74]

98. The Defendant notes that the obligation to adduce proof typically shifts between the parties to a dispute.[75] However, the Defendant rejects the arguments advanced on that point by the Plaintiff resulting from its interpretation of the Norwegian Supreme Court judgment in *Pedicel*.[76] As the Defendant understands it, the Plaintiff appears to submit that in *Pedicel* the Supreme Court of Norway held the burden of proof on necessity to lie with the private party. However, on the Defendant's interpretation, the reasoning of the Supreme Court emphasises that where a state determines the level of protection and has demonstrated that the measure is suitable and *prima facie* necessary, the other party must show that an alternative measure would nevertheless be equally effective when that measure only differs from the impugned measure in that it is less comprehensive.[77]

99. The Defendant rejects the Plaintiff's assertion that the objective of the display ban could be equally well attained through less restrictive means, including a licensing system for tobacco retailers and stricter enforcement of the age threshold for the purchase of tobacco. The Defendant asserts that other equally

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73 *Commission* v *Italy*, cited above, paragraphs 66-67.

74 *Pedicel*, cited above, paragraph 61.

75 Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, point 89.

76 Judgment of 24 June 2009, HR 2009-1319-A, Rt. 2009, p. 839.

77 The Defendant refers to the Judgment of the Norwegian Supreme Court in *Pedicel* in order to underscore its position on the difference between adducing proof and the burden of proof. See the Judgment of 24 June 2009, HR 2009-1319-A, Rt. 2009, p. 839, paragraphs 51-53 and 62.

97. Saksøkte understreker to forhold når det gjelder bevisbyrden. For det første innebærer ikke bevisbyrden at nasjonale myndigheter må legge frem positive bevis for at ikke noe annet tenkelig tiltak vil kunne være like effektivt. I tillegg er en stats behov for å nå sine legitime mål gjennom generelle og enkle regler, relevant i vurderingen av om andre tenkelige tiltak er tilgjengelige.[73] For det andre er det slik at dersom nasjonale myndigheter har vist at et tiltak innen folkehelsesektoren er egnet, kan tiltaket dermed rettferdiggjøres, med mindre det er åpenbart at folkehelsen kan beskyttes like effektivt med mindre inngripende virkemidler.[74]

98. Saksøkte anfører at plikten til å legge frem bevis typisk flytter seg mellom partene i en tvist.[75] Imidlertid forkaster saksøkte den påstand saksøker har fremsatt i denne anledning, som følger av saksøkers tolkning av Høyesteretts dom i *Pedicel*-saken.[76] Slik saksøkte forstår det, synes saksøker å påstå at Høyesterett i *Pedicel*-saken legger bevisbyrden med hensyn til nødvendighet på den private part. Men ifølge saksøktes tolkning understreker Høyesterett i sin begrunnelse at dersom en stat fastsetter et beskyttelsesnivå og har godtgjort at tiltaket er egnet og ved første øyekast nødvendig, må motparten likevel vise at et alternativt tiltak ville vært like virkningsfullt dersom dette tiltak skiller seg fra det omtvistede tiltak bare ved å være mindre omfattende.[77]

99. Saksøkte avviser saksøkers påstand om at målet med oppstillingsforbudet kunne vært like godt oppnådd gjennom mindre inngripende virkemidler, herunder en lisensordning for tobakksforhandlere og strengere håndhevelse av aldersgrensen for kjøp av tobakk. Saksøkte hevder at andre, like effektive tiltak

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73 *Kommisjonen* mot *Italia*, som sitert over (avsnitt 66–67).
74 *Pedicel*, som sitert over (avsnitt 61).
75 Uttalelse fra generaladvokat Kokott i sak C-8/08 *T-Mobile Netherlands BV m.fl.*, Sml. 2009 s. I-4529 (avsnitt 89).
76 Dom av 24. juni 2009, HR 2009-1319-A, Rt. 2009, s. 839.
77 Saksøkte viser til Høyesteretts dom i *Pedicel*-saken for å understreke sitt syn på forskjellen mellom bevisførsel og bevisbyrde. Jf. dom av 24. juni 2009, HR 2009-1319-A, Rt. 2009, s. 839 (avsnitt 51–53 og 62).

efficient measures do not exist; the alternative measures referred to by the Plaintiff would neither close the gap left by the tobacco advertising ban nor contribute to denormalise tobacco use. According to the Defendant, it is particularly crucial to close the final gap in the ban on tobacco advertising. For this reason alone, the display ban must be considered necessary.

100. In addition, the Defendant observes that some of the measures referred to by the Plaintiff, e.g. mass media campaigns, are supplements but not alternatives to the display ban. All the measures implemented by the Defendant form part of an existing tobacco policy. The need for a comprehensive and diversified tobacco control policy is of the utmost importance in countering the adverse effect of tobacco use on public health. Therefore, in its view, it is not a question of choosing between age control and a display ban, but whether age control and the display ban together are more effective than age control alone. Hence, the joint effect of several measures will lead to greater protection for public health.

101. The Defendant contends that measures similar to the display ban, only less comprehensive, must be assumed to be less effective. This applies to regulations relating to the maximum space for displaying tobacco products or limited visibility of such products. The Defendant argues that a total ban on displaying tobacco products is more effective than any such partial bans. In addition, it queries whether some of the alternative measures, e.g. a licensing system for retail sellers, would, in fact, be less restrictive to the tobacco trade than the current visual display ban.

102. Therefore, the Defendant submits that the display ban must be considered necessary and that other less restrictive measures would not be as effective in achieving the legitimate objective of protecting public health. In any event, it continues, it is for the national court to apply the necessity test, including the assessment of whether it is apparent *de facto* and *de jure* that the protection of public health against the harmful effects of tobacco use can be secured equally effectively by measures having less effect on intra-EEA trade.

ikke finnes; de alternative tiltak saksøker viser til, ville verken ha fylt hullet som forbudet mot tobakkreklame etterlater, eller bidra til å avnormalisere bruken av tobakk. Ifølge saksøkte er det særlig viktig å fylle det siste hull i forbudet mot tobakksreklame. Bare av denne grunn må reklameforbudet anses som nødvendig.

100. Saksøkte anfører i tillegg at en del av tiltakene saksøker viser til, f.eks. kampanjer i massemedia, er supplementer, ikke alternativer, til oppstillingsforbudet. Alle tiltakene gjennomført av saksøkte inngår i en eksisterende tobakkspolitikk. Behovet for en omfattende og mangfoldig tobakkskontrollpolitikk er av største betydning for å motvirke skadevirkningene av bruk av tobakk for folkehelsen. Det er etter saksøktes oppfatning derfor ikke et spørsmål om å velge mellom alderskontroll og oppstillingsforbud, men snarere om hvorvidt alderskontroll og oppstillingsforbud til sammen er mer effektive enn alderskontroll alene. Dermed vil den samlede effekt av flere tiltak føre til økt beskyttelse av folkehelsen.

101. Saksøkte gjør gjeldende at tiltak som ligner oppstillingsforbudet, bare mindre omfattende, må antas å være mindre effektive. Dette gjelder forskrifter som gjelder maksimalareal ved oppstilling av tobakksprodukter eller begrenset synlighet for slike produkter. Saksøker anfører at et totalforbud mot oppstilling av tobakksprodukter er mer effektivt enn ethvert slikt delvis forbud. Saksøkte setter dessuten spørsmålstegn ved hvorvidt noen av de alternative tiltak, f.eks. en lisensordning for forhandlere, faktisk ville være mindre inngripende for tobakkshandelen enn dagens forbud mot synlig oppstilling.

102. Derfor gjør saksøkte gjeldende at oppstillingsforbudet må betraktes som nødvendig, og at andre, mindre inngripende tiltak ikke ville være like effektive med hensyn til å nå det legitime mål om å beskytte folkehelsen. Uansett, fortsetter saksøkte, er det nasjonale domstoler som skal gjennomføre nødvendighetstesten, herunder vurdere hvorvidt det rettslig og faktisk er klart at beskyttelsen av folkehelsen mot skadevirkningene av bruken av tobakk kan sikres like effektivt gjennom tiltak som har mindre innvirkning på handelen innenfor EØS-området.

103. The Defendant proposes that the Court should answer the second question as follows:

Assuming that the national court concludes that the display ban falls under the scope of Article 11 EEA, it is justified on grounds of public health unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the EEA Contracting Party concerned, the protection of public health against the harmful effects of tobacco use can be secured equally effectively by measures having less effect on intra-EEA trade.

The Finnish Government

104. The Finnish Government points out that a visual display ban was adopted by the Finnish Parliament in 2010 and will take effect in 2012. The main goal of the Finnish legislation is to strengthen existing statutory provisions enacted in 1976 for the purposes of reducing smoking and related health detriments and to provide for more efficient measures to reduce the opportunities for children and young people to start smoking.

105. The Finnish Government observes that prohibition of the visible display of tobacco products constitutes one of the most important elements of the new legislation. Although advertising of tobacco products and other sales promotion activities have been banned for over three decades, the new prohibition is necessary because the visible display of tobacco products has become a significant method of marketing. In addition, the way in which products are displayed is of particular concern. These products are, as a rule, placed at the cash desk of retail stores where products intended for children and adolescents are stored. Placing products attractive to these groups alongside tobacco products brings such tobacco products to their attention and increases the risk that they will start smoking.

The first question

106. In the Finnish Government's view, a general prohibition on the visible display of tobacco products cannot be considered a

103. Saksøkte anmoder EFTA-domstolen om å besvare det andre spørsmål på følgende måte:

Forutsatt at den nasjonale domstol konkluderer med at oppstillingsforbudet hører inn under virkeområdet til EØS-avtalen artikkel 11, er forbudet berettiget av hensyn til folkehelsen med mindre det er åpenbart, under de rettslige og faktiske omstendigheter som kjennetegner situasjonen i den aktuelle EØS-stat, at folkehelsen kan beskyttes like effektivt mot skadevirkningene av tobakksbruk med tiltak som har mindre innvirkning på handelen innenfor EØS-området.

Finlands regjering

104. Finlands regjering viser til at Finlands parlament i 2010 vedtok et forbud mot synlig oppstilling som vil tre i kraft i 2012. Det fremste mål med den finske lov er å styrke dagens lovgivning vedtatt i 1976, for å redusere røyking og helseskadene i den forbindelse og sikre seg mer effektive tiltak for å redusere mulighetene for at barn og unge skal begynne å røyke.

105. Finlands regjering bemerker at forbudet mot synlig oppstilling av tobakksprodukter er et av de viktigste elementer i den nye lovgivning. Selv om reklame for tobakksprodukter og andre salgsfremmende aktiviteter har vært forbudt i over tre tiår, er det nye forbud nødvendig fordi den synlige oppstilling av tobakksprodukter har blitt en viktig markedsføringsmetode. Dessuten vekker måten produktene stilles ut på, særlig bekymring. Tobakksprodukterr blir som regel plassert ved kassadisken på utsalgsstedene, der produkter beregnet på barn og unge settes. Å plassere produkter som er attraktive for disse grupper, sammen med tobakksprodukter, trekker deres oppmerksomhet mot tobakksproduktene og øker risikoen for at de vil begynne å røyke.

Det første spørsmål

106. Etter den finske regjerings syn kan et generelt forbud mot synlig oppstilling av tobakksprodukter ikke anses å utgjøre et tiltak med

measure having equivalent effect to a quantitative restriction on the free movement of goods within the meaning of Article 11 EEA.

107. The Finnish Government argues that, according to settled case-law, all trading rules enacted by Member States capable of hindering directly or indirectly intra-Community trade are to be considered measures having equivalent effect to quantitative restrictions.[78] However, national provisions that restrict or prohibit certain selling arrangements are not considered a hindrance if those provisions apply to all relevant traders operating within the national territory and affect the marketing of domestic and imported products in the same manner.

108. The Finnish Government is of the opinion that the contested display ban should be characterised as selling arrangements. Therefore, the application of the display ban does not constitute a hindrance to the free movement of goods because the ban applies to all relevant traders operating in Norway and the ban affects in the same manner, in law and in fact, the marketing and selling of the tobacco products.[79] In any event, the substantive assessment whether the ban affects the marketing and selling of tobacco products *de jure* and *de facto* in the same manner should be undertaken by the national court. That applies in particular to the latter point.

109. The Finnish Government notes that the Plaintiff's case is based on its interpretation of *Gourmet*, in particular the point made in that case that an extensive prohibition on the advertising of alcoholic beverages is liable to impede access to the market for products from other Member States more than it impedes access of domestic products. The Government takes the view that the principle established in that case is not applicable in the present case because, unlike alcoholic beverages, tobacco products cannot, in general, be considered as products whose consumption

78 The Finnish Government refers to *Dassonville*, cited above, paragraph 5.

79 Reference is made to *Keck and Mithouard*, cited above, paragraphs 16-17, *Commission* v *Italy*, cited above, paragraph 36, and Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* [2009] ECR I-3717, paragraph 17.

tilsvarende virkning som en kvantitativ importrestriksjon i henhold til EØS-avtalen artikkel 11.

107. Finlands regjering anfører at alle handelsregler som er vedtatt av medlemsstatene, og som direkte eller indirekte kan hindre handelen innenfor Fellesskapet, i henhold til fast rettspraksis skal betraktes som tiltak med tilsvarende virkning som kvantitative importrestriksjoner.[78] Imidlertid betraktes ikke nasjonale bestemmelser som begrenser eller forbyr visse salgsordninger som restriksjoner dersom bestemmelsene gjelder for alle berørte næringsdrivende som driver virksomhet innenfor det nasjonale territorium, og berører markedsføringen av innenlandske og importerte produkter på samme måte.

108. Finlands regjering er av den oppfatning at det omtvistede oppstillingsforbud bør regnes som en salgsordning. Anvendelsen av oppstillingsforbudet utgjør derfor ikke en hindring på det frie varebytte ettersom forbudet gjelder alle berørte forhandlere som driver virksomhet i Norge, og forbudet påvirker markedsføringen og omsetningen av tobakksprodukter på samme måte, både rettslig og faktisk.[79] Uansett bør realitetsvurderingen av hvorvidt forbudet rettslig og faktisk påvirker markedsføringen og omsetningen av tobakksprodukter på samme måte, gjøres av den nasjonale domstol. Dette gjelder særlig det siste punkt.

109. Finlands regjering bemerker at saksøker baserer sin sak på sin tolkning av *Gourmet*, særlig punktet om at et omfattende forbud mot markedsføring av alkoholholdige drikker kan hemme markedsadgangen for produkter fra andre medlemsstater mer enn det hemmer adgangen for innenlandske produkter. Regjeringen inntar den holdning at prinsippet fastsatt i nevnte sak ikke får anvendelse i den foreliggende sak fordi tobakksprodukter i motsetning til alkoholholdige drikker generelt ikke kan betraktes

[78] Finlands regjering viser til *Dassonville*, som sitert over (avsnitt 5).

[79] Det vises til *Keck og Mithouard*, som sitert over (avsnitt 16–17), *Kommisjonen* mot *Italia*, som sitert over (avsnitt 36), og sak C-531/07 *Fachverband der Buch- und Medienwirtschaft* mot *LIBRO Handelsgesellschaft mbH*, Sml. 2009 s. I-3717 (avsnitt 17).

is linked to traditional social practices and to local habits and customs.

110. The Finnish Government does not accept the arguments advanced by the Plaintiff to the effect that the visual display ban impedes the market access of new products from other EEA States to the benefit of brands that are already established. Noting that no tobacco products are produced in Norway, it argues, first, that, as a consequence, consumers cannot be more familiar with any domestic products.[80] Second, the display ban affects the market access of new domestic products in a similar manner to the market access of new products from other Member States. Similarly, it rejects the argument that the display ban implies the prevention of market access and argues that the case-law referred to by the Plaintiff is not relevant.[81]

111. Accordingly, the Finnish Government proposes that the Court should answer the first question as follows:

A general prohibition against the visible display of tobacco products does not constitute a measure having equivalent effect to a quantitative restriction on the free movement of goods within the meaning of Article 11 of the EEA Agreement.

The second question

112. As the Finnish Government has concluded that the answer to the first question must be that the contested measure does not have equivalent effect to a quantitative restriction for the purposes of Article 11 EEA, it considers it unnecessary to answer the second question.

113. If, however, the Court concludes that a general prohibition on the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods, the Finnish Government considers that the restriction is justifiable on grounds of protection of health and life of humans in accordance with Article 13 EEA.

80 Reference is made to *De Agostini and TV-Shop*, cited above

81 Reference is made to *Mickelsson and Roos*, cited above.

som produkter hvis forbruk er knyttet til tradisjonell sosial praksis og lokal skikk og bruk.

110. Finlands regjering godtar ikke saksøkers anførsel om at forbudet mot synlig oppstilling hemmer adgangen til markedet for nye produkter fra andre EØS-stater til fordel for merker som allerede er etablert. Regjeringen anfører at ingen tobakksprodukter fremproduseres i Norge, og gjør først gjeldende at forbrukerne følgelig ikke kan være mer kjent med innenlandske produkter.[80] Dernest påvirker oppstillingsforbudet markedsadgangen for nye innenlandske produkter på samme måte som det påvirker markedsadgangen for nye produkter fra andre medlemsstater. Den finske regjering forkaster likeledes påstanden om at oppstillingsforbudet innebærer en markedshindring, og anfører at den rettspraksis som saksøker viser til, ikke er relevant.[81]

111. Følgelig anmoder den finske regjering EFTA-domstolen om å besvare det første spørsmål på følgende måte:

Et generelt forbud mot synlig oppstilling av tobakksprodukter utgjør ikke et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon i henhold til EØS-avtalen artikkel 11.

Det andre spørsmål

112. Ettersom Finlands regjering har konkludert med at svaret på det første spørsmål må bli at det omtvistede tiltak ikke har samme virkning som en kvantitativ restriksjon i henhold til EØS-avtalen artikkel 11, anser den det som unødvendig å besvare det andre spørsmål.

113. Om EFTA-domstolen derimot konkluderer med at et generelt forbud mot synlig oppstilling av tobakksprodukter utgjør et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon, mener Finlands regjering at restriksjonen kan rettferdiggjøres begrunnet ut fra hensynet til vernet om menneskers liv og helse i henhold til EØS-avtalen artikkel 13.

[80] Det vises til *De Agostini og TV-Shop*, som sitert over.
[81] Det vises til *Mickelsson og Roos*, som sitert over.

114. According to the Finnish Government, the contested visual display ban has as its objective to reduce tobacco use amongst the population in general and amongst young people in particular. It is, therefore, based on the public health exception established in Article 13 EEA. Although public health is a legitimate objective according to established case-law, for such objective to justify an obstacle to trade between EEA States it must fulfil a number of requirements. Thus, the measure must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. In addition, the measure must be appropriate for the attainment of the objective pursued and may not go further than is necessary.

115. The Finnish Government advances three points within the context of the public health concerns recognised in Article 13 EEA. First, the Government is of the view that the public health grounds on which the Norwegian authorities rely have not been diverted from their purpose.[82] Second, the Government contends that the visual display ban has been used neither to discriminate against products from other Member States nor to protect national products. Therefore, the ban is an appropriate measure for securing the attainment of the public health objective pursued.

116. On this point, in particular, the Finnish Government observes that the ban is designed to limit visibility of tobacco products in retail outlets with the purpose of effectively decreasing the risk that children and adolescents will start smoking. In this context, therefore, when assessing whether the ban is an appropriate measure for securing the attainment of the public health objective, according to the Government, it is important to take account of the fact that the WHO Convention and documents relating to its implementation authorise and recommend states to implement a visual display ban. This approach is based on and supported by scientific evidence. In any event, taking account of the fact that the ban is not the only measure adopted to reduce smoking, it is almost impossible to prove the individual effect

[82] The Finnish Government refers to *Gourmet International*, cited above, paragraph 32, and the case-law cited therein.

114. Ifølge Finlands regjering er målet for det omtvistede forbud mot synlig oppstilling å redusere bruken av tobakk i befolkningen generelt ogblant unge mennesker spesielt. Det er derfor basert på unntaket som er begrunnet i hensynet til folkehelsen, som fastsatt i EØS-avtalen artikkel 13. Selv om folkehelsen er et legitimt mål i henhold til fast rettspraksis, må et slikt mål, for å berettige et hinder for handelen mellom EØS-stater, oppfylle flere kriterier. Tiltaket må ikke utgjøre et middel for vilkårlig forskjellsbehandling eller en skjult begrensning på handelen mellom medlemsstater. Tiltaket må dessuten være hensiktsmessig for å oppnå målet som søkes oppnådd og ikke gå ut over det som er nødvendig.

115. Finlands regjering fremholder tre forhold i relasjon til hensynet til folkehelsen i EØS-avtalen artikkel 13. For det første er regjeringen av den oppfatning at de folkehelsehensyn som de norske myndigheter viser til, ikke er blitt mistolket i forhold til intensjonen.[82] Dernest anfører regjeringen at forbudet mot synlig oppstilling verken har blitt brukt til å forskjellsbehandle produkter fra andre medlemsstater eller til å beskytte nasjonale produkter. Derfor er forbudet et hensiktsmessig tiltak for å sikre oppnåelse av folkehelsemålet som forfølges.

116. Her anfører Finlands regjering særlig at forbudet er ment å begrense synligheten av tobakksprodukter på utsalgssteder i den hensikt effektivt å redusere risikoen for at barn og unge begynner å røyke. I denne sammenheng er det ifølge regjeringen derfor viktig ved en vurdering av hvorvidt forbudet er et hensiktsmessig tiltak for å sikre oppnåelse av folkehelsemålet, å ta hensyn til at WHO-konvensjonen og dokumenter knyttet til gjennomføringen av den tillater og anbefaler statene å innføre et forbud mot synlig oppstilling. Denne oppfatning er basert på og underbygget av vitenskapelig dokumentasjon. Hvis man tar hensyn til det faktum at forbudet ikke er det eneste tiltaket som er vedtatt for å redusere røyking, er det uansett nesten umulig å bevise den individuelle virkning av forbudet når det gjelder å redusere

[82] Finlands regjering viser til *Gourmet International*, som sitert over (avsnitt 32), og den rettspraksis som siteres der.

of the ban with regard to the reduction of smoking. Therefore, it cannot be a prerequisite for the adoption of the ban that scientific documentation be submitted showing with certainty that the ban will work. Third, the Government argues that it falls to the national court to determine whether the ban goes beyond in law or in fact what is necessary in order to attain the objective pursued.

117. With regard to other measures that could serve as alternatives to the ban, the Finnish Government argues that although these measures might reduce the use of tobacco amongst the general public, they cannot be considered as alternatives to a visual display ban. Instead, they should be recognised as parallel measures that may be introduced in order to achieve the degree of protection sought. In addition, certain less restrictive measures have proven to be ineffective in practice, as the experience of other countries demonstrates.

118. In the light of this analysis, the Finnish Government contends primarily that it is unnecessary to answer the second question, and, in the alternative, proposes that the Court should answer the question as follows:

A general prohibition against the visible display of tobacco products is justified on grounds of protection of health and life of humans under Article 13 of the EEA Agreement unless it is apparent that, in the circumstances of law and fact which characterise the situation in the EEA State concerned, the objective of the prohibition can be ensured by measures having less effect on the free movement of goods.

The Icelandic Government

119. The Icelandic Government points out that a visual display ban was implemented in Iceland in 2001. Under the ban, tobacco and tobacco trademarks must be placed in such manner that they are not visible to the customer. However, that display ban was affected by a Supreme Court ruling of 2006[83] which concluded that the visual display ban on tobacco infringed a person's right

[83] Judgment of 6 April 2006, Supreme Court of Iceland, Case No 220/2005, H 2006 1689.

røyking. Derfor kan det ikke være en forutsetning for å vedta forbudet at det legges frem vitenskapelig dokumentasjon som beviser med sikkerhet at forbudet vil virke. For det tredje gjør regjeringen gjeldende at det er de nasjonale domstoler som skal vurdere hvorvidt forbudet rettslig eller faktisk går ut over det som er nødvendig for å oppnå det fastsatte mål.

117. Når det gjelder andre tiltak som kunne vært brukt som alternativer til forbudet, gjør Finlands regjering gjeldende at selv om disse tiltak kanskje kan redusere bruken av tobakk i befolkningen generelt, kan de ikke betraktes som alternativer til et forbud mot synlig oppstilling. De bør heller betraktes som parallelle tiltak som kan innføres for å oppnå den grad av beskyttelse som søkes. Dessuten har visse mindre inngripende tiltak i praksis vist seg å være ineffektive, noe som fremgår av erfaringen fra andre land.

118. I lys av denne analyse gjør Finlands regjering primært gjeldende at det er unødvendig å besvare det andre spørsmål og mener at EFTA-domstolen subsidiært bør besvare spørsmålet som følger:

Et generelt forbud mot synlig oppstilling av tobakksprodukter er begrunnet ut fra hensynet til vernet om menneskers liv og helse i henhold til EØS-avtalen artikkel 13 med mindre det er åpenbart at målet med forbudet under de rettslige og faktiske omstendigheter som kjennetegner situasjonen i den berørte EØS-stat, kan sikres gjennom tiltak som påvirker det frie varebytte i mindre grad.

Islands regjering

119. Islands regjering peker på at et forbud mot synlig oppstilling ble gjennomført på Island i 2001. Dette forbud innebærer at tobakk og tobakksmerker må plasseres på en slik måte at de ikke er synlige for forbrukerne. Oppstillingsforbudet har imidlertid blitt påvirket av en høyesterettsavgjørelse i 2006,[83] som konkluderte med at forbudet mot synlig oppstilling av tobakk krenket den

[83] Dom av 6. april 2006, Islands høyesterett, sak nr. 220/2005, H 2006 1689.

to pursue an occupation of his own choosing and a person's right to freedom of opinion and belief as prescribed in the Icelandic Constitution. Consequently, an amendment to the law establishing the visual display ban was adopted authorising special tobacco shops to have tobacco products visible to customers.

120. The Icelandic Government supports the arguments advanced by the Defendant in the present case. Therefore, it takes the view that the visual display ban on tobacco products is compatible with EEA law and that it does not go further than necessary in order to attain the objective pursued.

The Portuguese Government

The first question

121. The Portuguese Government is of the opinion that the display ban restricts the free movement of goods. It argues further that, in conjunction with the general advertising ban, the visual display ban will create an insurmountable obstacle for any manufacturer of tobacco products to introduce a new product successfully.

122. The Portuguese Government emphasises the need for competition in the tobacco market, noting that the ECJ recently struck down minimum price requirements implemented in Ireland, France and Austria, all of which were based on public health grounds, because those measures were capable of undermining competition.[84] The Government observes further that the European Commission has acknowledged the importance of brand communication within the context of competition and introduction of new brands.[85]

123. The Portuguese Government argues that a total ban on all brand communication restricts the free movement of goods and is

[84] Reference is made to Case C-197/08 *Commission* v *France*, Case C-198/08 *Commission* v *Austria*, paragraph 30, and *Commission* v *Ireland*, paragraph 41, all cited above.

[85] The Portuguese Government refers to Case COMP/M.2779 – *Imperial Tobacco/Reemtsma*, paragraph 54, and Case COMP/M.4581 – *Imperial Tobacco/Altadis*.

enkeltes rett til å utøve det yrke man selv ønsker, og individers menings- og trosfrihet som hjemlet i Islands forfatning. Som en følge av dette ble loven som opprettet forbudet mot synlig oppstilling endret, slik at spesialforretninger for tobakk fikk tillatelse til å ha tobakksprodukter synlig for kunder.

120. Islands regjering støtter argumentene fremsatt av saksøkte i den foreliggende sak. Derfor inntar regjeringen det syn at forbudet mot synlig oppstilling av tobakksprodukter er forenlig med EØS-retten, og at det ikke går ut over det som er nødvendig for å nå målet som søkes oppnådd.

Portugals regjering

Det første spørsmål

121. Portugals regjering er av den oppfatning at oppstillingsforbudet begrenser det frie varebytte. Den gjør videre gjeldende at sett i sammenheng med det generelle reklameforbud, vil forbudet mot synlig oppstilling gjøre det uoverkommelig for enhver produsent av tobakksprodukter å introdusere et nytt produkt.

122. Portugals regjering understreker behovet for konkurranse på tobakksmarkedet og anfører at EU-domstolen nylig har kjent ugyldig minstepriskravene som Island, Frankrike og Østerrike hadde innført, alle med henvisning til folkehelsen, da tiltakene kunne undergrave konkurransen.[84] Regjeringen bemerker videre at Europakommisjonen har erkjent betydningen av merkekommunikasjon i forbindelse med konkurranse og introduksjon av nye merker.[85]

123. Portugals regjering gjør gjeldende at et totalforbud mot all merkekommunikasjon begrenser det frie varebytte og av natur innebær-

[84] Det vises til sak C-197/08 *Kommisjonen* mot *Frankrike*, sak C-198/08 *Kommisjonen* mot Østerrike (avsnitt 30), og *Kommisjonen* mot *Irland* (avsnitt 41), alle som sitert over.

[85] Portugals regjering viser til sak COMP/M.2779 – *Imperial Tobacco/Reemtsma* (avsnitt 54), og sak COMP/M.4581 – *Imperial Tobacco/Altadis*.

inherently discriminatory.[86] In addition to a general advertising ban, a ban on the visual display of tobacco products seriously affects the free movement of goods.

124. According to the Portuguese Government, even if a restriction is not discriminatory, it nevertheless infringes the principle of free movement of goods if it hinders market access.[87] In its view, the visual display ban hinders market access due to the fact that no product originating from another state can be introduced to Norway as it cannot be advertised or even displayed at points of sale. In such an environment, the market will undoubtedly be limited in accordance with local customs and habits already present. Finally, according to the Government, if the Court adopts the view advanced by the Defendant in this case, this will set a precedent allowing Member States to freeze the market in any product by precluding market entry to new brands.

The second question

125. The Portuguese Government argues that Article 13 EEA should be interpreted restrictively as it constitutes a derogation from the basic rule which provides for the free movement of goods.[88] Therefore, a state which implements a measure restricting trade must prove that it is both appropriate for securing the attainment of the objective in question and does not go beyond what is necessary in order to attain it.[89] In addition, a state must show that the measure is necessary, proportionate and that its aims could not be met by measures less restrictive of intra-EEA trade.[90] Finally, the reasons that are invoked by a state as justification for a particular measure must be substantiated by evidence

86 The Portuguese Government refers to the Opinion of Advocate General Jacobs in *Leclerc-Siplec* and to *Gourmet International*, paragraph 21, both cited above.

87 Reference is made to *Mickelsson and Roos* and *Commission* v *Italy*, paragraph 59, both cited above.

88 *Pedicel*, cited above, paragraph 53, Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep., p. 17, paragraph 56, and *Ullensaker kommune*, cited above, paragraph 33.

89 Reference is made to *Commission* v *Italy*, cited above, paragraph 59.

90 Reference is made to *De Agostini and TV-Shop*, cited above, paragraph 47.

er forskjellsbehandling.[86] Kombinert med et generelt reklameforbud har et forbud mot synlig oppstilling av tobakksprodukter alvorlig innvirkning på det frie varebytte.

124. Ifølge Portugals regjering vil en restriksjon, selv om den ikke innebærer forskjellsbehandling, likevel krenke prinsippet om fritt varebytte om den hindrer adgang til markedet.[87] Etter dens oppfatning hindrer forbudet mot synlig oppstilling adgang til markedet fordi ingen produkter med opprinnelse i andre stater kan introduseres i Norge ettersom de ikke kan reklameres for og ikke en gang stilles ut på utsalgsstedene. Under slike omstendigheter vil markedet uten tvil bli begrenset til det som allerede eksisterer i samsvar med lokal skikk og bruk. Endelig mener regjeringen at dersom EFTA-domstolen tar saksøktes påstand i denne sak til følge, vil dette skape presedens for å tillate medlemsstatene å fryse markedet for et hvilket som helst produkt ved å forhindre adgang til markedet for nye merker.

Det andre spørsmål

125. Portugals regjering anfører at EØS-avtalen artikkel 13 bør tolkes strengt ettersom den utgjør et unntak fra grunnregelen, som fastsetter fritt varebytte.[88] Derfor må en stat som innfører et tiltak som virker begrensede på handelen, bevise at det både er egnet for å oppnå det aktuelle mål og ikke går ut over det som er nødvendig for å nå det.[89] I tillegg må staten bevise at tiltaket er nødvendig og forholdsmessig, og at målene ved tiltaket ikke kan nås ved hjelp av tiltak som medfører mindre inngrep i forhold til handelen innenfor EØS-området.[90] Endelig må det staten påberoper seg som begrunnelse for et bestemt tiltak,

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86 Portugals regjering viser til uttalelse fra generaladvokat Jacobs i *Leclerc-Siplec* og til *Gourmet International* (avsnitt 21), begge som sitert over.

87 Det vises til *Mickelsson og Roos* og *Kommisjonen* mot *Italia* (avsnitt 59), begge som sitert over.

88 *Pedicel*, som sitert over (avsnitt 53), sak E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark*, EFTA Ct. Rep. 1994-1995 s. 17 (avsnitt 56), og *Ullensaker kommune*, som sitert over (avsnitt 33).

89 Det vises til *Kommisjonen* mot *Italia*, som sitert over (avsnitt 59).

90 Det vises til *De Agostini* og *TV-Shop*, som sitert over (avsnitt 47).

or analysis of the appropriateness and proportionality of the measure adopted.[91]

126. The Portuguese Government takes the view that although reducing smoking constitutes a legitimate objective, no evidence can be found that supports the notion that a visual display ban reduces smoking. The lack of such evidence is important when it comes to deciding whether the ban is proportionate. In its view, the criteria relevant for determining whether a ban is proportionate are: (i) whether a state has demonstrated that the ban reduces smoking prevalence; (ii) whether the state has considered the effects of bans implemented in other countries; (iii) whether the state has considered potential adverse effects of the ban on competition and illicit trade; and (iv) whether the state has demonstrated that no alternative less restrictive means of achieving its objective of reducing smoking are available.

127. The Portuguese Government asserts that a visual display ban will have an adverse affect. It will drive consumers to the illicit market; a phenomenon which has already become troublesome in Europe. Illicit tobacco products are cheaper than legitimate products and can lead to an increase in consumption that will undermine efforts to keep children and adolescents from smoking. In addition, the Government notes, a display ban might severely restrict brand competition in favour of price competition. That distortion of competition could lead to lower prices and increased consumption in the long run.

128. Finally, the Portuguese Government stresses that a total visual ban infringes the right to freedom of expression, as it restricts the possibility to exploit a trademark as a characteristic of products offered for sale or otherwise disseminated in business activity. Moreover, a total visual ban will interfere with the freedom to engage in commercial activity.

129. In the light of the above analysis, the Portuguese Government proposes that the Court should answer the questions as follows:

[91] Reference is made to *Commission* v *Belgium*, cited above, paragraph 36.

underbygges med dokumentasjon på eller en analyse av det vedtatte tiltaks egnethet og forholdsmessighet.[91]

126. Portugals regjering er av den oppfatning at selv om det å redusere røyking er et legitimt mål, er det ikke mulig å finne dokumentasjon til støtte for slutningen om at et forbud mot synlig oppstilling reduserer røyking. Fraværet av slik dokumentasjon er viktig i vurderingen av hvorvidt forbudet er forholdsmessig. Etter regjeringens oppfatning er følgende kriterier relevante for vurderingen av hvorvidt et forbud er forholdsmessig: i) hvorvidt staten har godtgjort at forbudet reduserer utbredelsen av røyking, ii) hvorvidt staten har vurdert virkningen av forbud innført i andre stater, iii) hvorvidt staten har vurdert potensielle negative effekter av forbudet på konkurransen og på ulovlig handel, og iv) hvorvidt staten har godtgjort at ingen alternative, mindre inngripende virkemidler for å nå målet om å redusere røyking, er tilgjengelig.

127. Portugals regjering gjør gjeldende at et forbud mot synlig oppstilling vil ha en negativ virkning. Det vil drive forbrukerne mot det illegale marked, et fenomen som allerede vekker bekymring i Europa. Ulovlige tobakksprodukter er billigere enn lovlige produkter og kan føre til en økning i forbruket som vil undergrave innsatsen for å holde barn og unge borte fra røyking. Dessuten, anfører regjeringen, kan et oppstillingsforbud føre til en kraftig begrensning av konkurransen mellom merkene og føre til en konkurranse på pris. Denne konkurransevridning kan i det lange løp føre til lavere priser og økt forbruk.

128. Endelig understreker Portugals regjering at et forbud mot synlig oppstilling er et brudd på ytringsfriheten ettersom det begrenser muligheten for å utnytte et varemerke som et kjennetegn ved produkter som tilbys for salg eller distribueres på annen måte i næringsvirksomhet. Videre vil et totalforbud mot synlig oppstilling krenke friheten til å drive kommersiell virksomhet.

129. I lys av ovenstående analyse anmoder Portugals regjering EFTA-domstolen om å besvare spørsmålene på følgende måte:

[91] Det vises til *Kommisjonen* mot *Belgia*, som sitert over (avsnitt 36).

1. Legislation which establishes a general prohibition against the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods is precluded by Article 11 EEA, because it affects market access of imported goods.

2. *Although agreeing with the goal of reducing smoking, it is considered that such restriction is not justifiable by public health reasons, in the terms of Article 13 EEA, as it is not adequately supported that this restriction is the most appropriate and proportionate measure for securing the attainment of the objectives pursued.*

The Romanian Government

130. The Romanian Government emphasises the importance that a causal link be established between the consumption of tobacco products and how tobacco products are displayed. Any such causal link must be proven by scientific research. Despite the fact that some products are detrimental to public health, the Government argues that states should adopt a proper approach to trade.

131. The Romanian Government acknowledges that measures protecting public health can be introduced on the basis of the precautionary principle. However, in its view, it is inherent in that principle that when Member States introduce measures protecting health, the burden of proving the necessity of such measures rests with those states.

132. The Romanian Government emphasises that in assessing the justification for the contested measure advanced by the Defendant consideration must be given to possible alternative measures having less effect on trade. Therefore, in its view, Norway should evaluate the possibility to implement other less restrictive measures aimed at reducing tobacco consumption. On its analysis, the current regime will enhance the power of producers already present on the Norwegian market at the cost of producers trying to enter the same market and introduce their products to consumers.

Spørsmål 1:

En lovgivning som fastsetter et generelt forbud mot synlig oppstilling av tobakksprodukter, utgjør et tiltak som har tilsvarende virkning som en kvantitativ importrestriksjon, og er forbudt i henhold til EØS-avtalen artikkel 11 da det påvirker markedsadgangen for importerte varer.

Spørsmål 2:

Selv om det å redusere røyking er et prisverdig mål, kan en slik begrensning ikke betraktes som begrunnet ut fra hensynet til folkehelsen i henhold til EØS-avtalen artikkel 13 ettersom det ikke er tilstrekkelig godtgjort at denne restriksjon er det mest egnede og forholdsmessige tiltak for å sikre oppnåelse av målene som forfølges.

Romanias regjering

130. Romanias regjering understreker betydningen av å etablere en årsakssammenheng mellom forbruket av tobakksprodukter og hvordan tobakksprodukter oppstilles. Enhver slik årsakssammenheng må bevises ved vitenskapelig forskning. Til tross for at en del produkter er skadelige for folkehelsen, gjør regjeringen gjeldende at statene bør forholde seg til handel på en tilbørlig måte.

131. Romanias regjering erkjenner at tiltak til beskyttelse av folkehelsen kan innføres med henvisning til føre-var-prinsippet. Etter dens oppfatning ligger det imidlertid i dette prinsipps natur at når medlemsstater innfører tiltak for å beskytte folkehelsen, påligger det disse stater å bevise at slike tiltak er nødvendige.

132. Romanias regjering understreker at det i vurderingen av den begrunnelse for det omtvistede tiltak som saksøkte har fremsatt, må tas hensyn til mulige alternative tiltak som har mindre innvirkning på handelen. Etter regjeringens mening bør Norge derfor vurdere muligheten for å innføre andre, mindre inngripende tiltak for å redusere tobakksforbruket. Ut fra denne analyse vil dagens regime gi produsenter som allerede er til stede på det norske marked, større makt, på bekostning av produsenter som prøver å komme seg inn på det samme marked for å introdusere sine produkter for forbrukerne.

The United Kingdom

The first question

133. The United Kingdom takes the view that the prohibition of tobacco displays does not constitute a measure having equivalent effect to a quantitative restriction on the free movement on goods. The contested measure is concerned with how tobacco is sold. Therefore, it constitutes a selling arrangement as that concept has been defined in the relevant case-law.[92] The fact that a selling arrangement is designed to reduce or does reduce sales volumes and, as a consequence, the volume of imports does not suffice to bring the measure within the scope of Article 11 EEA.

134. The United Kingdom submits that the Plaintiff cannot show that the visual display ban discriminates *de jure* or *de facto* between the marketing of domestic tobacco products and the marketing of imported tobacco products. First, the visual display ban applies to all relevant traders operating in Norway and affects the marketing of tobacco products in the same manner, regardless of their origin. Therefore, the prohibition does not constitute discrimination in law. Second, as stated in the reference by Oslo District Court, no tobacco is produced in Norway. All tobacco products sold in Norway are manufactured in other states. This leads to the conclusion that it is impossible to show that the contested measure will impact domestic products in a different manner to imported products. Thus, the prohibition does not constitute discrimination in fact.

135. The United Kingdom submits further that even if tobacco products were produced in Norway, any alleged difficulty resulting from the display prohibition would apply to all products regardless of their origin. In its view, any reference to case-law relating to advertising restrictions on alcoholic beverages, where consumption patterns are linked to social practices and local habits, should be assessed critically due to the fact that differences exist between the tobacco market and the alcohol

[92] The United Kingdom refers to *Keck and Mithouard*, cited above.

Storbritannia

Det første spørsmål

133. Storbritannia er av den oppfatning at oppstillingsforbudet for tobakk ikke er et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon. Det omtvistede tiltak gjelder hvordan omsetningen av tobakk foregår. Derfor utgjør det en salgsordning slik dette begrep er definert i relevant rettspraksis.[92] Det faktum at en salgsordning er ment å redusere eller faktisk reduserer salgsvolumet og følgelig importvolumet, er ikke nok til at tiltaket omfattes av EØS-avtalen artikkel 11.

134. Storbritannia gjør gjeldende at saksøker ikke kan godtgjøre at forbudet mot synlig oppstilling rettslig eller faktisk innebærer at markedsføringen av innenlandske tobaksprodukter behandles forskjellig fra markedsføringen av importerte tobaksprodukter. For det første gjelder forbudet mot synlig oppstilling alle berørte næringsdrivende med virksomhet i Norge, og berører markedsføringen av tobaksprodukter på samme måte, uavhengig av deres opprinnelse. Derfor innebærer ikke forbudet noen rettslig forskjellsbehandling. Dernest, som det fastslås i anmodningen fra Oslo tingrett, produseres det ikke tobakk i Norge. Alle tobaksprodukter som selges i Norge, er fremprodusert i andre stater. Dermed blir konklusjonen at det er umulig å vise at det omtvistede tiltak vil påvirke innenlandske produkter på en annen måte enn importerte produkter. Følgelig innebærer ikke forbudet noen faktisk forskjellsbehandling.

135. Storbritannia gjør videre gjeldende at selv om tobaksprodukter hadde vært fremprodusert i Norge, så ville enhver påstått vanskelighet oppstillingsforbudet hadde medført, gjelde for alle produkter, uavhengig av opprinnelse. Etter Storbritannias oppfatning bør enhver henvisning til rettspraksis når det gjelder begrensninger på reklame for alkoholholdige drikker, der forbruksmønstrene er knyttet til sosial praksis og lokal skikk og bruk, vurderes kritisk på grunn av de forskjeller som finnes

92 Storbritannia viser til *Keck og Mithouard*, som sitert over.

market in that regard.[93] The United Kingdom argues that social practices and local habits are not relevant to the consumption of tobacco products.

136. The United Kingdom emphasises that the visual display ban regulates the behaviour of all retail outlets and applies to all tobacco products. Therefore, as Article 11 EEA does not apply to legislation which restricts distribution by prohibiting advertising and affects all traders in the distribution sector in the same manner,[94] the visual display ban does not come within the scope of Article 11 EEA.

137. Moreover, the United Kingdom argues that Article 11 EEA does not apply to national legislation (i) which makes no distinction according to the origin of the goods to which it applies; (ii) whose purpose is not to regulate trade in goods with other Member States; and (iii) whose restrictive effects on the movement of goods are too uncertain and indirect for the obligation which it lays down to be regarded as being of a nature to hinder trade between Member States.[95] The United Kingdom argues that the contested visual display ban fulfils these criteria.

The second question

138. The United Kingdom supports the position of the Defendant, namely, that it suffices, having regard to all available sources, that there are reasonable grounds to assume that the prohibition of tobacco displays will further its objectives. In addition, the United Kingdom concurs with the Defendant's submission that it falls to the national court to decide on the suitability of the visual display ban.

139. With regard to the correct approach to be taken in assessing the suitability and necessity of tobacco control measures sought to be justified on public health grounds under Article 13 EEA, the United Kingdom submits that a state's discretion is broad and the

93 Reference is made to *Gourmet International*, cited above, paragraph 21.
94 Reference is made to *Leclerc-Siplec* and *Keck and Mithouard*, both cited above.
95 The United Kingdom refers to Case C-372/92 *Peralta* [1994] ECR I-3453, paragraph 23.

mellom tobakksmarkedet og alkoholmarkedet i denne relasjon.[93] Storbritannia gjør gjeldende at sosial praksis og lokal skikk og bruk ikke er relevant for forbruket av tobakksprodukter.

136. Storbritannia understreker at et forbud mot synlig oppstilling regulerer atferden for alle utsalgssteder og gjelder for alle tobakksprodukter. Derfor, ettersom EØS-avtalen artikkel 11 ikke får anvendelse på lovgivning som begrenser distribusjonen ved å forby reklame, og som berører alle næringsdrivende i distribusjonssektoren på samme måte,[94] kommer ikke forbudet mot synlig oppstilling inn under virkeområdet til EØS-avtalen artikkel 11.

137. Videre gjør Storbritannia gjeldende at EØS-avtalen artikkel 11 ikke får anvendelse på nasjonal lovgivning i) som ikke skiller mellom opprinnelsen til varene den får anvendelse på, ii) hvis formål ikke er å regulere varehandelen med andre medlemsstater, og iii) hvis begrensende virkning på varebyttet er altfor usikker og indirekte til at den forpliktelse den fastsetter, kan anses å være av en art som hindrer handelen mellom medlemsstatene.[95] Storbritannia anfører at det omtvistede forbud mot synlig oppstilling oppfyller disse kriterier.

Det andre spørsmål

138. Storbritannia støtter saksøktes holdning, nemlig at det er tilstrekkelig, alle tilgjengelige kilder tatt i betraktning, at det er rimelige grunner til å anta at oppstillingsforbudet for tobakk vil fremme forbudets mål. I tillegg slutter Storbritannia seg til saksøktes påstand om at det er den nasjonale domstol som skal vurdere egnetheten av forbudet mot synlig oppstilling.

139. Når det gjelder den tilnærming som bør anlegges ved vurderingen av egnetheten og nødvendigheten av tobakkskontrolltiltak som søkes begrunnet i hensynet til folkehelsen i henhold til EØS-avtalen artikkel 13, anfører Storbritannia at staten har en bred

93 Det vises til *Gourmet International*, som sitert over (avsnitt 21).
94 Det vises til *Leclerc-Siplec* og *Keck og Mithouard*, begge som sitert over.
95 Storbritannia viser til sak C-372/92 *Peralta*, Sml. 1994 s. I-3453 (avsnitt 23).

Court should not interfere unless the measure can be considered manifestly unreasonable or manifestly inappropriate taking into account the objective pursued. Therefore, it is for the state to determine what level of protection is to be achieved.[96] It follows from this principle that neither the ECJ nor the Court should enquire whether the benefits to human health deriving from the contested measure outweigh any detriments.

140. The United Kingdom points out that it has consistently been held that the health and life of humans are among the foremost interests to be protected when justifying exceptions to the free movement of goods.[97] However, in its view, the national legislature and the Union legislature must be allowed a broad discretion in the area of public health, entailing political, economic and social choices and based on complex assessments. Therefore, the legality of a measure adopted in the sphere of public health can only be affected if the measure is considered manifestly inappropriate. As a result, the Court should not interfere with the assessment of the national legislature unless the visual display ban is considered manifestly inappropriate.[98]

141. In any event, the United Kingdom points out that guidance on the approach to be taken can be found in *Aragonesa*. In that case, it was held, first, that alcohol advertising acted as an encouragement to consumption and rules restricting advertising of alcoholic beverages in order to combat alcoholism reflected public health concerns, and second, in the absence of common or harmonised rules governing advertising of alcoholic beverages, that it was at the Member States' discretion to decide on the degree of protection as long as the limits set by treaty and the principle of proportionality were observed.[99] The United Kingdom

96 Case C-262/02 *Commission* v *France*, paragraph 24, and *Pedicel*, both cited above.
97 Reference is made to *Deutscher Apothekerverband*, cited above.
98 Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraphs 47-48.
99 *Aragonesa de Publicidad Exterior*, cited above, paragraphs 14-18.

skjønnsmargin, og at EFTA-domstolen ikke bør gripe inn med mindre tiltaket må anses som åpenbart urimelig eller åpenbart uegnet i relasjon til det oppsatte mål. Derfor er det staten som skal vurdere hvilket beskyttelsesnivå som skal oppnås.[96] Det følger av dette prinsipp at verken EU-domstolen eller EFTA-domstolen skal undersøke i hvilken grad helsefordelene som det omtvistede tiltak vil medføre, er større enn eventuelle skadevirkninger.

140. Storbritannia peker på at man konsekvent har fastholdt at beskyttelse av menneskers liv og helse er blant de viktigste hensyn som kan begrunne et unntak fra det frie varebytte.[97] Etter Storbritannias oppfatning må imidlertid de nasjonale lovgivere og Unionens lovgivere innrømmes en bred skjønnsmargin på folkehelseområdet, med de politiske, økonomiske og sosiale valg basert på komplekse vurderinger, som dette medfører. Lovligheten av et tiltak vedtatt på folkehelseområdet kan derfor bare trekkes i tvil om tiltaket vurderes som åpenbart uegnet. Det følger av dette at EFTA-domstolen ikke bør gripe inn i de nasjonale lovgiveres vurdering med mindre forbudet mot synlig oppstilling vurderes som åpenbart uegnet.[98]

141. Uansett peker Storbritannia på at veiledning med hensyn til hvilken tilnærming som bør velges, er å finne i *Aragonesa*. I denne sak ble det for det første lagt til grunn at alkoholreklame fungerte som oppmuntring til forbruk, og at regler som begrenset reklame for alkoholholdige drikker for å bekjempe alkoholisme, gjenspeilte hensynet til folkehelsen, og for det andre – i mangel av felles eller harmoniserte regler som regulerer reklame for alkoholholdige drikker – at medlemsstatene hadde skjønnsmyndighet til å fastsette graden av beskyttelse såfremt grensene fastsatt i traktaten og forholdsmessighetsprinsippet ble overholdt.[99]

[96] Sak C-262/02 *Kommisjonen* mot *Frankrike* (avsnitt 24), og *Pedicel*, begge som sitert over.
[97] Det vises til *Deutscher Apothekerverband*, som sitert over.
[98] Sak C-210/03 *The Queen, on the application of: Swedish Match AB og Swedish Match UK Ltd* mot *Secretary of State for Health*, Sml. 2004 s. I-11893 (avsnitt 47–48).
[99] *Aragonesa de Publicidad Exterior*, som sitert over (avsnitt 14–18).

notes that in that case the ECJ held the national measure not to appear manifestly unreasonable.[100]

142. With regard to Article 13 EEA, in particular where the benefits of a measure cannot be precisely estimated, the United Kingdom argues that differences of opinion on the effects of a measure do not imply that the legislature exceeds its margin of discretion in preferring one view to another. That difference of opinion does not mean that the legislature did not have reasonable grounds to act as it did.[101] In that regard, the crucial issue is not the existence of conflicting evidence but whether sufficient evidence exists on the basis of which it can be said that the legislature has reasonable grounds to act.[102]

143. With regard to the argument that less restrictive measures could attain the same objective, the United Kingdom observes that the options referred to by the Plaintiff are considered by the Defendant to be less effective in protecting children, denormalising the use of tobacco and assisting adults to give up smoking.[103] In that connection, the United Kingdom emphasises that the burden of proof cannot be considered so extensive that it would require a state to prove in a positive way that no other conceivable measure could enable its legitimate objective to be attained under the same conditions.[104]

144. The United Kingdom acknowledges that it is inevitable that the freedom of market participants may be affected detrimentally following the implementation of a visual display ban on tobacco

[100] Reference is also made to Case C-262/02 *Commission* v *France*, cited above, paragraphs 30-39, Case C-429/02 *Bacardi* [2004] ECR I-6613, paragraphs 36-40, and the Opinion of Advocate General Tizzano in the latter case, points 78-80, on the application of the proportionality principle in public health cases. In addition, the United Kingdom refers to the Opinion of Advocate General Geelhoed in *British American Tobacco*, cited above, point 230, and his Joined Opinion in Case C-434/02 *Arnold André* [2004] ECR I-11825 and *Swedish Match*, cited above, points 111-112.

[101] The United Kingdom refers to the Opinion of Advocate General Fennelly in Case C-376/98 *Germany* v *Parliament and Council*, cited above, point 160.

[102] Ibid., point 162.

[103] The United Kingdom refers to the Opinion of Advocate General Geelhoed in *Swedish Match*, cited above, point 55.

[104] Reference is made to *Commission* v *Italy*, cited above, paragraphs 66-67.

Storbritannia bemerker at EU-domstolen i denne sak anså at det nasjonale tiltak ikke syntes å være åpenbart urimelig.[100]

142. Når det gjelder EØS-avtalen artikkel 13, særlig dersom fordelene ved et tiltak ikke kan vurderes nøyaktig, anfører Storbritannia at det at det er forskjellige oppfatninger om virkningene av et tiltak, ikke innebærer at lovgiverne går ut over grensene for sin skjønnsmyndighet når de foretrekker ett syn fremfor et annet. Denne meningsforskjell betyr ikke at lovgiverne ikke har hatt gode grunner til å handle som de har gjort.[101] I så henseende er det avgjørende ikke det at det foreligger motstridende dokumentasjon, men hvorvidt det foreligger tilstrekkelig dokumentasjon som det kan sies at lovgiverne har hatt rimelige grunner til å handle på grunnlag av.[102]

143. Når det gjelder påstanden om at mindre inngripende tiltak ville kunne bidra til å oppnå samme mål, anfører Storbritannia at saksøkte vurderer alternativene som saksøker viser til, som mindre effektive når det gjelder å beskytte barn, avnormalisere bruken av tobakk og hjelpe voksne til å slutte å røyke.[103] I denne forbindelse understreker Storbritannia at bevisbyrden ikke kan anses å være så omfattende at den ville kreve at en stat positivt beviser at ingen andre tenkelige tiltak ville kunne gjøre at dets legitime mål ble nådd under de samme omstendigheter.[104]

144. Storbritannia erkjenner at det ikke er til å unngå at markedsaktørenes frihet påvirkes negativt når et forbud mot

[100] Det vises også til sak C-262/02 *Kommisjonen* mot *Frankrike*, som sitert over (avsnitt 30–39); sak C-429/02 *Bacardi France SAS, tidligere Bacardi-Martini SAS* mot *Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA og Girosport SARL*, Sml. 2004 s. I-6613 (avsnitt 36–40), og uttalelse fra generaladvokat Tizzano i sistnevnte sak (avsnitt 78–80), om anvendelsen av forholdsmessighetsprinsippet i saker som vedrører folkehelsen. Storbritannia viser dessuten til uttalelse fra generaladvokat Geelhoed i *British American Tobacco*, som sitert over (avsnitt 230), og hans felles uttalelse i sak C-434/02 *Arnold André GmbH & Co. KG* mot *Landrat des Kreises Herford*, Sml. 2004 s. I-11825 og *Swedish Match*, som sitert over (avsnitt 111–112).

[101] Storbritannia viser til uttalelse fra generaladvokat Fennelly i sak C-376/98 *Tyskland* mot *Parlamentet og Rådet*, som sitert over (avsnitt 160).

[102] Samme sted, (avsnitt 162).

[103] Storbritannia viser til uttalelse fra generaladvokat Geelhoed i *Swedish Match*, som sitert over (avsnitt 55).

[104] Det vises til *Kommisjonen* mot *Italia*, som sitert over (avsnitt 66–67).

products. However, in its view, the protection of public health is a matter of public interest that the national legislature must be able to protect in full. That public interest is of such importance that for the purposes of the legislature's assessment other factors, such as the freedom of market participants, must be subsidiary.[105]

145. For the reasons set out above, the United Kingdom proposes that the questions referred by the Oslo District Court should be answered as follows:

1. Article 11 of the EEA Agreement should not be understood to mean that a general prohibition against the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods.

2. The criterion to be applied in the case of a challenge to the legality of a prohibition on display of tobacco products is whether it was manifestly inappropriate for the national legislature to conclude that the prohibition of tobacco displays could achieve the public health objectives of reducing tobacco use by the public in general and especially amongst young people.

The EFTA Surveillance Authority

The first question

146. The EFTA Surveillance Authority ("ESA") refers to case-law of the ECJ which indicates that all trading rules implemented by Member States capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered measures having equivalent effect to quantitative restrictions for the purposes of Article 11 EEA.[106] It notes, however, that the ECJ revisited this rule and clarified its scope of application.[107] The ECJ held that selling arrangements are

[105] Reference is made to the Opinion of Advocate General Geelhoed in *British American Tobacco*, cited above, point 229.
[106] ESA refers to *Dassonville*, paragraph 5, *Commission* v *Italy*, paragraph 33, and *Ker-Optika*, paragraph 47, all cited above.
[107] ESA refers to *Keck and Mithouard*, cited above, paragraphs 16-17.

synlig oppstilling av tobakksprodukter gjennomføres. Etter dens oppfatning er imidlertid beskyttelsen av folkehelsen et allment hensyn som de nasjonale lovgivere må være i stand til å beskytte fullt ut. Dette allmenne hensyn er så viktig at når det gjelder lovgivernes vurdering må andre faktorer, f.eks. markedsaktørenes frihet, komme i annen rekke.[105]

145. Av grunnene som det er redegjort for i det ovenstående, anmoder Storbritannia EFTA-domstolen om å besvare spørsmålene fra Oslo tingrett på følgende måte:

(1) EØS-avtalen artikkel 11 skal ikke forstås slik at et generelt forbud mot synlig oppstilling av tobakksprodukter utgjør et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon på det frie varebytte.

(2) Det kriterium som skal anvendes i en sak som gjelder lovligheten av et forbud mot oppstilling av tobakksprodukter, er hvorvidt det var åpenbart uriktig av de nasjonale lovgivere å konkludere med at oppstillingsforbudet for tobakk kan bidra til å nå folkehelsemålet om å redusere bruken av tobakk i befolkningen generelt og blant unge mennesker spesielt.

EFTAs overvåkingsorgan

Det første spørsmål

146. EFTAs overvåkingsorgan ("ESA") viser til EU-domstolens rettspraksis, som medfører at alle handelsregler gjennomført av medlemsstatene og som direkte eller indirekte, aktuelt eller potensielt, kan hindre handelen innenfor Fellesskapet, skal betraktes som tiltak med tilsvarende virkning som kvantitative importrestriksjoner i henhold til EØS-avtalen artikkel 11.[106] ESA bemerker imidlertid at EU-domstolen tok for seg regelen på nytt og avklarte dens anvendelsesområde.[107] EU-domstolen

[105] Det vises til uttalelse fra generaladvokat Geelhoed i *British American Tobacco*, som sitert over (avsnitt 229).
[106] ESA viser til *Dassonville* (avsnitt 5), *Kommisjonen* mot *Italia* (avsnitt 33), og *Ker-Optika* (avsnitt 47), alle som sitert over.
[107] ESA viser til *Keck og Mithouard*, som sitert over (avsnitt 16–17).

not to be regarded as hindering directly or indirectly, actually or potentially, trade between Member States if the provisions relating to these arrangements apply to all relevant traders operating in the national territory and affect in the same manner *de jure* and *de facto* the marketing of domestic and imported products. Accordingly, selling arrangements do not fall under the scope of Article 34 TFEU which corresponds to Article 11 EEA.

147. ESA asserts that this clarification by the ECJ results in a three-stage test, namely: (1) whether the legislation in question constitutes a "selling arrangement"; (2) whether the national provision applies to all relevant traders operating within the national territory; and (3) whether the measures affect in the same manner *de jure* and *de facto* the marketing of domestic products and imported products.

148. With regard to the first point, ESA argues that the visual display of tobacco products should be seen as constituting a form of advertising and promotion. Therefore, the display of tobacco products is a fundamental means of promoting tobacco. Any advertising ban affecting the promotion of a tobacco product constitutes, as established by case-law, a selling arrangement.[108] The matter would be different if the packaging or labelling of imported products had to be altered.[109] In that case, the contested measure could not be considered a selling arrangement. However, that is not the situation in the present case. The contested ban does not require tobacco products to be repackaged or modified in any way. The products are simply to be hidden from visual display.

149. On the second point, ESA submits that the ban applies to all retail outlets that do not sell exclusively tobacco products, in total some 15,000-18,000 outlets. The only exception to the visual display ban is for boutique tobacco outlets. However, as their number is very limited, ESA submits that the visual display ban should be

[108] Reference is made to *De Agostini and TV-Shop* and *Gourmet International*, both cited above.
[109] Reference is made to *Keck and Mithouard*, cited above, paragraph 37, and Case C-12/00 *Commission* v *Spain* [2003] ECR I-459, paragraph 76.

fant at salgsordninger ikke skal betraktes slik at de direkte eller indirekte, aktuelt eller potensielt, hindrer handelen mellom medlemsstatene dersom bestemmelsene som gjelder disse ordninger, får anvendelse for alle berørte næringsdrivende som driver virksomhet på det nasjonale territorium, og rettslig og faktisk berører markedsføringen av innenlandske og importerte produkter på samme måte. Følgelig omfattes ikke salgsordninger av TEUV artikkel 34, som tilsvarer EØS-avtalen artikkel 11.

147. ESA gjør gjeldende at avklaringen fra EU-domstolen medfører en tre-trinnstest, nemlig: 1) hvorvidt den aktuelle lovgivning utgjør en "salgsordning", 2) hvorvidt den nasjonale bestemmelse gjelder for alle berørte næringsdrivende på det nasjonale territorium, og 3) hvorvidt tiltakene rettslig og faktisk berører markedsføringen av innenlandske og importerte produkter på samme måte.

148. Når det gjelder det første punkt, anfører ESA at synlig oppstilling av tobakksprodukter bør betraktes som en form for reklame og salgsfremmende tiltak. Derfor er oppstilling av tobakksprodukter et grunnleggende virkemiddel for å markedsføre tobakk. Ethvert reklameforbud som berører markedsføringen av et tobakksprodukt, utgjør, i henhold til rettspraksis, en salgsordning.[108] Saken ville stilt seg annerledes om emballasjen eller merkingen av importerte produkter måtte endres.[109] I så tilfelle ville det omtvistede tiltaket ikke kunne betraktes som en salgsordning. Dette er imidlertid ikke tilfellet i den foreliggende sak. Det omtvistede forbud krever ikke at tobakksprodukter reemballeres eller endres på noen måte. Produktene skal ganske enkelt holdes skjult fra synlig oppstilling.

149. Med hensyn til det andre punkt gjør ESA gjeldende at forbudet gjelder alle utsalgssteder som ikke utelukkende selger tobakksprodukter, til sammen 15 000–18 000 utsalgssteder. Det eneste unntaket fra forbudet mot synlig oppstilling er for spesialforretninger for tobakk. Men ettersom det er tale om et

[108] Det vises til *De Agostini og TV-Shop* og *Gourmet International*, begge som sitert over.
[109] Det vises til *Keck og Mithouard*, som sitert over (avsnitt 37), og sak C-12/00 *Kommisjonen* mot *Spania*, Sml. 2003 s. I-459 (avsnitt 76).

considered to apply, in practice, to all traders within the relevant territory.

150. On the third point, ESA submits that the issue can be divided in two parts. First, it must be assessed whether the contested measure affects *in law* the marketing of domestic products and those from other Member States in the same manner. Second, an assessment needs to take place whether the contested measure affects *in fact* the marketing of domestic products and those from other Member States in the same manner.

151. ESA is of the opinion that the first part concerning the contested measure's effect *in law* can only be answered in the affirmative. As the display ban applies to all tobacco products irrespective of their origin, the contested measure affects *in law* the marketing of domestic products and those from other states in the same manner. However, the second part is more complicated and needs to be examined from three different perspectives, namely: (1) whether the absence of domestic production is decisive; (2) whether the display ban is an outright advertising ban to the advantage of domestic products; and (3) whether any restriction of access for imported products to the Norwegian market is sufficient for the display ban to be characterised as a measure having equivalent effect to a quantitative restriction on free movement on goods.

152. ESA addresses those issues in turn. On the first issue, ESA argues that the fact that there is no domestic production is not determinative of whether the Norwegian measure is contrary to Article 11 EEA.[110] On the second issue, ESA is of the opinion, taking into account the information provided in the order for reference, that the visual display ban does not seem likely to entail a difference in treatment between domestic products and

[110] Reference is made to Case C-391/92 *Commission* v *Greece*, paragraphs 17-18, and *Morellato*, paragraph 37, both cited above.

meget lite antall, anfører ESA at forbudet mot synlig oppstilling bør anses i praksis å gjelde for alle næringsdrivende på det aktuelle territorium.

150. Når det gjelder det tredje punkt, kan saken etter ESAs oppfatning deles i to. For det første må det vurderes hvorvidt det omtvistede tiltak *rettslig* berører markedsføringen av innenlandske produkter og produkter fra andre medlemsstater på samme måte. Dernest må det vurderes hvorvidt det omtvistede tiltak *faktisk* berører markedsføringen av innenlandske produkter og produkter fra andre medlemsstater på samme måte.

151. ESA er av den oppfatning at den første del, som gjelder det omtvistede tiltaks *rettslige* virkning, bare kan besvares bekreftende. Ettersom oppstillingsforbudet gjelder for alle tobakksprodukter uavhengig av deres opprinnelse, berører det omtvistede tiltak *rettslig sett* markedsføringen av innenlandske produkter og produkter fra andre stater på samme måte. Imidlertid er den andre del mer komplisert og må analyseres fra tre ulike synsvinkler, nemlig: 1) om det er avgjørende at det ikke finnes innenlandske produkter, 2) om oppstillingsforbudet er et regelrett reklameforbud til fordel for innenlandske produkter, og 3) om eventuelle restriksjoner på adgangen til det norske marked for importerte produkter er tilstrekkelig til at oppstillingsforbudet kan karakteriseres som et tiltak med tilsvarende virkning som en kvantitativ importrestriksjon.

152. ESA behandler spørsmålene etter tur. Når det gjelder det første spørsmål, fremholder ESA at det faktum at det ikke er innenlandsk produksjon, ikke er avgjørende for om det norske tiltak er i strid med EØS-avtalen artikkel 11.[110] Når det gjelder det andre spørsmål, mener ESA at i betraktning av den informasjon som er gitt i anmodningen om rådgivende uttalelse, synes det ikke sannsynlig at oppstillingsforbudet vil medføre at innenlandske produkter behandles annerledes enn produkter importert fra

[110] Det vises til sak C-391/92 *Kommisjonen* mot *Hellas* (avsnitt 17–18), og *Morellato* (avsnitt 37), begge som sitert over.

products imported from other EEA states.[111] On the third issue, ESA submits that the Court of Justice has never considered that a selling arrangement falls under Article 11 EEA / Article 34 TFEU merely because it is likely to restrict the access of imported products to the market regardless of whether it also affects domestically produced goods. The Court has always assessed whether the measure was likely to impede access to the market of goods originating in other Member States more than it impeded access of domestic products.[112]

The second question

153. ESA argues that even if the contested visual display ban is considered to fall within the scope of Article 11 EEA, it may be justified on grounds of public health in accordance with Article 13 EEA.

154. ESA emphasises that, under established case-law, states have been successful in arguing that restrictions on advertising particular products considered harmful to public health may be justified on public health grounds. It points out that is for the EEA States to decide the appropriate level of human health protection.[113]

155. ESA observes that the contested measure forms a part of a consistent policy to reduce tobacco consumption. The visual display ban is a part of a regime that has been in place since 1975. In its view, in the light of the total advertising ban that predated the contested measure, it was only logical to introduce a visual display ban in order to address the last important marketing element, i.e. the visible display of tobacco. In the same way, the exception for boutique tobacco stores is justifiable having regard to the fact that the customers of such retail stores have already decided to purchase tobacco before entering.

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[111] ESA refers to *Leclerc-Siplec* and *Gourmet International*, both cited above, and the Opinion of Advocate General Jacobs in the latter case, points 35-36.

[112] Reference is made to *Leclerc-Siplec*; *De Agostini and TV-Shop*; *Gourmet International*; and *Morellato*, all cited above.

[113] Reference is made to Case 152/78 *Commission* v *France* [1980] ECR 2299, *Aragonesa de Publicidad Exterior*, cited above, and Case C-380/03 *Germany* v *Parliament and Council* [2006] ECR I-11573, paragraph 40.

andre EØS-stater.[111] Til det tredje spørsmål anfører ESA at EU-domstolen aldri har ansett en salgsordning for å falle inn under EØS-avtalen artikkel 11 / TEUV artikkel 34 utelukkende fordi det er sannsynlig at ordningen vil hindre markedsadgang for importerte produkter, uavhengig av om ordningen også får betydning for innenlandske produkter. EU-domstolen har alltid vurdert hvorvidt det var sannsynlig at tiltaket ville hindre markedsadgangen for importerte produkter mer enn for innenlandske produkter.[112]

Det andre spørsmål

153. ESA anfører at selv om det omtvistede oppstillingsforbud anses å omfattes av EØS-avtalen artikkel 11, kan det rettferdiggjøres av hensyn til folkehelsen i henhold til EØS-avtalen artikkel 13.

154. ESA understreker at i henhold til fast rettspraksis har statene fått medhold når de har gjort gjeldende at restriksjoner på reklame for særskilte produkter som betraktes som helseskadelige, kan rettferdiggjøres av hensyn til folkehelsen. ESA peker på at det er EØS-statene som skal fastsette et hensiktsmessig nivå for beskyttelse av menneskers helse.[113]

155. ESA bemerker at det omtvistede tiltak er del av en sammenhengende politikk for å redusere forbruket av tobakk. Forbudet mot synlig oppstilling inngår i et regime som har vært på plass siden 1975. Etter ESAs mening var det, i lys av totalforbudet mot reklame som ble innført før det omtvistede tiltak, bare logisk å innføre et forbud mot synlig oppstilling for å gripe fatt i det siste store markedsføringselement, nemlig den synlige oppstilling av tobakk. På samme måte er unntaket for spesialforretninger for tobakk berettiget idet kundene i disse utsalgssteder allerede har bestemt seg for å kjøpe tobakk før de går inn.

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[111] ESA viser til *Leclerc-Siplec* og *Gourmet International*, begge som sitert over, og uttalelse fra generaladvokat Jacobs i sistnevnte sak (avsnitt 35–36).

[112] Det vises til *Leclerc-Siplec*, *De Agostini og TV-Shop*, *Gourmet International* og *Morellato*, alle som sitert over.

[113] Det vises til sak 152/78 *Kommisjonen* mot *Frankrike*, Sml. 1980 s. 2299; *Aragonesa de Publicidad Exterior*, som sitert over, og sak C-380/03 *Tyskland* mot *Parlamentet og Rådet*, Sml. 2006 s. I-11573 (avsnitt 40).

156. On the question of whether or not less restrictive measures exist, ESA refers to the main purpose of the visual display ban, namely, to prevent customers of a particular retail outlet being faced with tobacco products, a situation that might incite such customers to make an impulse purchase of tobacco. In ESA's view, the alternative and allegedly less restrictive measures referred to by the Plaintiff would not achieve the same level of protection, as these alternatives are mainly aimed at discouraging young people from smoking. Assuming that the aim of the measure is legitimate, ESA cannot see what other less restrictive measures might be applied.

157. In light of those considerations, ESA proposes that the questions referred by the Oslo District Court should be answered as follows:

Article 11 EEA does not preclude national measures such as a prohibition on the display of tobacco products which constitutes a selling arrangement which does not lead to discriminatory treatment between domestic products and products imported from other Contracting States. In any event, if such measures were to be considered to be measures having an equivalent effect, they would fall within the public health exception.

The European Commission

The first question

158. According to the European Commission ("the Commission"), a ban on the display of a product can be regarded as an advertising ban in a more radical form. Therefore, case-law dealing with advertising restrictions is of direct relevance in the present case. Moreover, the Commission argues that a display ban must be regarded, in the same way as an advertising restriction, as a selling arrangement. Therefore, if no *de jure* or *de facto* discrimination can be found, it falls outside the scope of Article 34 TFEU and Article 11 EEA.[114]

[114] The Commission refers to *Keck and Mithouard*, cited above, paragraph 16.

156. Når det gjelder hvorvidt mindre inngripende tiltak finnes eller ikke, viser ESA til hovedformålet med forbudet mot synlig oppstilling, nemlig å forhindre at kundene på et bestemt utsalgssted blir stilt overfor tobakksprodukter, en situasjon som kan få slike kunder til å kjøpe tobakk på impuls. Etter ESAs oppfatning ville de alternative og etter sigende mindre inngripende tiltak saksøker viser til, ikke bidra til å oppnå samme beskyttelsesnivå ettersom disse alternativer hovedsakelig tar sikte på å avskrekke unge mennesker fra å røyke. Forutsatt at målet med tiltaket er legitimt, kan ikke ESA se hvilke andre, mindre inngripende tiltak som kunne vært innført.

157. I lys av disse betraktninger anmoder ESA EFTA-domstolen om å besvare spørsmålene fra Oslo tingrett på følgende måte:

EØS-avtalen artikkel 11 er ikke til hinder for nasjonale tiltak slik som et oppstillingsforbud for tobakksprodukter som utgjør en salgsordning som ikke fører til at innenlandske produkter behandles annerledes enn produkter importert fra andre avtalestater. Uansett ville slike tiltak, om de ble betraktet som tiltak med tilsvarende virkning, omfattes av unntaket som er begrunnet i folkehelsen.

Europakommisjonen

Det første spørsmål

158. Ifølge Europakommisjonen ("Kommisjonen") kan et oppstillingsforbud for et produkt betraktes som et reklameforbud, bare i en mer radikal form. Derfor er rettspraksis som gjelder begrensninger på reklame, av direkte relevans i denne sak. Videre fremholder Kommisjonen at et oppstillingsforbud, på samme måte som en begrensning på reklame, må betraktes som en salgsordning. Dersom det verken rettslig eller faktisk foreligger noen forskjellsbehandling, faller det utenfor virkeområdet til TEUV artikkel 34 og EØS-avtalen artikkel 11.[114]

[114] Kommisjonen viser til *Keck og Mithouard*, som sitert over (avsnitt 16).

159. However, according to case-law, an advertising ban could entail *de facto* discrimination against imports or, in fact, constitute such discrimination.[115] Therefore, in the Commission's view, if there were any production of tobacco products in Norway, the contested ban would fall under Article 11 EEA. However, taking account of the fact that no tobacco is produced in Norway, the contested ban cannot be regarded as discriminating against imports.[116] For those reasons, the Commission argues that the contested prohibition on the visible display of tobacco products does not constitute a measure having equivalent effect within the meaning of Article 11 EEA.

160. On the other hand, the Commission acknowledges that, despite the fact that no domestic tobacco is produced, a display ban is highly restrictive because it can stifle competition between brands and make it difficult for new products to enter the market. Therefore, it regards it as arguable, on the basis of *Commission* v *Italy*,[117] that such a ban might constitute a measure having equivalent effect as it hinders market access. However, in the light of the answer it proposes to the second question, the Commission does not see the need to venture into this territory which would entail an analysis of facts specific to tobacco products.

The second question

161. The Commission observes that the ECJ has acknowledged that restrictions on advertising products harmful to human health may be justified on public health grounds as they serve to reduce consumption.[118]

[115] Reference is made to *De Agostini and TV-Shop*, paragraphs 42-44, and *Gourmet International*, paragraph 21, both cited above.

[116] Reference is made to Case C-391/92 *Commission* v *Greece*, cited above, and Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, paragraph 10.

[117] The Commission refers to *Commission* v *Italy*, cited above. Reference is also made to *Rewe-Zentral* and *Keck and Mithouard*, both cited above.

[118] The Commission refers to Case 152/78 *Commission* v *France* and *Aragonesa de Publicidad Exterior*, both cited above.

159. Ifølge rettspraksis kan imidlertid et reklameforbud rent faktisk innebære forskjellsbehandling av importerte produkter, eller i realiteten utgjøre forskjellsbehandling.[115] Etter Kommisjonens oppfatning ville det omtvistede forbud vært i strid med EØS-avtalen artikkel 11 dersom det hadde vært produksjon av tobakksprodukter i Norge. Men i og med at det ikke fremproduseres tobakk i Norge, kan det omtvistede forbud ikke anses å diskriminere importerte produkter.[116] Av disse grunner gjør Kommisjonen gjeldende at det omtvistede forbud mot synlig oppstilling av tobakksprodukter ikke utgjør et tiltak med tilsvarende virkning i henhold til EØS-avtalen artikkel 11.

160. På den annen side erkjenner Kommisjonen at selv om det ikke produseres noe innenlandsk tobakk, innebærer et oppstillingsforbud store begrensninger da det kan kvele konkurransen mellom merkene og gjøre det vanskelig for nye produkter å komme inn på markedet. Derfor anser Kommisjonen at det kan hevdes, på grunnlag av *Kommisjonen* mot *Italia*,[117] at et slikt forbud kan utgjøre et tiltak med tilsvarende virkning ettersom det hindrer markedsadgang. Men i lys av det Kommisjonen foreslår som svar på det andre spørsmål, ser Kommisjonen ikke behov for å begi seg inn på dette område, som ville innebære en analyse av forhold som er spesifikke for tobakksprodukter.

Det andre spørsmål

161. Kommisjonen anfører at EU-domstolen har erkjent at begrensninger på reklame for helseskadelige produkter kan være begrunnet ut fra hensynet til folkehelsen i og med at de bidrar til å redusere forbruket.[118]

[115] Det vises til *De Agostini og TV-Shop* (avsnitt 42–44), og *Gourmet International* (avsnitt 21), begge som sitert over.

[116] Det vises til sak C-391/92 *Kommisjonen* mot *Hellas*, som sitert over, og sak C-47/88 *Kommisjonen* mot *Danmark*, Sml. 1990 s. I-4509 (avsnitt 10).

[117] Kommisjonen viser til *Kommisjonen* mot *Italia*, som sitert over. Det vises også til *Rewe-Zentral* og *Keck og Mithouard*, begge som sitert over.

[118] Kommisjonen viser til sak 152/78 *Kommisjonen* mot *Frankrike* og *Aragonesa de Publicidad Exterior*, begge som sitert over.

162. The Commission argues that the display ban is both necessary and proportionate due to the fact that the same level of protection cannot be achieved by less restrictive means. It was for Norway to decide that it was necessary to limit the visibility of tobacco products in addition to the general advertising ban already in place. In the Commission's view, the effect of the display ban in protecting children and adolescents and supporting those who are attempting to stop consuming tobacco cannot be achieved by other less restrictive means.

163. Finally, the Commission submits that the exception for dedicated tobacco boutiques does not prevent the contested legislation from being justified on public health grounds. The display of tobacco products in those specialised boutiques cannot be expected to encourage customers to purchase goods they would otherwise not buy. That presumption is based on the fact that individuals who enter such a boutique have decided to buy or are very likely to buy tobacco products regardless of whether tobacco is displayed.

164. In the light of those observations, the Commission proposes that the questions should be answered as follows:

1. A general prohibition on the visible display of tobacco products does not constitute a measure of equivalent effect within the meaning of Article 11 EEA where no such products are produced within the territory of the Contracting Party concerned.

2. However, if a general prohibition on the visible display of tobacco products does constitute a measure of equivalent effect within the meaning of Article 11 EEA, it is justified on public health grounds under Article 13 EEA.

Thorgeir Örlygsson
Judge-Rapporteur

162. Kommisjonen gjør gjeldende at oppstillingsforbudet både er nødvendig og forholdsmessig fordi samme beskyttelsesnivå ikke kan oppnås med mindre inngripende virkemidler. Norge hadde anledning til å bestemme at det var nødvendig å begrense synligheten av tobakksprodukter i tillegg til det generelle reklameforbud som allerede var på plass. Kommisjonen ser det slik at virkningen av oppstillingsforbudet når det gjelder å beskytte barn og unge og å støtte dem som prøver å slutte å bruke tobakk, ikke kan oppnås med andre, mindre inngripende virkemidler.

163. Endelig anfører Kommisjonen at unntaket for spesialforretninger for tobakk ikke er til hinder for at den omtvistede lovgivning er berettiget av hensyn til folkehelsen. Oppstilling av tobakksprodukter i slike spesialforretninger for tobakk kan ikke forventes å oppmuntre kunder til å kjøpe varer de ellers ikke ville kjøpt. Denne antakelse er basert på det faktum at personer som går inn i slike forretninger, har bestemt seg for å kjøpe eller svært sannsynlig vil kjøpe tobakksprodukter uten hensyn til om tobakken er oppstilt.

164. I lys av disse bemerkninger mener Kommisjonen at spørsmålene bør besvares som følger:

1. Et generelt forbud mot synlig oppstilling av tobakksprodukter utgjør ikke et tiltak med tilsvarende virkning i henhold til EØS-avtalen artikkel 11 dersom ingen slike produkter produseres på territoriet til den berørte avtalepart.

2. Dersom et generelt forbud mot synlig oppstilling av tobakksprodukter likevel utgjør et tiltak med tilsvarende virkning i henhold til EØS-avtalen artikkel 11, er det begrunnet ut fra hensynet til folkehelsen i henhold til EØS-avtalen artikkel 13.

Thorgeir Örlygsson
Forberedende dommer


EFTA COURT

Case E-5/11

EFTA Surveillance Authority
v
The Kingdom of Norway

CASE E-5/11

EFTA Surveillance Authority

v

The Kingdom of Norway

(Failure by a Contracting Party to fulfil its obligations – Regulation (EC) No 1406/2002 – Regulation (EC) No 1891/2006)

Summary of the Judgment

1. Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. Furthermore, Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion.

3. By failing to adopt the measures necessary to make the Acts referred to at points 56o and points 56oa of Chapter V of Annex XIII to the EEA Agreement, i.e. Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, as adapted to the EEA Agreement by Protocol 1 thereto, and Regulation (EC) No 1891/2006 of the European Parliament and of the Council of 18 December 2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No 1406/2002), as adapted to the EEA Agreement by Protocol 1 thereto, part of its internal legal order within the time prescribed, Norway has failed to fulfil its obligations under Article 7 EEA.

JUDGMENT OF THE COURT

20 September 2011

(Failure by a Contracting Party to fulfil its obligations – Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency – Regulation (EC) No 1891/2006 of the European Parliament and of the Council of 18 December 2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No 1406/2002)

In Case E-5/11,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Ms Ida Thue, Advocate, Office of the Attorney General (Civil Affairs), and Mr Vegard Emaus, Adviser, Ministry of Foreign Affairs, acting as Agents

defendant,

APPLICATION for a declaration that by failing to adopt the measures necessary to make a) the Act referred to at point 56o of Chapter V of Annex XIII to the Agreement on the European Economic Area (Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency), as adapted to the EEA Agreement by Protocol 1 thereto, and, b) the Act referred to at point 56oa of Chapter V of Annex XIII to the Agreement on the European Economic Area (Regulation (EC) No 1891/2006 of the European Parliament and of the Council of 18 December 2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No 1406/2002), as adapted to the EEA Agreement by Protocol 1 thereto, part of its internal legal order within the time prescribed, the Kingdom of Norway failed to fulfil its obligations under Article 7 EEA.

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I THE APPLICATION

1 By application lodged at the Court Registry on 24 February 2011, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the "SCA"), for a declaration that, by failing to adopt measures necessary to make the Acts referred to at points 56o and 56oa of Chapter V of Annex XIII to the EEA Agreement ("EEA"), within the time-limit prescribed, the Kingdom of Norway ("Norway") has failed to fulfil its obligations under Article 7 EEA. The Acts referred to are Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, and Regulation (EC) No 1891/2006 of the European Parliament and of the Council of 18 December 2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No 1406/2002, as adapted by Protocol 1 to the EEA Agreement.

II FACTS AND PRE-LITIGATION PROCEDURE

2 Decision 81/2003 of 20 June 2003 of the EFTA Joint Committee amended Annex XIII to the EEA Agreement by adding Regulation (EC) No 1406/2002 to point 56o of Chapter V of that Annex. The

Decision entered into force on 1 January 2004 and the time limit for EFTA States to adopt the measures necessary to implement the Act expired on the same date.

3 By letter of 13 July 2004 ESA invited the Government of Norway to provide information concerning the measures by which Regulation (EC) No 1406/2002 had been made part of the Norwegian internal legal order.

4 The Government of Norway wrote to ESA on 16 August 2004 to inform it that Norway had presented a parliamentary bill regarding Regulation (EC) No 1406/2002 and that the Norwegian Parliament had approved the incorporation into the EEA Agreement of the Act by a Parliamentary Resolution dated 6 November 2003. As a consequence of the approval of the Parliament the Government was obliged to allocate funds regarding Norway's participation in the European Maritime Safety Agency ("the Agency"). Norway did not consider Regulation (EC) No 1406/2002 to establish either obligations or privileges for Norwegian citizens of such a character that any other national measures must be taken to implement Regulation (EC) No 1406/2002. Therefore the Act was considered by Norway to have "as such" been made part of Norway's internal legal order. Norway noted that it had also made the establishment of the Agency and the Norwegian participation in it known to the Norwegian maritime community.

5 At a meeting in Oslo on 22 September 2004, ESA invited Norway to send copies of the documents which established the basis for the incorporation of Regulation (EC) No 1406/2002. ESA discussed the incorporation of regulations in the internal legal order of Norway, in light of the Authority's interpretation of Article 7 EEA, at meetings in 2006, 2007 and 2008. Apart from that, the ESA did not actively pursue the incorporation of the Regulation until the issue arose again in connection with the incorporation of Regulation (EC) No 1891/2006.

6 Decision No 52/2007 of 8 June of the EFTA Joint Committee amended Annex XIII to the EEA Agreement by adding Regulation (EC) No 1891/2006 to point 56oa of Chapter V of that Annex.

The Decision entered into force on 9 June 2007 and the time limit for EFTA States to adopt the measures necessary to implement the Act expired on the same date.

7 By letter of 6 July 2007 ESA invited the Government of Norway to provide information concerning the measures by which Regulation (EC) No 1891/2006 had been made part of the internal legal order of Norway.

8 In its reply of 10 July 2007, the Norwegian Government informed ESA that as Regulation (EC) No 1891/2006 deals with the organisation of budgetary commitments only, the Parliament's approval of Joint Committee Decision No 81/2003, incorporating Regulation (EC) No 1891/2006 into the EEA Agreement was considered a sufficient measure to incorporate the Act.

9 ESA did not agree with the arguments set forward by Norway and on 27 February 2008 issued a letter of formal notice. The Norwegian Government replied by letter of 8 October 2008, and reiterated its previous opinion that the Act had been incorporated by the Parliament's approval of Joint Committee Decision No 81/2003.

10 On 1 July 2009 ESA delivered a reasoned opinion to Norway concluding that by failing to make Regulation (EC) No 1891/2006 part of its internal legal order, Norway had failed to comply with its obligations under Article 7 EEA.

11 On the same day, the Authority issued a letter of formal notice for failure to make Regulation (EC) No 1406/2002 part of its internal legal order. The Norwegian Government submitted a reply to both the letter and to the reasoned opinion of 1 July 2009 on 1 December 2009.

12 In those replies, Norway maintained that, due to their nature and content, it was not required to incorporate Regulation (EC) No 1891/2006 and Regulation (EC) No 1406/2002 into the Norwegian internal legal order. Insofar as such an obligation should exist, Norway maintained that the acts had been incorporated into the Norwegian legal order in accordance with Article 7(a) EEA.

13 Having assessed the reply, ESA upheld its opinion that the acts had not been made part of the Norwegian internal legal order as required by Article 7 EEA. Accordingly, ESA delivered a reasoned opinion to Norway on 24 February 2010 for failure to make Regulation (EC) No 1406/2002 part of its internal legal order.

14 In its letter of 23 April 2010 in reply to the reasoned opinion, Norway informed ESA that after reassessing the case, both acts, Regulation (EC) No 1406/2002 and Regulation (EC) No 1891/2006, would be incorporated by way of statutes and/or regulations. The reply stated that Norway could not preclude the possibility that Regulation 1406/2002 indeed contained provisions affecting the rights and obligations of individuals.

15 By a letter of 24 August 2010, Norway informed ESA that work had been started to ensure the incorporation of both acts as soon as possible, and not later than 1 July 2011.

16 At a meeting in November 2010 ESA invited Norway to provide information on how far the incorporation process had come, and asked if Norway foresaw to finalise the incorporation before 1 July 2011 as indicated in earlier correspondence. The representatives of the Norwegian Government told ESA that four ministries in Norway were involved in the incorporation of the Regulation into the national legal order which made the task more time consuming. It had not yet been determined in Norway whether the incorporation into national law would require Parliamentary action, resolution or amendment to existing legislation.

17 In a letter of 1 December 2010 the Norwegian Government stated that the incorporation involved questions relating to the jurisdiction of several ministries. Accordingly the method of technical legal incorporation required further clarification between the ministries. In the letter it was further submitted that this work was in progress and more detailed information on the time schedule depended on the outcome of this process. However, it had been clarified that there was no need for changes to any laws and that the objective was to make the incorporation as soon as possible, and not later than 1 July 2011.

18 Given its view that Norway should have incorporated Regulation (EC) No 1406/2002 and Regulation (EC) No 1891/2006 respectively more than seven and more than three and a half years ago, ESA considered that the Norwegian Government had had more than sufficient time to adopt the measures necessary to make the Regulations part of its internal legal order. Accordingly, on 2 February 2011, ESA decided to refer the matter to the Court.

III PROCEDURE BEFORE THE COURT

19 ESA lodged the present application at the Court Registry on 24 February 2011. The statement of defence from Norway was received on 15 April.

20 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

IV ARGUMENTS OF THE PARTIES

21 The application is based on one plea in law, namely that by failing to adopt the national measures necessary to fully implement Regulations 1406/2002 and 1891/2006 within the time-limit prescribed, Norway has failed to fulfil its obligations under Article 7 EEA.

22 In its statement of defence, Norway does not dispute that it is obliged to make the Acts in question part of its legal order under Article 7 EEA and that the time limit for the implementation of the Acts has expired. Nor is the order sought by ESA disputed.

23 However, Norway submits some general views on the obligation to make regulations part of the internal legal order. In this regard, it contends that Article 7(a) EEA must be interpreted in light of its object and purpose, which is to ensure the simultaneous and uniform application of regulations throughout the EEA. Thus, in its view, Article 7(a) requires such implementing action by dualist Norway which ensures the simultaneous and uniform application of regulation throughout the European Economic Area.

24 It is further argued that in the majority of cases, Article 7(a) EEA requires that regulations are made part of the Norwegian legal order as such. However, Norway holds that, in exceptional cases, implementation is not required. Where it is apparent that a regulation does not affect rights or obligations of natural or legal persons, but merely regulates internal affairs of an EU body, the relationship between EU bodies, or the rights and obligations of states, it would serve no legal or practical purpose to make the regulation part of the internal legal order. In such cases, non-implementation would not prejudice the simultaneous and uniform application of the regulation throughout the EEA. Such regulations do not, for instance, contain provisions that can be invoked in national courts.

25 Moreover, since measures of Norwegian law are traditionally confined to establishing rights or obligations for natural or legal persons or regulating the affairs of public bodies, regulations that merely concern the internal affairs of international organizations, or the rights and obligations of states, would not form a natural part of the internal Norwegian legal order. Provided that a regulation is of such a nature that it is not to be implemented into the internal legal order of the EEA EFTA States, there can be no need for an adaptation text when the act is taken into the EEA Agreement by a decision of the EEA Joint Committee.

V FINDINGS OF THE COURT

26 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see Case E-18/10 *EFTA Surveillance Authority* v *The Kingdom of Norway*, judgment of 28 June 2011, not yet reported, paragraph 25). Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

27 Decision 81/2003 of the EEA Joint Committee of 20 June 2003 entered into force on 1 January 2004. The time limit for EFTA

States to adopt the measures necessary to implement the Act expired on the same date. As regards Decision No 52/2007, it entered into force on 9 June 2007. The time limit for EFTA States to adopt the measures necessary to implement the Act expired on the same date.

28 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see Case E-18/10 *EFTA Surveillance Authority* v *The Kingdom of Norway*, cited above, paragraph 30). It is undisputed that Norway did not adopt those measures before the expiry of the time-limit given in the reasoned opinion.

29 It must therefore be held that, by failing to adopt the measures necessary to make the Acts referred to at points 56o and points 56oa of Chapter V of Annex XIII to the EEA Agreement, i.e. Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, as adapted to the EEA Agreement by Protocol 1 thereto, and Regulation (EC) No 1891/2006 of the European Parliament and of the Council of 18 December 2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No 1406/2002), as adapted to the EEA Agreement by Protocol 1 thereto, part of its internal legal order within the time prescribed, Norway has failed to fulfil its obligations under Article 7 EEA.

VI COSTS

30 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the EFTA Surveillance Authority has requested that the Kingdom of Norway be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, the Kingdom of Norway must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing to adopt the measures necessary to make a) the Act referred to at point 56o of Chapter V of Annex XIII to the Agreement on the European Economic Area (Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency), as adapted to the EEA Agreement by Protocol 1 thereto, and b) the Act referred to at point 56oa of Chapter V of Annex XIII to the Agreement on the European Economic Area (Regulation (EC) No 1891/2006 of the European Parliament and of the Council of 18 December 2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No 1406/2002), as adapted to the EEA Agreement by Protocol 1 thereto, part of its internal legal order within the time prescribed, the Kingdom of Norway has failed to fulfil its obligations under Article 7 EEA.**

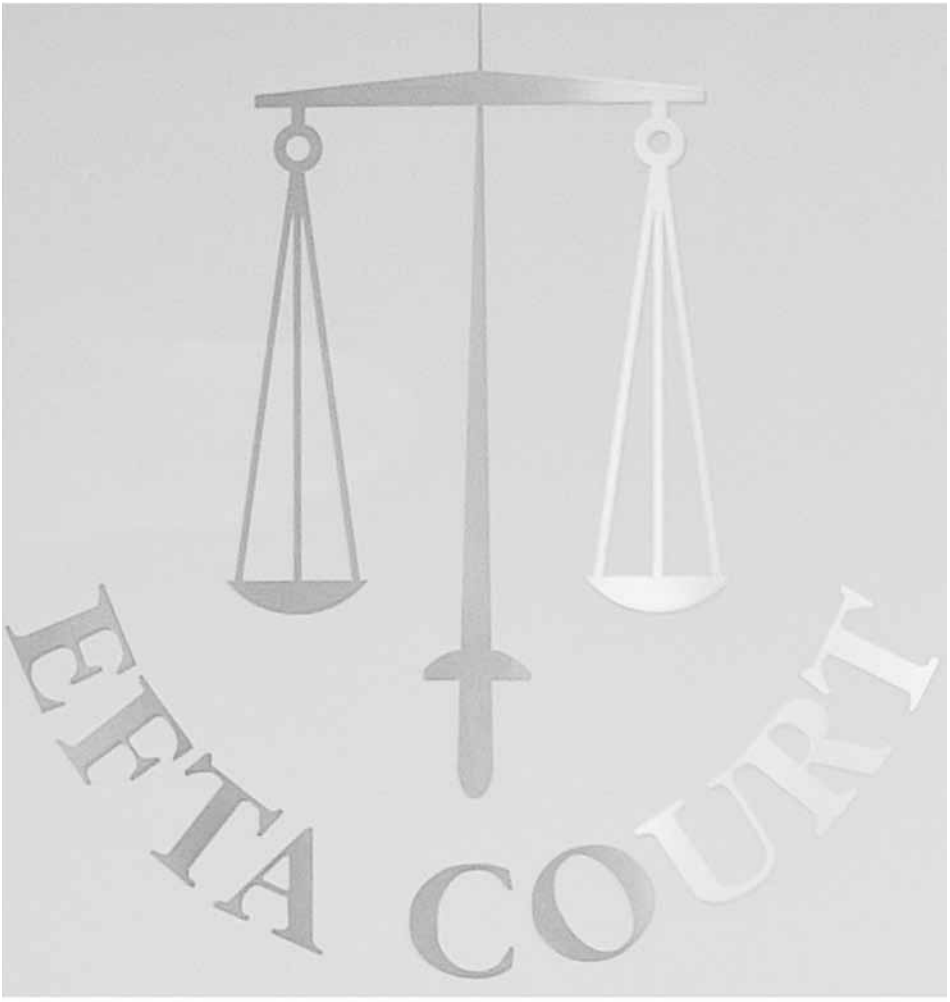
2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 20 September 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President


EFTA COURT

Case E-3/11

Pálmi Sigmarsson

v

The Central Bank of Iceland

CASE E-3/11

Pálmi Sigmarsson

v

The Central Bank of Iceland

(Free movement of capital - Article 43 EEA - National restrictions on capital movements - Jurisdiction - Proportionality - Legal certainty)

Summary of the Judgment

1. Article 43 EEA provides for derogations from the free movement of capital established in Article 40 EEA. Article 43(2) EEA provides that if movements of capital lead to disturbances in the functioning of the capital market in any EFTA State, the State concerned may take protective measures. Moreover, it follows from Article 43(4) EEA that where an EFTA State is in difficulties, or is seriously threatened with difficulties, as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardize the functioning of the EEA Agreement, the State concerned may take protective measures.

2. The EFTA Standing Committee and the EEA Joint Committee are, pursuant to Article 44 EEA in conjunction with Protocol 18 to the EEA Agreement and Article 45 EEA, to be notified and consulted prior to the implementation of the protective measures. Moreover, the EFTA Standing Committee is required to examine and deliver an opinion on the introduction of the measures, keep the situation under review and issue recommendations, as appropriate. However, neither committee has been vested with a competence to issue binding decisions to determine whether the protective measures are compatible with Article 43 EEA.

3. The Court has jurisdiction to review whether measures taken pursuant to Article 43 EEA satisfy

MÁL E-3/11

Pálmi Sigmarsson

gegn

Seðlabanka Íslands

(Frjálsir fjármagnsflutningar – 43. gr. EES-samningsins – Takmarkanir aðildarríkja á fjármagnsflutningum - Lögsaga - Meðalhóf – Réttarvissa)

Samantekt

1. Í 43. gr. EES-samningsins er að finna heimildir til undanþágu frá frjálsum flutningum fjármagns eins og því er lýst í 40. gr. EES-samningsins. Í 2. mgr. 43. gr. EES-samningsins er kveðið á um að í tilvikum þar sem fjármagnsflutningar leiði til röskunar á starfsemi fjármagnsmarkaðar í EFTA-ríki geti hlutaðeigandi ríki gripið til verndarráðstafana á viðkomandi sviði. Enn fremur segir í 4. mgr. sömu greinar að ef EFTA-ríki eigi í örðugleikum með greiðslujöfnuð eða alvarleg hætta sé á að örðugleikar skapist, hvort sem það stafar af heildarójafnvægi í greiðslujöfnuði eða því hvaða gjaldmiðli það hefur yfir að ráða, geti hlutaðeigandi ríki gripið til verndarráðstafana, einkum ef örðugleikarnir eru til þess fallnir að stofna framkvæmd EES-samningsins í hættu.

2. Í 44. gr. EES-samningsins er kveðið á um tilkynningaskyldu og að leitað sé samráðs við fastanefnd EFTA-ríkjanna og sameiginlegu EES-nefndina áður en gripið er til verndarráðstafana, í samræmi við bókun 18 og 45. gr. EES-samningsins. Þá er fastanefnd EFTA-ríkjanna skylt að athuga og skila áliti um beitingu verndarráðstafananna, endurskoða aðstæður og mæla með breytingum, eftir því sem við á. Þó hefur hvorugri nefndinni verið falið vald til að taka bindandi ákvarðanir um hvort verndarráðstafanirnar samrýmist 43. gr. EES-samningsins.

3. Dómstóllinn hefur lögsögu til að endurskoða ráðstafanir sem gerðar eru samkvæmt 43. gr. EES-samningsins og leggja á það mat

the substantive requirements of that provision.

4. The conditions laid down in Article 43 (2) and (4) EEA call for a complex assessment of various macroeconomic factors. EFTA States must therefore enjoy a wide margin of discretion, both in determining whether the conditions are fulfilled and in the choice of measures taken, as those measures in many cases concern fundamental choices of economic policy.

5. The measures in the case at hand, prohibition of importation of offshore Icelandic krónur, were adopted to prevent transactions which would cause serious and substantial monetary and exchange rate instability. The critical situation that existed in Iceland after the financial crash in late 2008, satisfied the substantive requirements for applying the derogation clause at the time when the prohibition on importation of offshore krónur was adopted (October 2009), as well as when the Plaintiff in the national proceedings was finally denied an exemption from the prohibition (October 2010). Furthermore, the contested measures were in accordance with the principle of proportionality, and did not either contravene the principle of legal certainty.

hvort þær uppfylli þær kröfur sem í henni eru gerðar.

4. Hin efnislegu skilyrði sem kveðið er á um í 2. og 4. mgr. 43. gr. EES-samningsins útheimta flókið mat á ýmsum þjóðhagfræðilegum þáttum. EFTA-ríki njóta því aukins svigrúms til að meta hvort skilyrðin teljist uppfyllt og ákveða til hvaða úrræða skuli gripið, þar sem slík ákvörðun snýst í mörgum tilvikum um grundvallaratriði við mörkun efnahagsstefnu.

5. Verndarráðstafanirnar sem deilt er um í þessu máli, þ.e. reglurnar sem takmarka innflutning á aflandskrónum, voru settar til að hindra fjármagnsflutninga sem gætu valdið alvarlegum og verulegum óstöðugleika í gengis- og peningamálum. Atvik málsins, sem vísað hefur verið til fyrir dómstólnum, gefa til kynna að alvarlegar aðstæður hafi skapast á Íslandi eftir hrun fjármálakerfisins síðla árs 2008. Þessar aðstæður lýstu sér meðal annars í verulegri gengislækkun íslensku krónunnar og minnkandi gjaldeyrisforða. Við þessar aðstæður voru uppfyllt efnisleg skilyrði fyrir því að grípa til verndarráðstafana, jafnt á þeim tímapunkti þegar reglurnar voru settar (í október 2009) sem og þegar stefnanda var endanlega meinuð undanþága frá gildandi banni við innflutningi aflandskróna (í október 2010). Ráðstafanirnar voru enn fremur í samræmi við meginregluna um meðalhóf, og fóru ekki í bága við meginregluna um réttarvissu.

JUDGMENT OF THE COURT

14 December 2011*

(Free movement of capital – Article 43 EEA – National restrictions on capital movements – Jurisdiction – Proportionality – Legal certainty)

In Case E-3/11,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court), in the case of

Pálmi Sigmarsson

and

the Central Bank of Iceland

concerning the interpretation of Article 43 of the EEA Agreement,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Benedikt Bogason (ad hoc), Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– Pálmi Sigmarsson ("the Plaintiff"), represented by Stefán Geir Þórisson, Supreme Court Attorney;

– the Central Bank of Iceland ("the Defendant"), represented by Gizur Bergsteinsson, District Court Attorney;

– the Icelandic Government, represented by its Agent Bergþór Magnússon, assisted by Þóra M. Hjaltested, Director, Ministry of Economic Affairs, and Peter Dyrberg, advokat;

* Language of the request: Icelandic.

DÓMUR DÓMSTÓLSINS

14. desember 2011*

(Frjálsir fjármagnsflutningar – 43. gr. EES-samningsins – Takmarkanir aðildarríkja á fjármagnsflutningum – Lögsaga – Meðalhóf – Réttarvissa)

Mál E-3/11,

BEIÐNI, samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, um ráðgefandi álit EFTA-dómstólsins, frá Héraðsdómi Reykjavíkur, í máli sem þar er rekið

Pálmi Sigmarsson

gegn

Seðlabanka Íslands

varðandi túlkun á 43. gr. EES-samningsins.

DÓMSTÓLLINN,

skipaður dómurunum Carl Baudenbacher, forseta, Per Christiansen, framsögumanni og Benedikt Bogasyni, settum dómara,

dómritari: Skúli Magnússon,

hefur, með tilliti til skriflegra greinargerða frá:

– Stefnanda, Pálma Sigmarssyni, í fyrirsvari er Stefán Geir Þórisson, hrl.;

– Stefnda, Seðlabanka Íslands, í fyrirsvari er Gizur Bergsteinsson, hdl.;

– Ríkisstjórn Íslands, í fyrirsvari sem umboðsmaður er Bergþór Magnússon, með aðstoð Þóru M. Hjaltested, skrifstofustjóra efnahags- og viðskiptaráðuneytis og Peter Dyrberg, lögmanns;

* Beiðni um ráðgefandi álit er á íslensku.

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Elisabetta Montaguti and Nicola Yerrell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Stefán Geir Þórisson; the Defendant, represented by Gizur Bergsteinsson; the Icelandic Government, represented by its agent, Þóra M. Hjaltested, and by Peter Dyrberg; ESA, represented by its agents, Xavier Lewis and Maria Moustakali; and the Commission, represented by its agent, Nicola Yerrell, at the hearing on 7 October 2011,

gives the following

JUDGMENT

I LEGAL BACKGROUND

EEA law

1 Article 40 of the EEA Agreement reads as follows:

Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.

– Eftirlitsstofnun EFTA (ESA), í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri lögfræði- og framkvæmdasviðs, og Ólafur Jóhannes Einarsson, aðstoðarframkvæmdastjóri á lögfræði- og framkvæmdasviði;

– Framkvæmdastjórn Evrópusambandsins, í fyrirsvari sem umboðsmenn eru Elisabetta Montaguti og Nicola Yerrell, hjá lögfræðideildinni,

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings umboðsmanns stefnanda, Stefáns Geirs Þórissonar, umboðsmanns stefnda, Gizurar Bergsteinssonar, umboðsmanna ríkisstjórnar Íslands, Þóru M. Hjaltested og Peter Dyrberg, fulltrúa eftirlitsstofnunar EFTA, Xavier Lewis og Maria Moustakali og fulltrúa framkvæmdastjórnar Evrópusambandsins, Nicola Yerrell, sem fram fór 7. október 2011,

kveðið upp svofelldan

DÓM

I LÖGGJÖF

EES-réttur

1 Í 40. gr. EES-samningsins segir:

Innan ramma ákvæða samnings þessa skulu engin höft vera milli samningsaðila á flutningum fjármagns í eigu þeirra sem búsettir eru í aðildarríkjum EB eða EFTA-ríkjum né nokkur mismunun, byggð á ríkisfangi eða búsetu aðila eða því hvar féð er notað til fjárfestingar. Í XII. viðauka eru nauðsynleg ákvæði varðandi framkvæmd þessarar greinar.

2 Article 43(2) and (4) of the EEA Agreement provides as follows:

Article 43

...

(2) If movements of capital lead to disturbances in the functioning of the capital market in any EC Member State or EFTA State, the Contracting Party concerned may take protective measures in the field of capital movements.

...

(4) Where an EC Member State or an EFTA State is in difficulties, or is seriously threatened with difficulties, as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardize the functioning of this Agreement, the Contracting Party concerned may take protective measures.

3 Article 44 EEA provides that the Community, on the one hand, and the EFTA States, on the other, shall apply their internal procedures, as provided for in Protocol 18 to the EEA Agreement, to implement the provisions of Article 43 EEA. Pursuant to Protocol 18, in conjunction with Protocol 2 to the Agreement on a Standing Committee of the EFTA States, an EFTA State which intends to take measures in accordance with Article 43 EEA must give notice "in good time" to the Standing Committee of the EFTA States ("the EFTA Standing Committee"). In cases of secrecy or urgency, notice must be given to the other EFTA States and to the EFTA Standing Committee at the latest by the date of entry into force of the measures. The EFTA Standing Committee is required to examine and deliver an opinion on the introduction of the measures, keep the situation under review and issue recommendations, as appropriate.

4 Article 45 EEA sets out that decisions, opinions and recommendations related to the measures laid down in Article 43 EEA shall be notified to the EEA Joint Committee. Moreover, the measures shall be the subject of prior consultations and exchange of information within the EEA Joint Committee.

2 Í 2. og 4. mgr. 43. gr. EES-samningsins segir:

43. gr.

...

2. Leiði fjármagnsflutningar til röskunar á starfsemi fjármagnsmarkaðar í aðildarríki EB eða EFTA-ríki getur hlutaðeigandi samningsaðili gripið til verndarráðstafana á sviði fjármagnsflutninga.

...

4. Eigi aðildarríki EB eða EFTA-ríki í örðugleikum með greiðslujöfnuð eða alvarleg hætta er á að örðugleikar skapist, hvort sem það stafar af heildarójafnvægi í greiðslujöfnuði eða því hvaða gjaldmiðli það hefur yfir að ráða, getur hlutaðeigandi samningsaðili gripið til verndarráðstafana, einkum ef örðugleikarnir eru til þess fallnir að stofna framkvæmd samnings þessa í hættu.

3 Í 44. gr. EES-samningsins segir að Bandalagið annars vegar og EFTA-ríkin hins vegar skuli beita eigin málsmeðferð, sem mælt er fyrir um í bókun 18 við EES-samninginn, vegna framkvæmdar ákvæða 43. gr. EES-samningsins. EFTA-ríki sem hefur í hyggju að beita úrræðum 43. gr. skal tilkynna fastanefnd EFTA-ríkjanna um þá fyrirætlun ,,með góðum fyrirvara", í samræmi við bókun 18 ásamt bókun 2 við samninginn um fastanefnd EFTA-ríkjanna. Ef um leynd er að ræða eða ef málið er aðkallandi, skal tilkynna það hinum EFTA-ríkjunum og fastanefnd EFTA-ríkjanna í síðasta lagi daginn sem ráðstafanirnar öðlast gildi. Fastanefnd EFTA-ríkjanna skal athuga aðstæður og skila áliti um hvort beita skuli þessu ráðstöfunum endurskoða aðstæður og mælast til breytinga, eftir því sem við á.

4 Í 45. gr. EES-samningsins segir að tilkynna skuli sameiginlegu EES-nefndinni um ákvarðanir, álit og tilmæli vegna ráðstafana sem lýst er í 43. gr. EES-samningsins. Enn fremur segir að ekki megi grípa til neinna ráðstafana nema að höfðu samráði í

Protective measures may nevertheless be taken without prior consultation in accordance with Article 45(3) and (4) EEA on grounds of secrecy and urgency and where a sudden crisis in the balance of payments occurs. It follows from Article 45(5) EEA that in those cases notice of the protective measures must be given at the latest by the date of their entry into force, and the exchange of information and consultations must take place as soon as possible thereafter.

National law

5 In Iceland, Act No 87/1992 on Foreign Exchange ("the 1992 Act") lays down certain rules concerning capital movements, imports and foreign investment. According to Article 3, the Central Bank of Iceland ("the Central Bank") may decide, in consultation with the Ministry of Economic Affairs, to "restrict or suspend for a period of up to six months" certain listed categories of capital movements "if short-term capital movements to and from Iceland create, in the Bank's opinion, exchange-rate and monetary instability". The import and export of domestic currency is mentioned in point 5 of Article 3.

6 Article 7 of the 1992 Act permits the Central Bank, upon application by a party, to grant exemptions from restrictions imposed on capital movements. According to that Article, the Central Bank shall in this regard assess the consequences which restrictions on capital movements have for the applicant, the objectives behind the restrictions and the impact which an exemption will have on exchange rate and monetary stability. A refusal to grant an exemption may be referred to the Ministry of Economic Affairs.

7 On 28 November 2008, the Icelandic Parliament adopted Act No 134/2008, which amended the 1992 Act, adding, *inter alia*, a temporary provision authorising the Central Bank to adopt rules which "restrict or temporarily suspend" certain listed capital movements and related foreign exchange transactions, including the import and export of domestic currency, "if the Bank considers that such movements of capital to and from the country

sameiginlegu EES-nefndinni og eftir að henni hafa verið veittar upplýsingar. Verndarráðstafanir má þó gera án samráðs í samræmi við 3. og 4. mgr. 45. gr. EES-samningsins, á grundvelli þess að þær verði að fara leynt eða þoli enga bið og ef skyndilega kemur upp vandi er varðar greiðslujöfnuð. Það leiðir af 5. mgr. 45. gr. EES-samningsins að í slíkum tilvikum skuli tilkynna það eigi síðar en þann dag sem þær taka gildi, og að í kjölfar þess skuli veita upplýsingar og leita samráðs eins fljótt og auðið er.

Landsréttur

5 Á Íslandi mæla lög nr. 87/1992 um gjaldeyrismál, fyrir um reglur um fjármagnsflutninga, innflutning og erlendar fjárfestingar. Samkvæmt 3. gr. laganna er Seðlabanka Íslands heimilt að ákveða, að höfðu samráði við efnahags- og viðskiptaráðuneytið, að ,,takmarka eða stöðva í allt að sex mánuði“ ákveðna, nánar tilgreinda flokka fjármagnshreyfinga „ef skammtímahreyfingar fjármagns til og frá landinu valda að mati bankans óstöðugleika í gengis- og peningamálum“. Minnst er á inn- og útflutning innlends gjaldeyris í 5. tl. 3. gr. laganna.

6 Í 7. gr. laganna frá 1992 er Seðlabankanum heimilað að veita aðila undanþágu, samkvæmt umsókn þar að lútandi, frá takmörkunum á fjármagnshreyfingum. Samkvæmt 7. gr. skal Seðlabankinn, við mat á beiðni um undanþágu, horfa til þess hvaða afleiðingar takmarkanir á fjármagnshreyfingum hafa fyrir umsækjanda, hvaða markmið eru að baki takmörkununum og hvaða áhrif undanþága hefur á stöðugleika í gengis- og peningamálum. Synjun undanþágu má kæra til efnahags- og viðskiptaráðuneytisins.

7 Þann 28. nóvember 2008 samþykkti Alþingi lög nr. 134/2008 sem breyttu lögum nr. 87/1992 um gjaldeyrismál. Í þeim er meðal annars að finna bráðabirgðaákvæði sem heimilar Seðlabankanum að gefa út reglur sem ,,takmarka eða stöðva tímabundið” tilteknar fjármagnshreyfingar og gjaldeyrisviðskipti sem þeim tengjast, þar á meðal inn- og útflutning innlends gjaldeyris, ,,ef slíkar hreyfingar fjármagns til og frá landinu valda

would cause serious and significant instability in exchange rates and monetary issues". On the same day, the Defendant issued the Rules on Foreign Exchange No 1082/2008. The rules restricted cross-border movements of capital and required domestic parties that acquired foreign currency to deposit such holdings with domestic financial undertakings within a certain time-limit.

8 On 30 October 2009, the Defendant adopted the Rules on Foreign Exchange No 880/2009 ("the Rules"). According to Article 1, the purpose of the Rules is "to restrict or stop, on a temporary basis, certain types of cross-border capital movements or foreign exchange transactions related thereto that, in the Central Bank's estimation, cause serious and substantial monetary and exchange rate instability".

9 According to the first subparagraph of Article 2 of the Rules, cross-border movement of capital means the transfer or transport of capital between residents and non-residents. Pursuant to the third subparagraph of Article 2, cross-border movement of capital denominated in domestic currency is prohibited, subject to certain exceptions.

10 Article 3 of the Rules provides that foreign exchange transactions between residents and non-residents are prohibited if domestic currency is part of the transaction. Residents in Iceland are prohibited from purchasing foreign currency at a financial undertaking in Iceland when payment is made in domestic currency, unless it is demonstrated that the funds will be used, *inter alia*, for transactions with goods and services, including travel, or for certain movements of capital, including payment of interest, dividends, contractual instalments, gifts to individuals, and subsidies to charitable organisations.

11 Article 15 of the Rules sets out that Article 7 of the 1992 Act, which permits the Central Bank to grant exemptions from restrictions imposed on capital movements, applies also to the restrictions imposed by the Rules.

að mati Seðlabankans alvarlegum og verulegum óstöðugleika í gengis- og peningamálum“. Sama dag gaf Seðlabankinn út reglur um gjaldeyrismál nr. 1082/2008. Reglurnar takmörkuðu fjármagnsflutninga milli landa og skylduðu innlenda aðila sem eignast erlendan gjaldeyri til að skila honum til innlendra fjármálafyrirtækja innan tiltekins frests.

8 Þann 30. október 2009 setti Seðlabankinn reglur um gjaldeyrismál nr. 880/2009. Samkvæmt 1. gr. er markmið reglnanna „að takmarka eða stöðva tímabundið tiltekna flokka fjármagnshreyfinga og gjaldeyrisviðskipti sem þeim tengjast til og frá landinu sem valda að mati Seðlabanka Íslands alvarlegum og verulegum óstöðugleika í gengis- og peningamálum“.

9 Samkvæmt 1. mgr. 2. gr. reglnanna er fjármagnshreyfing á milli landa skilgreind sem yfirfærsla eða flutningur á fjármunum milli innlendra og erlendra aðila. Í 3. mgr. 2. gr. reglnanna segir að allar fjármagnshreyfingar samkvæmt 1. mgr. bráðabirgðaákvæðis I í lögum nr. 87/1992, á milli landa í erlendum gjaldeyri, séu óheimilar nema um sé að ræða greiðslu vegna kaupa á vöru og þjónustu eða aðrar fjármagnshreyfingar sem sérstaklega eru undanþegnar í reglunum.

10 Í 3. gr. reglnanna segir að gjaldeyrisviðskipti á milli innlendra og erlendra aðila þar sem innlendur gjaldeyrir er hluti af viðskiptunum séu óheimil. Innlendum aðila er óheimilt að kaupa erlendan gjaldeyri hjá fjármálafyrirtæki hér á landi, þegar greiðsla fer fram með innlendum gjaldeyri, nema hann sýni fram á að notkun fjárins sé vegna vöru- og þjónustuviðskipta, þ.m.t. ferðalaga, eða vegna fjármagnshreyfinga, þ.m.t. greiðslu á vöxtum, arði, samningsbundnum afborgunum, gjafa til einstaklinga og styrkja til góðgerðarsamtaka.

11 Í 15. gr. reglnanna segir að ákvæði 7. gr. laga nr. 87/1992 um gjaldeyrismál, sem heimilar Seðlabankanum að veita undanþágur frá takmörkunum vegna fjármagnshreyfinga, gildi einnig um takmarkanir sem settar eru fram í reglunum.

II FACTS AND PRE-LITIGATION PROCEDURE

12 By a letter of 8 February 2011, registered at the Court on 14 February 2011, the Reykjavík District Court requested an Advisory Opinion in a case pending before it between Pálmi Sigmarsson and the Central Bank of Iceland.

13 The Plaintiff is an Icelandic national resident in the United Kingdom. On 16 November 2009, he purchased ISK 16 400 000 on the offshore market in exchange for pounds sterling. On 8 December 2009, in order to transfer those krónur to Iceland, the Plaintiff applied to the Defendant for an exemption from the currency controls laid down in Article 2 of the Rules. The Defendant rejected the Plaintiff's application on 26 February 2010. This conclusion was upheld by a ruling of the Ministry of Economic Affairs on 8 October of the same year.

14 The Plaintiff sought judicial review of the Defendant's decision before the Reykjavík District Court, claiming that this decision contravenes Icelandic law and is incompatible with the rules on free movement of capital established in the EEA Agreement.

15 On the latter issue, the Reykjavík District Court decided in a ruling of 3 January 2011 that it was necessary to request an Advisory Opinion from the Court on the proper interpretation and application of Article 43 of the EEA Agreement. An appeal against this ruling was lodged with the Supreme Court of Iceland, which in a judgment of 7 February 2011 upheld the District Court's ruling.

16 The following question was submitted to the Court:

Is it compatible with paragraphs 2 and 4 of Article 43 of the EEA Agreement that the Icelandic State should prevent an Icelandic national, resident in Britain, from transferring Icelandic krónur, which he has purchased on the offshore market in Britain, to Iceland?

17 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 insofar as is necessary for the reasoning of the Court.

II MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

12 Með bréfi, dagsettu 8. febrúar 2011, sem skráð var í málaskrá dómstólsins 14. febrúar sama ár, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir þeim dómstól milli Pálma Sigmarssonar og Seðlabanka Íslands.

13 Stefnandi er íslenskur ríkisborgari búsettur í Bretlandi. Þann 16. nóvember 2009 keypti hann 16.400.000 ISK á aflandsmarkaði, í skiptum fyrir bresk pund. Þann 8. desember, sama ár, sótti stefnandi um undanþágu til Seðlabanka Íslands frá gjaldeyrishöftum, sem mælt er fyrir um í 2. gr. reglna nr. 880/2009 um gjaldeyrismál, til að geta flutt þessar krónur til Íslands. Þann 26. febrúar 2010 hafnaði Seðlabankinn umsókn stefnanda og sú niðurstaða var staðfest með úrskurði efnahags- og viðskiptaráðuneytisins 8. október, sama ár.

14 Stefnandi hefur borið ákvörðun Seðlabankans undir Héraðsdóm Reykjavíkur og heldur því fram að ákvörðunin sé bæði brot á íslenskum lögum og ósamrýmanleg reglum EES-samningsins um frjálsa fjármagnsflutninga.

15 Í úrskurði frá 3. janúar 2011 komst Héraðsdómur Reykjavíkur að því að nauðsynlegt væri að leita ráðgefandi álits dómstólsins varðandi síðara atriðið, um rétta túlkun og beitingu 43. gr. EES-samningsins. Úrskurðurinn var kærður til Hæstaréttar, sem staðfesti hann með dómi, 7. febrúar 2011.

16 Eftirfarandi spurning var borin undir EFTA-dómstólinn:

Samrýmist það ákvæðum 2. og 4. mgr. 43. gr. EES-samningsins að íslenska ríkið meini íslenskum ríkisborgara, búsettum í Bretlandi, að flytja íslenskar krónur, sem hann hefur keypt á aflandsmarkaði í Bretlandi, til Íslands?

17 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika og meðferðar málsins, svo og um greinargerðir sem dómstólnum bárust. Þessi atriði verða ekki rakin frekar eða rædd hér á eftir nema forsendur dómsins krefjist þess.

III THE QUESTION

Jurisdiction

Observations submitted to the Court

18 The Defendant, supported by the Icelandic Government, argues that an assessment of the necessity of a measure taken under Article 43 EEA falls outside the normal surveillance and judicial review mechanisms of the Agreement, and thus outside the jurisdiction of the Court pursuant to Article 34 SCA.

19 Given the utmost importance of the macroeconomic public interests at stake, recourse to Article 43 EEA is subject to specific conditions, which do not find their parallel under the provisions concerning the other freedoms. Thus, Articles 44 and 45 EEA set out special procedures to apply when the State has to enact such measures. In the EFTA pillar, under the provisions of Article 44 EEA and Protocol 18 to the EEA Agreement, scrutiny of the measures adopted by an EFTA State pursuant to Article 43 EEA is entrusted to the EFTA Standing Committee. According to the Defendant and the Icelandic Government, since scrutiny is not entrusted to ESA, the normal surveillance procedures do not apply and, as a consequence, ESA cannot open infringement procedures against the notifying State. Moreover, so they argue, ESA has no powers in relation to the EFTA Standing Committee.

20 Since an EFTA State's recourse to Article 43 EEA is "implemented" through "procedures", it follows, according to those parties, that where an EFTA State observes those procedures it may rely on the fact that its measures are permitted under the EEA Agreement. Given the gravity of the circumstances envisaged by Article 43 EEA, there is an imperative need for the EFTA State concerned to ascertain in advance that its acts are in accordance with the Agreement.

21 Furthermore, there is no provision that provides for the judicial review of the acts of the EFTA Standing Committee. Judicial scrutiny must be limited, therefore, to an assessment whether

III SPURNINGIN

Lögsaga

Athugasemdir bornar fram við EFTA-dómstólinn

18 Stefndi telur, líkt og ríkisstjórn Íslands, að mat á nauðsyn þeirra ráðstafana sem gripið var til í samræmi við 43. gr. EES-samningsins falli utan lögsögu venjubundinna eftirlits- og endurskoðunarleiða samningsins og þar með utan lögsögu dómstólsins samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls.

19 Stefndi bendir á að þegar horft er til þess hversu miklir þjóðhagfræðilegir almannahagsmunir eru í húfi, sé beiting 43. gr. EES-samningsins bundin sérstökum skilyrðum sem ekki verður jafnað til þeirra ákvæða sem varða aðra þætti fjórfrelsisins. Af þeim sökum mæli 44. og 45. gr. EES-samningsins fyrir um sérstaka málsmeðferð þegar ríki verður að grípa til slíkra aðgerða. Fyrir EFTA-stoðina, samkvæmt 44. gr. og bókun 18 við EES-samninginn, er athugun á ráðstöfunum EFTA-ríkis, samkvæmt 43. gr. EES-samningsins, í höndum fastanefndar EFTA-ríkjanna. Þar sem slík athugun er ekki falin ESA, telja Seðlabankinn og ríkisstjórn Íslands að hin venjulega tilhögun eftirlits eigi ekki við og þar af leiðandi geti ESA ekki hafið formlegt athugunarferli vegna brota þess ríkis sem tilkynnt hefur um ráðstafanirnar. Þau telja enn fremur að ESA hafi engin völd hvað varðar fastanefnd EFTA-ríkjanna.

20 Seðlabankinn og ríkisstjórnin halda því fram að þar sem beiting 43. gr. EES-samningsins fylgi tilteknum reglum geti EFTA-ríki sem fylgt hefur reglunum treyst því að aðgerðir þess séu heimilar samkvæmt EES-samningnum. Þegar litið sé til alvarleika þeirra kringumstæðna sem 43. gr. EES-samningsins tekur til, sé knýjandi þörf fyrir viðkomandi EFTA-ríki að geta fyrirfram verið fullvisst um að aðgerðir þess séu í samræmi við samninginn.

21 Enn fremur heimili ekkert ákvæði endurskoðun dómstóla á aðgerðum fastanefndar EFTA-ríkjanna. Endurskoðun dómstólsins verði því að takmarkast við mat á því hvort umrætt EFTA-ríki hafi

the EFTA State concerned followed the procedures prescribed in Articles 44 and 45 EEA.

22 The Plaintiff contends that the Court has jurisdiction to review the legality of measures taken under Article 43 EEA. He observes that Article 34 SCA states that the Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. If a particular area of EEA law, such as derogations from the rules on the free movement of capital were to be excluded from the jurisdiction of the Court, such exclusion would have to be explicitly set out in the relevant provisions. EEA citizens cannot be deprived of their individual rights, conferred upon them by the EEA Agreement, and the judicial defence of such rights, as a consequence of purely formal requirements under Articles 44 and 45 EEA. A mere act of notification and a non-binding opinion concerning a particular internal procedure of an EFTA State are clearly insufficient in this respect. In addition, neither the Court nor the Court of Justice of the European Union has held that rules derogating from the free movement of capital may be exempted from their respective jurisdictions.

23 ESA and the Commission argue that the implementation of measures adopted pursuant to Article 43 EEA is subject to judicial review by the Court. Admittedly, under the procedure provided for in Protocol 18 to the EEA Agreement, notice of the implementation of measures taken pursuant to Article 43 EEA is to be given to the Standing Committee of the EFTA States, and not to ESA. However, in the view of ESA and the Commission, an EFTA State cannot be accorded unfettered powers to introduce such restrictions on the fundamental freedoms. It remains for the Court to assess whether such measures are, for example, manifestly disproportionate. In their view, there is, in principle, no legal barrier to *ex post* scrutiny by ESA or the Court of a measure taken by an EFTA State under Article 43 EEA. However, given the complexity of the economic assessments involved and the type of measures at issue, EFTA States must necessarily enjoy a certain margin of discretion when implementing measures under Article 43 EEA.

fylgt málsmeðferðinni sem mælt er fyrir um í 44. og 45. gr. EES-samningsins.

22 Stefnandi heldur því fram að dómstóllinn hafi lögsögu í málum sem varða athugun á lögmæti ráðstafana sem gripið er til samkvæmt 43. gr. EES-samningsins. Hann bendir á að í 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls segi að dómstóllinn hafi lögsögu til að gefa ráðgefandi álit varðandi túlkun á EES-samningnum. Ef sérstök svið EES-réttar, svo sem frávik frá reglunum um frjálst flæði fjármagns, væru undanskilin lögsögu dómstólsins yrði að taka slíkt skýrlega fram í viðeigandi ákvæðum. Hvorki megi svipta EES-borgara einstaklingsbundnum réttindum sem samningurinn veitir þeim né réttinum til að verja slík réttindi fyrir dómstólum, á grundvelli formlegra skilyrði 44. og 45. gr. EES-samningsins. Tilkynning, ásamt útgáfu yfirlýsingar, sem er ekki bindandi, um tiltekna ráðstöfun innan EFTA-ríkis sé augljóslega ófullnægjandi í þessu sambandi. Enn fremur segir stefnandi að dómstóllinn og Evrópudómstóllinn hafi hvorugur talið að reglur sem varða frávik frá frjálsu flæði fjármagns séu undanskildar lögsögu þeirra.

23 ESA og framkvæmdastjórn Evrópusambandsins telja að ráðstafanir sem teknar eru í samræmi við 43. gr. EES-samningsins falli undir endurskoðunarvald dómstólsins. Vissulega sé það svo að eftir málsmeðferðarreglum bókunar 18 við EES-samninginn beri að tilkynna fastanefnd EFTA-ríkjanna um slíkar ráðstafanir, en ekki ESA. Engu að síður er það mat ESA og framkvæmdastjórnarinnar að EFTA-ríkjum verði ekki veitt óheft vald til að grípa til slíkra takmarkana á grundvallarréttindum. Undir dómstólinn heyri til dæmis mat á því hvort slíkar ráðstafanir gangi bersýnilega lengra en nauðsynlegt er. Að meginstefnu telja þau að engar lagalegar takmarkanir séu á eftirfarandi endurskoðun ESA eða EFTA-dómstólsins hvað varðar ráðstafanir sem EFTA-ríki grípur til samkvæmt 43. gr. samningsins. Með tilliti til hins flókna hagfræðilega mats í tengslum við ráðstafanir eins og þær sem hér um ræðir, verði EFTA-ríki engu að síður að njóta ákveðins svigrúms varðandi framkvæmd þeirra í samræmi við 43. gr. EES-samningsins.

Findings of the Court

24 The Court notes that by its question the national court essentially seeks to establish whether restrictions on cross-border movements of capital implemented in Iceland are compatible with Article 43(2) and (4) EEA, which provides for the adoption of derogations from the free movement of capital.

25 As described in paragraphs 3 to 4 above, measures taken in accordance with Article 43 EEA are implemented by means of a special procedure, whereby, as provided for in Articles 44 and 45 EEA, the EFTA Standing Committee and the EEA Joint Committee are to be notified or consulted prior to the implementation of the measures. It is common ground that Iceland has respected the relevant notification procedures. The parties disagree, however, whether the existence of the special procedure prevents the Court from having jurisdiction to assess whether the substantive requirements laid down in Article 43 EEA are fulfilled.

26 According to Article 34 SCA, the Court has jurisdiction to give advisory opinions on the "interpretation of the EEA Agreement". Pursuant to Article 1(a) SCA, the term "EEA Agreement" includes "the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein".

27 The fact that measures adopted in accordance with Article 43 EEA are implemented through a special procedure cannot entail that judicial review of the compatibility of those measures with Article 43 EEA falls outside the scope of the Court's jurisdiction.

28 First, nothing in the EEA Agreement, the SCA or other relevant legal instruments suggests that any provision governing the functioning of the EFTA Standing Committee or the EEA Joint Committee is excluded from the jurisdiction of the Court under Article 34 SCA (see, as regards the EEA Joint Committee, Case E-6/01 *CIBA and Others* [2002] EFTA Ct. Rep. 281, paragraph 22).

Álit dómstólsins

24 Dómstóllinn bendir á að með spurningu sinni leitast Héraðsdómur Reykjavíkur í reynd við að fá úr því skorið hvort takmarkanir á fjármagnsflutningum milli landa, sem gilda á Íslandi, samrýmist 2. og 4. mgr. 43. gr. EES-samningsins, sem veitir heimild til að víkja frá reglum um frjálst flæði fjármagns.

25 Eins og lýst hefur verið í 3. og 4. mgr. forsendna dómsins hér að framan er beiting úrræða í samræmi við 43. gr. EES-samningsins háð sérstakri málsmeðferð, sem gerir ráð fyrir að tilkynnt sé um slíkar ráðstafanir eða leitað samráðs við fastanefnd EFTA eða sameiginlegu EES-nefndina áður en þeim er beitt, samanber 44. og 45. gr. EES-samningsins. Það er óumdeilt í máli þessu að Ísland hafi sinnt upplýsingaskyldunni. Málsaðila greinir hins vegar á um hvort hin sérstaka málsmeðferð útiloki lögsögu dómstólsins varðandi mat á því hvort efnislegum skilyrðum 43. gr. samningsins hafi verið fullnægt.

26 Samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls hefur dómstóllinn lögsögu til að gefa ráðgefandi álit varðandi ,,túlkun á EES-samningnum". Samkvæmt a-lið 1. gr. þess samnings felur hugtakið ,,EES-samningur" í sér ,,meginmál EES-samningsins, bókanir og viðauka við hann, auk þeirra gerða sem þar er vísað til".

27 Sú staðreynd að ráðstafanir sem gripið er til í samræmi við 43. gr. EES-samningsins séu háðar sérstakri málsmeðferð getur ekki haft í för með sér að endurskoðun á því hvort ráðstafanirnar samrýmist 43. gr. EES-samningsins falli utan lögsögu dómstólsins.

28 Í fyrsta lagi bendir ekkert til þess í EES-samningnum, samningnum milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls eða öðrum lagareglum sem við eiga, að nokkurt ákvæði sem liggur til grundvallar starfi fastanefndar EFTA-ríkjanna eða sameiginlegu EES-nefndarinnar sé undanskilið lögsögu dómstólsins samkvæmt 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls (sjá, varðandi sameiginlegu EES-nefndina, mál E-6/01 *CIBA og fleiri* [2002] EFTA Ct. Rep. 281, 22. mgr.).

29 Second, the structure and content of Article 40 EEA suggest that measures implemented in accordance with Article 43 EEA must be subject to judicial review. Article 40 EEA prohibits restrictions between the Contracting Parties on the movement of capital belonging to persons resident in the EEA, and discrimination based on the nationality or the place of residence of natural or legal persons or on the place where such capital is invested. It is settled case-law that this Article confers a right upon individuals and economic operators to market access (see Cases E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 25, and E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 32). The EEA Agreement aims at securing equal treatment for individuals and economic operators and equal conditions of competition throughout the European Economic Area, as well as adequate means of enforcement, including at the judicial level (see the fourth and fifteenth recital in the Preamble to the EEA Agreement and Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 57-58). In this regard, the Court has emphasised that access to justice is an essential element of the EEA legal framework. This is evidenced by the eighth recital in the Preamble to the EEA Agreement which stresses the value of the judicial defence of rights conferred by the Agreement on individuals and intended for their benefit (see Cases E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 36, and E-5/10 *Dr Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraph 26).

30 Further to this, it must be borne in mind that although the special notification procedure provided for in Article 44 EEA, in conjunction with Protocol 18 to the EEA Agreement, and Article 45 EEA, has no equivalent in the EU pillar of the EEA, the rules governing the free movement of capital in the EEA Agreement are in substance essentially identical to those of the TFEU (see *Fokus Bank*, cited above, paragraph 23, and Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 28). In light of the objective of the EEA Agreement to provide for a homogeneous European Economic Area, this applies equally to

29 Í öðru lagi bendir efni og uppbygging 40. gr. EES-samningsins til þess að ráðstafanir sem gripið er til samkvæmt 43. gr. EES-samningsins falli undir endurskoðunarvald dómstóla. Í 40. gr. EES-samningsins er lagt bann við höftum milli samningsaðila á flutningum fjármagns sem er í eigu þeirra sem búsettir eru innan EES. Þá bannar hún mismunun sem byggð er á ríkisfangi eða búsetu einstaklinga og lögaðila, eða því hvar féð er notað til fjárfestingar. Samkvæmt viðurkenndri dómvenju hefur greinin verið túlkuð með þeim hætti að hún veiti einstaklingum og rekstraraðilum rétt til aðgangs að mörkuðum (sjá mál E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, 25. mgr., og E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, 32. mgr.). Með EES-samningnum er stefnt að því að tryggja jafnræði og jafna samkeppnisstöðu einstaklinga og rekstraraðila á öllu Evrópska efnahagssvæðinu og jafnframt að unnt sé að fylgja því á viðunandi hátt eftir í framkvæmd að þessa jafnræðis sé í reynd gætt, þar með talið fyrir dómstólum (sjá fjórða og fimmtánda lið í formálsorðum EES-samningsins og mál E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, 57. og 58. mgr.). Dómstóllinn hefur, í þessu tilliti, lagt áherslu á að aðgangur að dómstólum sé grundvallarþáttur í EES-rétti. Áttundi liður formálsorða EES-samningsins rennir stoðum undir þennan skilning, þar sem sérstaklega er lögð áhersla á nauðsyn þess að hægt sé að leita úrlausnar dómstóla varðandi réttindi sem EES-samningurinn veitir einstaklingum og ætluð eru þeim til hagsbóta (sjá mál E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, 36. mgr., og E-5/10 *Kottke* [2009-2010] EFTA Ct. Rep. 320, 26. mgr.).

30 Jafnframt verður að hafa í huga að þótt 44. gr. EES-samningsins mæli fyrir um sérstakt tilkynningarferli, í samræmi við 45. gr. og bókun 18 við EES-samninginn, sem eigi sér ekki samsvörun í ESB-stoð EES, eru reglurnar sem varða frjálst flæði fjármagns innan Evrópska efnahagssvæðisins í grundvallaratriðum þær sömu og kveðið er á um í sáttmálanum um starfshætti Evrópusambandsins (sjá áður tilvitnað mál *Fokus Bank*, 23. mgr., og mál C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, 28. mgr.). Í ljósi markmiðs EES-samningsins um að mynda einsleitt evrópskt efnahagssvæði á ofangreint jafnt við um reglur sem banna

rules prohibiting restrictions on the free movement of capital and rules governing any possible justification (see *Piazza*, cited above, paragraph 39).

31 Against this background, the Court holds that it has jurisdiction to review whether measures taken pursuant to Article 43 EEA satisfy the requirements of that provision.

Substance

Observations submitted to the Court

32 The Plaintiff argues that there is nothing to suggest that the safeguard clauses established in Article 43 EEA have a broader scope than restrictions authorised under other provisions of the EEA Agreement, or that the EFTA States have a wider margin of discretion when implementing such safeguard measures. In his view, the only difference relates to form, as the safeguard clauses established in Article 43 EEA refer to temporary measures and may be invoked only under certain circumstances.

33 In the Plaintiff's view, safeguard measures adopted in accordance with Article 43 EEA may not disregard fundamental principles of European law. However, the national legislation applied by the Central Bank and the Icelandic Government is incompatible with Article 43(2) and (4) EEA, since it delegates unrestricted powers to a state-owned entity, thereby violating the principle of legal certainty. Moreover, EEA States may not unilaterally determine the scope of restrictions on the fundamental freedoms. Finally, according to the Plaintiff, the national legislation is incompatible also with the principles of proportionality and necessity.

34 As regards legal certainty, the Plaintiff argues that a system for granting exemptions from restrictions on a fundamental freedom must be transparent and foreseeable and the conditions on which approval is granted should be defined, as should the extent of the rights and obligations of individuals. It supports that view by reference to Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraphs 33 to 36. According to the Plaintiff, the contested system of rules governing the grant of exemptions

takmarkanir á frjálsu flæði fjármagns og reglur sem mæla fyrir um réttmætar ástæður fyrir slíkum takmörkunum (sjá áður tilvitnaðan dóm *Piazza*, 39. mgr.).

31 Að framansögðu virtu telur dómstóllinn sig hafa lögsögu til að endurskoða ráðstafanir sem gerðar eru samkvæmt 43. gr. EES-samningsins og leggja á það mat hvort þær uppfylli þær kröfur sem í henni eru gerðar.

Efnisatriði

Athugasemdir bornar fram við EFTA-dómstólinn

32 Stefnandi telur ekkert benda til þess að verndarákvæði 43. gr. EES-samningsins hafi víðtækara gildissvið en takmarkanir sem heimilaðar eru í öðrum greinum samningsins, né að EFTA-ríkin hafi aukið svigrúm við beitingu slíkra verndarráðstafana. Stefnandi telur 43. gr. EES-samningsins einungis frábrugðna öðrum reglum að formi til, að því leyti að hún fjallar um tímabundnar aðgerðir sem einungis megi beita við ákveðnar aðstæður.

33 Stefnandi lítur svo, á að verndarráðstafanir sem gripið er til í samræmi við 43. gr. EES-samningsins megi ekki brjóta í bága við grundvallarreglur Evrópuréttar. Hann telur íslenska löggjöf sem Seðlabankinn og ríkisstjórn Íslands hafa beitt ósamrýmanlega 2. og 4. mgr. 43. gr. EES-samningsins, þar sem hún feli í sér óheft framsal valds til ríkisstofnunar, og brjóti þar með gegn meginreglunni um réttarvissu. Auk þess geti EES-ríki ekki einhliða ákveðið umfang takmarkana á grundvallarréttindum. Þá telur hann íslensku löggjöfina ósamrýmanlega meginreglunum um nauðsyn og meðalhóf.

34 Varðandi meginregluna um réttarvissu heldur stefnandi því fram að kerfi sem veitir undanþágur frá takmörkunum á grundvallarréttindum verði að vera gagnsætt og fyrirsjáanlegt. Skilyrði fyrir veitingu undanþágu verði að vera skilgreind, rétt eins og umfang réttinda og skyldna einstaklinga. Hann vísar til máls C-463/00 *Framkvæmdastjórnin gegn Spáni* [2003] ECR I-4581, 33.-36. mgr. þessu til stuðnings. Að mati stefnanda, er ekki að finna

to the restrictions on capital movements does not contain any objective criteria. The national legislation provides that, when assessing a request for an exemption, the Central Bank shall look to the effects of the restrictions of the capital movements for the applicant, the objectives of the restrictions, and which effect an exemption has on the stability in currency and monetary matters. In the Plaintiff's view, those requirements do not establish criteria to determine which transactions pose an actual threat to monetary and exchange rate stability. Instead, the purpose of the restrictions itself constitutes the only substantive standard. In his view, such a general, open delegation of power to a state-owned institution such as the Central Bank opens the possibility of arbitrary decision-taking.

35 As for proportionality, the Plaintiff asserts that the authorities have not proven that there is a risk that the transaction in question will endanger the objective of the legislation, and, as a consequence, that the restriction is necessary. There is, he contends, no evidence or indication that, where a small amount is to be transferred, it is necessary to deny an exemption from the restrictions. Moreover, no substantial inspection or research has been carried out by the Icelandic Government to establish the need for the safeguard measures taken.

36 In addition, the Plaintiff argues that the restrictions on capital movements in question are discriminatory, since non-Icelandic financial entities that own Icelandic krónur cannot sell their krónur for foreign currency, whereas Icelandic financial institutions may do so.

37 The Defendant, the Icelandic Government, ESA and the Commission contend that there is nothing to suggest that the prohibition on the inbound transfer of krónur violates the EEA Agreement.

38 The Defendant and the Icelandic Government submit that an EFTA State taking protective measures under Article 43 EEA enjoys a wide margin of discretion in deciding, first, whether conditions for resorting to such measures are satisfied, and, second, whether other measures are likely to cause less disturbance in

nein hlutlæg viðmið í reglum hins umdeilda kerfis um undanþágur frá takmörkunum fjármagnsflutninga. Samkvæmt íslenskri löggjöf ber Seðlabankanum, þegar hann leggur mat á undanþágubeiðni, að líta til þeirra áhrifa sem takmarkanir á fjármagnsflutningum hafa fyrir umsækjanda, markmiða takmarkananna, og til þeirra afleiðinga sem undanþágan geti haft fyrir stöðugleika í gengis- og gjaldeyrismálum. Stefnandi telur þessi skilyrði ekki setja nein viðmið um hvaða fjármagnsflutningar stefni stöðugleika í gengis- og peningamálum í raunverulega hættu. Þess í stað felst eina efnislega viðmiðið í sjálfum tilgangi takmarkananna. Að hans mati getur slíkt almennt og opið framsal valds til ríkisstofnunar á borð við Seðlabankann leitt til geðþóttaákvarðana.

35 Að því er snertir meðalhóf, heldur stefnandi því fram að stjórnvöld hafi ekki sannað að umræddir fjármagnsflutningar myndu tefla markmiði laganna í tvísýnu og að takmörkunin hafi verið nauðsynleg af þeim sökum. Hann segir ósannað, og ekkert benda til þess að þörf sé á að synja um undanþágu í tilvikum þar sem til stendur að millifæra lágar fjárhæðir. Enn fremur segir hann enga efnislega athugun eða könnun hafa farið fram af hálfu ríkisstjórnar Íslands, sem sýni fram á nauðsyn þess að grípa til umræddra verndarráðstafana.

36 Stefnandi heldur því einnig fram, að umræddar takmarkanir á fjármagnsflutningum leiði til mismununar, þar sem erlendar fjármálastofnanir sem eigi íslenskar krónur geti ekki selt þær gegn greiðslu í erlendum gjaldeyri, en íslenskum fjármálastofnununum sé það heimilt.

37 Seðlabankinn, ríkisstjórn Íslands, ESA og framkvæmdastjórn ESB halda því fram að ekkert bendi til þess að bann við innflutningi íslenskra króna brjóti gegn EES-samningnum.

38 Seðlabankinn og ríkisstjórn Íslands telja að EFTA-ríki sem grípur til verndarráðstafana samkvæmt 43. gr. EES-samningsins njóti aukins svigrúms til ákvörðunar á því annars vegar, hvort skilyrði fyrir beitingu slíkra ráðstafana séu uppfyllt, og hins vegar, hvort önnur úrræði séu til þess fallin að valda minni röskun á

the functioning of the EEA. They argue by reference to Joined Cases C-111/88, C-112/88 and C-20/89 *Greece and Crete Citron Producers' Association* v *Commission* [1990] ECR I-1559 that where a complex assessment of economic factors is called for, the judicial instances cannot invalidate the assessment made unless there are gross or manifest errors.

39 In any event, they contend that it is clear that the collapse of Iceland's banking system together with the Central Bank's limited foreign currency reserves entailed that a situation envisaged in Article 43(2) and (4) EEA existed. This allowed Iceland to take protective measures in the form of a prohibition on the inbound transfer of krónur. From late 2008, the Defendant's foreign exchange reserves diminished day by day until the inbound transfer of Icelandic krónur was prohibited in late October 2009. Without those measures, the currency could not have been stabilised.

40 The Defendant and the Icelandic Government assert that the rules restricting the inbound transfer of Icelandic krónur are not discriminatory, since they apply equally to Icelandic as well as non-Icelandic citizens and irrespective of whether the owner of the krónur is resident in Iceland or not. It is simply the nature of the funds – offshore krónur – which is decisive, and not the nationality or the residence of the holder of those funds.

41 As regards legal certainty and proportionality, the Defendant argues that these principles are not relevant. In the view of the Defendant, the principle of proportionality applies only as regards measures applied in accordance with Article 43(3) EEA. In any event, the rules on capital control did not and do not prevent the Plaintiff from paying off his debt. Moreover, the volume of offshore Icelandic krónur the Plaintiff wishes to import has no bearing on the case.

42 ESA and the Commission submit that application of the conditions established in Article 43(2) and (4) EEA calls for a complex assessment of various macroeconomic factors. This suggests, they continue, that EFTA States enjoy a certain

framkvæmd EES-samningsins. Þau telja að þegar þörf er á flóknu mati hagfræðilegra þátta geti dómstólar ekki ógilt slíkt mat nema á því séu verulegir eða augljósir annmarkar og vísa í því sambandi til sameinaðra mála C-111/88, C-112/88 og C-20/89 *Grikkland and Crete Citron Producers' Association* gegn *Framkvæmdastjórninni* [1990] ECR I-1559.

39 Þau telja, hvað sem öðru líður, ljóst að hrun íslensks bankakerfis ásamt takmörkuðum gjaldeyrisforða Seðlabankans hafi skapað þær aðstæður sem 2. og 4. mgr. 43. gr EES-samningsins taka til. Íslenska ríkinu hafi því verið heimilt að grípa til verndarráðstafana í formi banns við innflutningi íslenskra króna. Frá síðari hluta ársins 2008 minnkaði gjaldeyrisforði Seðlabankans dag frá degi, þar til sett var bann við innflutningi króna undir lok októbermánaðar 2009. Ekki hefði tekist að gera gengi krónunnar stöðugt án þessara aðgerða.

40 Seðlabankinn og ríkisstjórn Íslands telja reglurnar um takmörkun við innflutningi íslenskra króna ekki fela í sér mismunun þar sem þær eigi jafnt við um íslenska ríkisborgara og ríkisborgara annarra landa óháð því hvort eigandinn er búsettur á Íslandi eður ei. Eðli fjárins – að það sé í formi aflandskróna – er það sem ræður úrslitum en ekki ríkisfang eða dvalarstaður eiganda þess.

41 Hvað varðar réttarvissu og meðalhóf telur stefndi, Seðlabanki Íslands, að meginreglurnar tvær eigi ekki við í máli þessu. Að mati stefnda hefur meðalhófsreglan einungis þýðingu í málinu í tengslum við þau úrræði sem gripið er til í samræmi við 3. mgr. 43. gr. EES-samningsins. Hvað sem því þó líður telur stefndi að gjaldeyrishöftin hafi hvorki fyrr né síðar hindrað stefnanda í að greiða niður skuldir sínar. Að mati stefnda hefur upphæð þeirra aflandskróna sem stefnandi vill flytja til landsins enn fremur enga þýðingu í þessu máli.

42 ESA og framkvæmdastjórn ESB telja að þau skilyrði sem sett eru í 2. og 4. mgr. 43. gr. EES-samningsins krefjist flókins hagfræðilegs mats á ýmsum þjóðhagfræðilegum þáttum. Þetta mæli með því að EFTA-ríki njóti ákveðins svigrúms við mat á því hvort umrædd

margin of discretion when it comes to determining whether the conditions are satisfied and, if so, the exact measures to be taken. In many cases this determination concerns fundamental choices of economic policy.

43 At any rate, there is, in their view, little doubt that, in the case in hand, in the wake of the financial crisis, the situation in the Icelandic economy met the conditions for the application of Article 43(2) and (4) EEA.

44 ESA and the Commission argue that the measures taken by Iceland did not discriminate on the basis of nationality or residence. The protective measures in question were targeted to protect a specific currency, the Icelandic krónur. The rationale for emergency exchange controls is precisely to protect a specific currency.

45 With respect to legal certainty, ESA submits that there is nothing to suggest that the rules in question, including the conditions for granting exemptions, were not transparent or objective. On the contrary, it appears to ESA that their scope was clearly delineated leaving to the Central Bank no margin for arbitrary decisions. Likewise, the Commission takes the view that the principle of legal certainty has not been infringed.

46 Both ESA and the Commission assert that the measures taken are proportionate. ESA notes that the restrictions referred only to Icelandic krónur. The Plaintiff could have transferred the funds to Iceland in a different currency without any restriction. Thus, ESA is of the opinion that the restriction did not go further than was necessary to address the disturbances in the Icelandic currency market due to the financial crisis.

47 The Commission submits that the prohibition does not deprive an individual of the possibility to pay his debts. It merely places an additional financial burden upon him by requiring him to do so via the onshore market, thus, denying him the opportunity to take advantage of the more favourable offshore market. As regards the Plaintiff's submission that an exemption should

skilyrði teljist uppfyllt og til hvaða ráðstafana beri að grípa. Í mörgum tilvikum geti þetta mat snúist um grundvallaratriði við mörkun efnahagsstefnu.

43 Hvað sem þessu líður telja ESA og framkvæmdastjórnin það tæpast vafa undirorpið í málinu að aðstæður í íslensku efnahagslífi í kjölfar fjármálakreppunnar hafi uppfyllt skilyrðin fyrir beitingu 2. og 4. mgr. 43. gr. EES-samningsins.

44 ESA og framkvæmdastjórn ESB halda því fram að úrræðin sem Ísland greip til hafi ekki falið í sér mismunun á grundvelli þjóðernis eða búsetu. Hinar umdeildu verndarráðstafanir hafi verið gerðar til að vernda tiltekinn gjaldmiðil, íslensku krónuna. Rökin að baki gjaldeyrishöftum sem neyðarúrræði eru einmitt þau að vernda tiltekinn gjaldmiðil.

45 Varðandi réttarvissu telur ESA ekkert í umræddum reglum, eða skilyrðum þeirra fyrir veitingu undanþágu, gefa til kynna að þær séu ekki gagnsæjar og almennar. Þvert á móti sýnist umfang þeirra skýrt afmarkað og Seðlabankanum ekki gefið svigrúm til töku geðþóttaákvarðana. Framkvæmdastjórn ESB er jafnframt þeirrar skoðunar að ekki hafi verið brotið gegn meginreglunni um réttarvissu.

46 ESA og framkvæmdastjórn ESB telja að meðalhófs hafi verið gætt við val á þeim úrræðum sem gripið var til. ESA tekur fram að takmarkanirnar hafi einungis gilt um íslenskar krónur. Stefnandi hefði því getað flutt fjármagnið til Íslands í öðrum gjaldmiðli án nokkurra takmarkana. Þar af leiðandi lítur ESA svo á að takmarkanirnar hafi ekki gengið lengra en nauðsynlegt var til að takast á við þann óstöðugleika sem fjármálakreppan skapaði á íslenskum gjaldeyrismarkaði.

47 Framkvæmdastjórnin bendir á að bannið við innflutningi króna til Íslands komi ekki í veg fyrir að einstaklingar geti greitt skuldir sínar. Það leggi einungis auknar fjárhagslegar kvaðir á þá með því að fara fram á að þeir inni greiðslurnar af hendi á innanlandsmarkaði frekar en að færa sér í nyt hagstæðari aflandsmarkað. Hvað varðar röksemdir stefnanda um að

have been granted in his case because the amounts involved were relatively small. A transfer to Iceland could not properly be considered to affect the stability of the krónur. The Commission asserts that such argument fails to take account of the fact that if all holders of offshore krónur sought to carry out the same type of operation as the Plaintiff, the impact would clearly be considerable. Moreover, in the Commission's view, the existence of an exemption scheme as such tends to reinforce the view that the measures satisfy the requirements of proportionality.

Findings of the Court

48 Article 43 EEA provides for derogations from the free movement of capital established in Article 40 EEA. Article 43(2) EEA provides that if movements of capital lead to disturbances in the functioning of the capital market in any EFTA State, the State concerned may take protective measures in the respective field. Moreover, it follows from Article 43(4) EEA that where an EFTA State is in difficulties, or is seriously threatened with difficulties, as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardize the functioning of the EEA Agreement, the State concerned may take protective measures.

49 As described above in paragraphs 3 to 4, the EFTA Standing Committee and the EEA Joint Committee are, pursuant to Article 44 EEA in conjunction with Protocol 18 to the EEA Agreement, and Article 45 EEA, to be notified and consulted prior to the implementation of the protective measures. Moreover, the EFTA Standing Committee is required to examine and deliver an opinion on the introduction of the measures, keep the situation under review and issue recommendations, as appropriate. However, neither committee has been vested with a competence to issue binding decisions to determine whether the protective measures are compatible with Article 43 EEA.

50 The substantive conditions laid down in Article 43(2) and (4) EEA call for a complex assessment of various macroeconomic factors.

fjárhæðin í hans tilviki sé tiltölulega lág og flutningur hennar til Íslands gæti ekki með réttu talist hafa áhrif á stöðugleika krónunnar, er það álit framkvæmdastjórnarinnar að með slíkum rökstuðningi sé sú staðreynd ekki tekin með í reikninginn, að ef allir eigendur aflandskróna myndu leitast við að framkvæma sams konar gerning og stefnandi, hefði slíkt augljóslega veruleg áhrif. Að mati framkvæmdastjórnarinnar rennir sjálf tilvist slíks undanþágukerfis frekari stoðum undir þá skoðun að meðalhófs hafi verið gætt við setningu reglnanna.

Álit dómstólsins

48 Í 43. gr. EES-samningsins er að finna heimildir til undanþágu frá frjálsum flutningum fjármagns eins og því er lýst í 40. gr. EES-samningsins. Í 2. mgr. 43. gr. EES-samningsins er kveðið á um að í tilvikum þar sem fjármagnsflutningar leiði til röskunar á starfsemi fjármagnsmarkaðar í EFTA-ríki geti hlutaðeigandi ríki gripið til verndarráðstafana á viðkomandi sviði. Enn fremur segir í 4. mgr. sömu greinar að ef EFTA-ríki eigi í örðugleikum með greiðslujöfnuð eða alvarleg hætta sé á að örðugleikar skapist, hvort sem það stafar af heildarójafnvægi í greiðslujöfnuði eða því hvaða gjaldmiðli það hefur yfir að ráða, geti hlutaðeigandi ríki gripið til verndarráðstafana, einkum ef örðugleikarnir eru til þess fallnir að stofna framkvæmd EES-samningsins í hættu.

49 Eins og lýst er í 3. og 4. mgr. forsendna dómsins hér að framan, kveður 44. gr. EES-samningsins á um tilkynningaskyldu og að leitað sé samráðs við fastanefnd EFTA-ríkjanna og sameiginlegu EES-nefndina áður en gripið er til verndarráðstafana, í samræmi við bókun 18 og 45. gr. EES-samningsins. Þá er fastanefnd EFTA-ríkjanna skylt að athuga og skila áliti um beitingu verndarráðstafananna, endurskoða aðstæður og mæla með breytingum, eftir því sem við á. Þó hefur hvorugri nefndinni verið falið vald til að taka bindandi ákvarðanir um hvort verndarráðstafanirnar samrýmist 43. gr. EES-samningsins.

50 Hin efnislegu skilyrði sem kveðið er á um í 2. og 4. mgr. 43. gr. EES-samningsins útheimta flókið mat á ýmsum þjóðhagfræði-

EFTA States must therefore enjoy a wide margin of discretion, both in determining whether the conditions are fulfilled, and the choice of measures taken, as those measures in many cases concern fundamental choices of economic policy.

51 The protective measures in question, the Rules restricting importation of offshore Icelandic krónur, were adopted to prevent transactions which would cause serious and substantial monetary and exchange rate instability. According to the facts presented to the Court, a critical situation existed in Iceland after the financial crash in late 2008. This situation was characterised, *inter alia*, by substantial reductions in the international value of the króna and of Iceland's foreign exchange reserves. In those circumstances, the substantive conditions required for taking protective measures under Article 43(2) and (4) EEA were satisfied at the time when the Rules were adopted (October 2009), as well as when the Plaintiff was finally denied an exemption from the prohibition on the importation of offshore krónur (October 2010). It appears that the Plaintiff does not dispute the facts as presented to the Court nor the fact that the conditions for introducing protective measures were satisfied at the time when the measures were taken.

52 For a restriction on the free movement of capital to be justified, the national rules adopted must be suitable for securing the objective they pursue and must not exceed what is necessary in order to achieve it, so as to accord with the principle of proportionality (see *Piazza*, cited above, paragraph 39, and, for comparison, Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraph 35). In addition, measures must satisfy the principle of legal certainty (see *Fokus Bank*, cited above, paragraph 37).

53 The Court has not been provided with information to suggest that the measures taken are not in conformity with the principle of proportionality. On the contrary, it appears that it was only when the rules prohibiting inbound transfer of offshore krónur were enacted that the króna and the foreign exchange reserves were stabilised. This suggests that the measures did not go beyond

legum þáttum. EFTA-ríki njóta því aukins svigrúms til að meta hvort skilyrðin teljist uppfyllt og ákveða til hvaða úrræða skuli gripið, þar sem slík ákvörðun snýst í mörgum tilvikum um grundvallaratriði við mörkun efnahagsstefnu.

51 Verndarráðstafanirnar sem deilt er um í þessu máli, þ.e. reglurnar sem takmarka innflutning á aflandskrónum, voru settar til að hindra fjármagnsflutninga sem gætu valdið alvarlegum og verulegum óstöðugleika í gengis- og peningamálum. Atvik málsins, sem vísað hefur verið til fyrir dómstólnum, gefa til kynna að alvarlegar aðstæður hafi skapast á Íslandi eftir hrun fjármálakerfisins síðla árs 2008. Þessar aðstæður lýstu sér meðal annars í verulegri gengislækkun íslensku krónunnar og minnkandi gjaldeyrisforða. Við þessar aðstæður voru uppfyllt efnislegu skilyrðin fyrir því að grípa til verndarráðstafana samkvæmt 2. og 4. mgr. 43. gr. EES-samningsins, jafnt á þeim tímapunkti þegar reglurnar voru settar (í október 2009) sem og þegar stefnanda var endanlega meinuð undanþága frá gildandi banni við innflutningi aflandskróna (í október 2010). Stefnandi virðist hvorki andmæla því að málsatvik hafi verið með þeim hætti sem þeim hefur verið lýst fyrir dómstólnum, né því að skilyrðin fyrir því að grípa til verndarráðstafana hafi verið uppfyllt á þeim tíma sem það var gert.

52 Til þess að unnt sé að réttlæta takmarkanir á frjálsum fjármagnsflutningum verða reglur EES-ríkis að vera til þess fallnar að ná markmiðinu sem að er stefnt og mega í því sambandi ekki ganga lengra en nauðsyn krefur. Þessar kröfur verður að gera til þess að reglurnar teljist samræmast meðalhófsreglunni (sjá áður tilvitnað mál *Piazza*, 39. mgr., og til samanburðar mál C-174/04 *Framkvæmdastjórnin gegn Ítalíu* [2005] ECR I-4933, 35. mgr.). Þar að auki verða þau úrræði sem gripið er til að samrýmast meginreglunni um réttarvissu (sjá áður tilvitnað mál, *Fokus Bank*, 37. mgr.).

53 Engin gögn hafa verið lögð fyrir dómstólinn sem benda til þess að úrræðin sem gripið var til hafi brotið í bága við meðalhófsregluna. Þvert á móti, virðist stöðugleiki íslensku krónunnar og gjaldeyrisforðans ekki hafa náðst fyrr en sett voru gjaldeyrishöft

what was necessary to attain the objective pursued. Moreover, as noted by the Commission, the prohibition on the transfer of offshore krónur to Iceland does not render it impossible for individuals, such as the Plaintiff, to pay off debt in Iceland. It merely entails that more favourable exchange rates for Icelandic krónur on the offshore market cannot readily be obtained. Finally, the argument advanced by the Plaintiff, to the effect that the amount of funds in question is small, and that, consequently, it is disproportionate not to grant him an exception, is flawed. If all holders of offshore krónur were to carry out the same type of transaction as the Plaintiff, this would, taken together, have a major impact.

54 With regard to the Plaintiff's assertion that the measures in question cannot be regarded as necessary, the Court notes that it is inherent in the principle of proportionality that derogations from a fundamental freedom can only be upheld if they are necessary. However, what is at stake in the case at hand is not the question whether the necessity requirement is fulfilled today, but whether it was fulfilled at the relevant time.

55 The contested measures and the scheme providing for exemptions thereto also do not contravene the principle of legal certainty. All inbound transfer of offshore krónur is prohibited, save where an exemption is granted. When considering applications for exemptions, the national rules provide that an assessment must be made of the consequences the restrictions on capital movements will have for the applicant, the objectives behind the restrictions and the impact which an exemption will have on exchange rate and monetary stability. Consequently, applicants are given sufficient indication of the circumstances on the basis of which applications for exemption will be decided.

56 In light of the foregoing, the answer to the referring court's question must be that a national measure which prevents inbound transfer into Iceland of Icelandic krónur purchased on the offshore market, is compatible with Article 43(2) and (4) of the EEA Agreement in circumstances such as those in the case before the referring court.

sem bönnuðu innflutning aflandskróna. Það bendir til þess að með ráðstöfununum hafi ekki verið gengið lengra en nauðsynlegt var til að ná markmiðinu sem að var stefnt. Enn fremur felur bann við innflutningi aflandskróna ekki í sér hindrun fyrir einstaklinga, líkt og stefnanda í máli þessu, sem vilja greiða niður skuldir sínar á Íslandi, eins og framkvæmdastjórn ESB hefur bent á. Bannið felur einungis í sér að ekki er jafn auðvelt að færa sér hagstæðari gengismun í nyt með því að kaupa íslenskar krónur á aflandsmarkaði. Loks er stefnanda ekkert hald í þeirri röksemd að upphæð fjárins sé lág og að þar af leiðandi standi engin efni til að synja beiðni hans um undanþágu. Ef allir eigendur aflandskróna ættu sams konar viðskipti myndu þau samanlagt hafa veruleg áhrif.

54 Varðandi röksemd stefnanda um að umræddar aðgerðir geti ekki talist nauðsynlegar, bendir dómstóllinn á að meðalhófsreglan feli í sér að frávik frá grundvallarréttindum fái aðeins staðist ef þau eru nauðsynleg. Hins vegar er spurningin sem mestu máli skiptir fyrir mál það sem hér er til úrlausnar, ekki sú hvort nauðsynleg skilyrði séu uppfyllt í dag, heldur hvort þau hafi verið uppfyllt þegar til ráðstafananna var gripið.

55 Reglurnar sem ágreiningur þessa máls lýtur að og undanþágukerfið sem í þeim er að finna brjóta heldur ekki bága við meginregluna um réttarvissu. Allur innflutningur aflandskróna er bannaður, nema að sérstök undanþága sé veitt. Í reglunum er kveðið á um að við mat á því hvort undanþága skuli veitt beri að horfa til þess hvaða afleiðingar takmarkanir á fjármagnshreyfingum hafi fyrir umsækjanda, hvaða markmið búi að baki takmörkununum og hvaða áhrif undanþága muni hafa á stöðugleika í gengis- og peningamálum. Af því leiðir að umsækjendum er gefið til kynna með nægilega skýrum hætti til hvaða þátta sé litið við mat á umsóknum um undanþágu.

56 Í samræmi við það sem að framan er rakið er svarið við spurningu Héraðsdóms Reykjavíkur að ráðstafanir í landsrétti sem hindra innflutning aflandskróna til Íslands samrýmast 2. og 4. mgr. 43. gr. EES-samningsins við aðstæður eins og þær sem eru til umfjöllunar í málinu sem rekið er fyrir héraðsdómi.

IV COSTS

57 The costs incurred by the Icelandic Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Héraðsdómur Reykjavíkur, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

A national measure which prevents inbound transfer into Iceland of Icelandic krónur purchased on the offshore market, is compatible with Article 43(2) and (4) of the EEA Agreement in circumstances such as those in the case before the referring court.

Carl Baudenbacher Per Christiansen Benedikt Bogason

Delivered in open court in Luxembourg on 14 December 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President

IV MÁLSKOSTNAÐUR

57 Ríkisstjórn Íslands, Eftirlitsstofnun EFTA og framkvæmdastjórn Evrópusambandsins, sem skilað hafa greinargerðum til EFTA-dómstólsins, skulu hver bera sinn málskostnað. Þar sem um er ræða mál sem er hluti af málarekstri fyrir Héraðsdómi Reykjavíkur kemur það í hlut þess dómstóls að kveða á um kostnað málsaðila.

Með vísan til framangreindra forsendna lætur,

DÓMSTÓLLINN

uppi svohljóðandi ráðgefandi álit um spurningu þá sem Héraðsdómur Reykjavíkur beindi til dómstólsins:

Ráðstafanir í landsrétti sem hindra innflutning aflandskróna til Íslands samrýmast 2. og 4. mgr. 43. gr. EES-samningsins við aðstæður eins og þær sem eru til umfjöllunar í málinu sem rekið er fyrir héraðsdómi.

Carl Baudenbacher Per Christiansen Benedikt Bogason

Kveðið upp í heyranda hljóði í Lúxemborg 14. desember 2011.

Skúli Magnússon
dómritari

Carl Baudenbacher
forseti

REPORT FOR THE HEARING

in Case E-3/11

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court), in the case of

Pálmi Sigmarsson

and

the Central Bank of Iceland

concerning the interpretation of paragraphs 2 and 4 of Article 43 of the EEA Agreement.

I INTRODUCTION

1. By a letter of 8 February 2011, registered at the EFTA Court on 14 February 2011, the Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between Pálmi Sigmarsson ("the Plaintiff") and the Central Bank of Iceland ("the Defendant").

2. The case before the Reykjavík District Court concerns the decision by the Defendant not to grant the Plaintiff permission to import into Iceland domestic currency in the amount of ISK 16 400 000.

II LEGAL BACKGROUND

EEA law

3. Article 40 of the EEA Agreement reads as follows:

Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.

...

SKÝRSLA FRAMSÖGUMANNS

í máli E-3/11

Beiðni um ráðgefandi álit EFTA-dómstólsins, samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, frá Héraðsdómi Reykjavíkur, Íslandi, í máli

Pálma Sigmarssonar

gegn

Seðlabanka Íslands

varðandi túlkun á 2. og 4. mgr. 43. gr. EES-samningsins.

I INNGANGUR

1. Með bréfi dagsettu 8. febrúar 2011, sem skráð var í málaskrá dómstólsins 14. febrúar sama ár, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Pálma Sigmarssonar, stefnanda, og Seðlabanka Íslands, stefnda.

2. Málið fyrir Héraðsdómi Reykjavíkur snýst um þá ákvörðun stefnda, að synja umsókn stefnanda um leyfi til innflutnings á innlendum gjaldeyri að fjárhæð 16.400.000 ISK.

II LÖGGJÖF

EES-réttur

3. Í 40. gr. EES-samningsins segir:

> *Innan ramma ákvæða samnings þessa skulu engin höft vera milli samningsaðila á flutningum fjármagns í eigu þeirra sem búsettir eru í aðildarríkjum EB eða EFTA-ríkjum né nokkur mismunun, byggð á ríkisfangi eða búsetu aðila eða því hvar féð er notað til fjárfestingar. Í XII. viðauka eru nauðsynleg ákvæði varðandi framkvæmd þessarar greinar.*
>
> *...*

4. Article 43(2) and (4) of the EEA Agreement provides as follows:

Article 43

...

(2) If movements of capital lead to disturbances in the functioning of the capital market in any EC Member State or EFTA State, the Contracting Party concerned may take protective measures in the field of capital movements.

...

(4) Where an EC Member State or an EFTA State is in difficulties, or is seriously threatened with difficulties, as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardize the functioning of this Agreement, the Contracting Party concerned may take protective measures.

5. Article 44 EEA provides that the Community, on the one hand, and the EFTA States, on the other, shall apply their internal procedures to implement the provisions of Article 43 EEA. In the case of the EFTA States, Protocol 18 to the EEA Agreement on internal procedures for the implementation of Article 43, together with Protocol 2 to the Agreement on a Standing Committee of the EFTA States, provide that notice of measures must be given "in good time" to the Standing Committee of the EFTA States ("the EFTA Standing Committee"). However, in cases of secrecy or urgency, notice must be given to the other EFTA States and to the EFTA Standing Committee at the latest by the date of entry into force of the measures. The EFTA Standing Committee is required to deliver an opinion, keep the situation under review and issue recommendations, as appropriate.

6. Article 45 EEA sets out that decisions, opinions and recommendations related to the measures laid down in Article 43 EEA must be notified to the EEA Joint Committee. Moreover, the measures must be the subject of prior consultations and exchange of information within the EEA Joint Committee. When measures are

4. Í 2. og 4. mgr. 43. gr. EES-samningsins segir:

43. gr.

...

2. Leiði fjármagnsflutningar til röskunar á starfsemi fjármagnsmarkaðar í aðildarríki EB eða EFTA-ríki getur hlutaðeigandi samningsaðili gripið til verndarráðstafana á sviði fjármagnsflutninga.

...

4. Eigi aðildarríki EB eða EFTA-ríki í örðugleikum með greiðslujöfnuð eða alvarleg hætta er á að örðugleikar skapist, hvort sem það stafar af heildarójafnvægi í greiðslujöfnuði eða því hvaða gjaldmiðli það hefur yfir að ráða, getur hlutaðeigandi samningsaðili gripið til verndarráðstafana, einkum ef örðugleikarnir eru til þess fallnir að stofna framkvæmd samnings þessa í hættu.

5. Í 44. gr. EES-samningsins segir, að Evrópubandalagið, annars vegar, og EFTA-ríkin, hins vegar, skuli beita eigin málsmeðferð vegna framkvæmdar ákvæða 43. gr. EES-samningsins. Hvað EFTA-ríkin varðar, segir í bókun 18 við EES-samninginn, um reglur aðila vegna framkvæmdar 43. gr., sem og í bókun 2 við Samninginn um fastanefnd EFTA-ríkjanna, að tilkynna skuli fastanefnd EFTA-ríkjanna um ráðstafanir ,,með góðum fyrirvara“. *Þó* skal, ef um leynd er að ræða eða ef málið er aðkallandi, tilkynna það hinum EFTA-ríkjunum og fastanefnd EFTA-ríkjanna í síðasta lagi daginn sem ráðstafanirnar öðlast gildi. Fastanefnd EFTA-ríkjanna skal skila áliti, endurskoða aðstæður og mæla með breytingum, eftir því sem við á.

6. Í 45. gr. EES-samningsins segir að tilkynna beri sameiginlegu EES-nefndinni um ákvarðanir, álit og tilmæli vegna þeirra ráðstafana sem lýst er í 43. gr. EES-samningsins. Enn fremur segir að ekki megi grípa til neinna ráðstafana nema að höfðu samráði í sameiginlegu EES-nefndinni og eftir að henni hafa

taken in accordance with Article 43(2) and (4) EEA, notice thereof must be given at the latest by the date of their entry into force, and the exchange of information and consultations must take place as soon as possible thereafter.

National law*

7. Act No 87/1992 on Foreign Exchange ("the 1992 Act") lays down certain rules concerning capital movements, imports and foreign investments. According to Article 3, the Central Bank of Iceland may decide, in consultation with the Ministry of Economic Affairs, to "restrict or suspend for a period of up to six months" certain listed categories of capital movements "if short-term capital movements to and from Iceland create, in the Bank's opinion, exchange-rate and monetary instability". The import and export of domestic currency is mentioned in point 5 of Article 3.

8. Article 7 of the 1992 Act permits the Central Bank, upon application by a party, to grant exemptions from restrictions imposed on capital movements. According to point 2 of that Article, the Central Bank of Iceland shall in this regard assess the consequences which restrictions on capital movements have for the applicant, the objectives behind the restrictions and the impact which an exemption will have on exchange rate and monetary stability. A refusal to grant an exemption may be referred to the Ministry of Economic Affairs.

9. On 28 November 2008, the Icelandic parliament passed Act No 134/2008, which amended the 1992 Act, adding, *inter alia*, a transitional provision authorising the Central Bank to adopt, until 30 November 2010, rules which "restrict or temporarily suspend" certain listed capital movements and related foreign exchange transactions, including the import and export of domestic currency, "if the Bank considers that such movements of capital to and from the country would cause serious and significant instability in exchange rates and monetary issues". On the same day, the Defendant issued the Rules on Foreign Exchange

* Translations of national provisions are based on translations contained in the documents of the case

verið veittar upplýsingar. Þegar gerðar eru ráðstafanir í samræmi við 2. og 4. mgr. 43. gr. EES-samningsins skal tilkynna það eigi síðar en þann dag sem þær öðlast gildi. Í kjölfar þess skal veita upplýsingar og leita samráðs eins fljótt og auðið er.

Landsréttur*

7. Í lögum nr. 87/1992, um gjaldeyrismál, er mælt fyrir um reglur um fjármagnsflutninga, innflutning og erlendar fjárfestingar. Samkvæmt 3. gr. laganna er Seðlabanka Íslands heimilt að ákveða, að höfðu samráði við efnahags- og viðskiptaráðuneytið, að ,,takmarka eða stöðva í allt að sex mánuði“ ákveðna, nánar tilgreinda flokka fjármagnshreyfinga „ef skammtímahreyfingar fjármagns til og frá landinu valda að mati bankans óstöðugleika í gengis- og peningamálum“. Fjallað er um inn- og útflutning innlends gjaldeyris í 5. tl. 3. gr. laganna.

8. Ákvæði 7. gr. laganna heimila Seðlabankanum að veita aðila undanþágu, samkvæmt umsókn þar að lútandi, frá takmörkunum á fjármagnshreyfingum. Samkvæmt 2. mgr. 7. gr. skal Seðlabankinn, við mat á beiðni um undanþágu, horfa til þess hvaða afleiðingar takmarkanir á fjármagnshreyfingum hafa fyrir umsækjanda, hvaða markmið eru að baki takmörkunum og hvaða áhrif undanþága hefur á stöðugleika í gengis- og peningamálum. Synjun undanþágu má kæra til efnahags- og viðskiptaráðuneytisins.

9. Alþingi setti þann 28. nóvember 2008 lög nr. 134/2008, um breytingu á lögum nr. 87/1992 um gjaldeyrismál. Í þeim lögum er meðal annars að finna bráðabirgðaákvæði sem heimilar Seðlabankanum, fram til 30. nóvember 2010, að gefa út reglur sem ,,takmarka eða stöðva tímabundið“ tilteknar fjármagnshreyfingar og gjaldeyrisviðskipti sem þeim tengjast, þar á meðal inn- og útflutning innlends gjaldeyris, ,,ef slíkar hreyfingar fjármagns til og frá landinu valda að mati Seðlabankans alvarlegum og verulegum óstöðugleika í gengis- og peningamálum“. Sama dag gaf Seðlabankinn út

* Á einungis við í enskri útgáfu

No 1082/2008. The rules restricted cross-border movements of capital and required domestic parties that acquired foreign currency to deposit such holdings with domestic financial undertakings within a certain time-limit.

10. On 30 October 2009, the Defendant adopted the Rules on Foreign Exchange No 880/2009 ("the Rules"). According to Article 1, the purpose of the Rules is "*to restrict or stop, on a temporary basis, certain types of cross-border capital movements or foreign exchange transactions related thereto that, in the Central Bank's estimation, cause serious and substantial monetary and exchange rate instability*".

11. Article 2 of the Rules provides as follows:

For the purposes of these Rules, cross-border movement of capital shall mean the transfer or transport of capital between residents and non-residents.

All cross-border movement of foreign-denominated capital according to the Paragraph 1 of Temporary Provision 1 of Act No 87/1992 is prohibited unless it is for the purchase of goods or services or is particularly exempted according to these Rules.

...

12. Article 3 of the Rules reads as follows:

Foreign exchange transactions between residents and non-residents are prohibited if domestic currency is part of transaction.

Residents are prohibited from purchasing foreign currency at a financial undertaking in Iceland, when payment is remitted in domestic currency, unless they demonstrate that the funds will be used for transaction with goods and services, including travel, or for movements of capital according to Article 10 and Article 11.

...

13. Article 15 of the Rules sets out that Article 7 of the 1992 Act, which permits the Central Bank to grant exemptions from restrictions imposed on capital movements, applies also to the restrictions imposed by the Rules.

reglur um gjaldeyrismál nr. 1082/2008. Reglurnar takmörkuðu fjármagnsflutninga milli landa og skylduðu innlenda aðila sem eignast erlendan gjaldeyri til að skila honum til innlendra fjármálafyrirtækja innan tiltekins frests.

10. Þann 30. október 2009, setti Seðlabankinn reglur um gjaldeyrismál nr. 880/2009. Samkvæmt 1. gr. er markmið reglnanna „að takmarka eða stöðva tímabundið tiltekna flokka fjármagnshreyfinga og gjaldeyrisviðskipti sem þeim tengjast til og frá landinu sem valda að mati Seðlabanka Íslands alvarlegum og verulegum óstöðugleika í gengis- og peningamálum".

11. Í 2. gr. reglnanna segir:

Í reglum þessum merkir fjármagnshreyfing á milli landa yfirfærslu eða flutning á fjármunum milli innlendra og erlendra aðila.

Allar fjármagnshreyfingar samkvæmt 1. mgr. bráðabirgðaákvæðis I í lögum nr. 87/1992, á milli landa í erlendum gjaldeyri, eru óheimilar nema um sé að ræða greiðslu vegna kaupa á vöru og þjónustu eða annarra fjármagnshreyfinga sem sérstaklega eru undanþegnar í reglum þessum.

...

12. Í 3. gr. reglnanna segir:

Gjaldeyrisviðskipti á milli innlendra og erlendra aðila þar sem innlendur gjaldeyrir er hluti af viðskiptunum eru óheimil.

Innlendum aðila er óheimilt að kaupa erlendan gjaldeyri hjá fjármálafyrirtæki hér á landi, þegar greiðsla fer fram með innlendum gjaldeyri, nema hann sýni fram á að notkun fjárins sé vegna vöru- og þjónustuviðskipta, þ.m.t. ferðalaga, eða vegna fjármagnshreyfinga samkvæmt ákvæðum 10. gr. og 11. gr.

...

13. Í 15. gr. reglnanna segir að ákvæði 7. gr. laga nr. 87/1992 um gjaldeyrismál, sem heimilar Seðlabankanum að veita undanþágur frá takmörkunum vegna fjármagnshreyfinga, gildi einnig um takmarkanir settar fram í reglunum.

III FACTS AND PROCEDURE

14. The Plaintiff is an Icelandic national resident in the United Kingdom. On 16 November 2009, he purchased ISK 16 400 000 on the offshore market in exchange for pounds Sterling. On 8 December 2009, the Plaintiff applied to the Defendant for an exemption from the currency controls laid down in Article 2 of the Rules on Foreign Exchange No 880/2009, in order to be able to transfer those krónur to Iceland. The Defendant rejected the Plaintiff's application on 26 February 2010, and this conclusion was upheld by a ruling of the Ministry of Economic Affairs on 8 October of the same year.

15. The Plaintiff has sought judicial review of the Defendant's decision before the Reykjavik District Court, claiming that it is both in breach of Icelandic law and incompatible with the free movement of capital provided for by the EEA Agreement.

16. On the latter issue, the Reykjavik District Court decided in a ruling of 3 January 2011 that it was necessary to request an advisory opinion from the EFTA Court on the proper interpretation and application of Article 43 of the EEA Agreement. An appeal against this ruling was lodged with the Supreme Court of Iceland, which in a judgment of 7 February 2011 upheld the District Court's ruling.

17. The following question was submitted to the Court:

    Is it compatible with paragraphs 2 and 4 of Article 43 of the EEA Agreement that the Icelandic State should prevent an Icelandic national, resident in Britain, from transferring Icelandic krónur, which he has purchased on the offshore market in Britain, to Iceland?

IV WRITTEN OBSERVATIONS

18. 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 Plaintiff, represented by Stefán Geir Þórisson, Supreme Court Attorney;

III MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

14. Stefnandi er íslenskur ríkisborgari búsettur í Bretlandi. Þann 16. nóvember 2009 keypti hann 16.400.000 ISK á aflandsmarkaði, í skiptum fyrir bresk pund. Þann 8. desember, sama ár, sótti stefnandi um undanþágu frá gjaldeyrishöftum, sem mælt er fyrir um í 2. gr. reglna nr. 880/2009 um gjaldeyrismál, til að geta flutt þessar krónur til Íslands. Þann 26. febrúar 2010 hafnaði Seðlabankinn umsókn stefnanda og sú niðurstaða var staðfest með úrskurði efnahags- og viðskiptaráðuneytisins 8. október, sama ár.

15. Stefnandi hefur borið úrskurð Seðlabankans undir Héraðsdóm Reykjavíkur og heldur því fram að úrskurðurinn sé bæði brot á íslenskum lögum og ósamrýmanlegur reglum EES-samningsins um frjálsa fjármagnsflutninga.

16. Í úrskurði frá 3. janúar 2011 komst Héraðsdómur að því að nauðsynlegt væri að leita ráðgefandi álits EFTA-dómstólsins varðandi síðara atriðið, um rétta túlkun og beitingu 43. gr. EES-samningsins. Úrskurðurinn var kærður til Hæstaréttar, sem staðfesti hann með dómi, 7. febrúar 2011.

17. Eftirfarandi spurning var borin undir EFTA-dómstólinn:

Samrýmist það ákvæðum 2. og 4. mgr. 43. gr. EES-samningsins að íslenska ríkið meini íslenskum ríkisborgara, búsettum í Bretlandi, að flytja íslenskar krónur, sem hann hefur keypt á aflandsmarkaði í Bretlandi, til Íslands?

IV SKRIFLEGAR GREINARGERÐIR

18. Í samræmi við 20. gr. stofnsamþykktar EFTA-dómstólsins og 97. gr. starfsreglna hans hafa skriflegar greinargerðir borist frá eftirtöldum aðilum:

– Stefnanda, Pálma Sigmarssyni, í fyrirsvari er Stefán Geir Þórisson, hrl.

– the Defendant, represented by Gizur Bergsteinsson, District Court Attorney;

– the Icelandic Government, represented by its Agent Bergþór Magnússon, assisted by Þóra M. Hjaltested, Director, Ministry of Economic Affairs, and Peter Dyrberg, advokat;

– the EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission, represented by Elisabetta Montaguti and Nicola Yerrell, members of its legal service, acting as Agents.

The Plaintiff

19. The Plaintiff notes that all transactions concerning Icelandic krónur between Icelandic residents and non-residents are prohibited, unless an exemption is granted. As a result, the Plaintiff contends that the issue at hand requires an assessment of whether the exemption framework is compatible with the substantive rules of the EEA Agreement.

20. He submits that the derogations to the right to free movement of capital permitted under Article 43 EEA are materially analogous to and not substantively distinguishable from other derogations in the chapter on capital or more generally from derogations concerning other fundamental freedoms. There is, he continues, no indication that the safeguard clauses under Article 43 have a broader scope than restrictions authorised under other provisions of the Agreement, or that the EEA States have a wider margin of discretion when implementing such safeguard measures. In his view, the only difference relates to form, as the safeguard clauses established in Article 43 relate to temporary measures and can only be invoked under certain circumstances.

21. The Plaintiff argues that although the safeguard clauses provided for in Article 43 EEA give EEA States the opportunity to apply protective measures, these measures may not disregard

– Stefnda, Seðlabanka Íslands, í fyrirsvari er Gizur Bergsteinsson, hdl.

– Ríkisstjórn Íslands, í fyrirsvari sem umboðsmaður er Bergþór Magnússon, með aðstoð Þóru M. Hjaltested, skrifstofustjóra efnahags- og viðskiptaráðuneytis og Peter Dyrberg, lögmanns.

– Eftirlitsstofnun EFTA, í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri lögfræði- og framkvæmdasviðs, og Ólafur Jóhannes Einarsson, aðstoðarframkvæmdastjóri á lögfræði- og framkvæmdasviði.

– Framkvæmdastjórn Evrópusambandsins, í fyrirsvari sem umboðsmenn eru Elisabetta Montaguti og Nicola Yerrell, hjá lagadeildinni.

Stefnandi

19. Stefnandi bendir á að öll viðskipti með íslenskar krónur milli aðila á Íslandi og erlendra aðila séu bönnuð, nema að veittri undanþágu. Þess vegna telur stefnandi að í máli þessu verði að meta hvort undanþágukerfið samrýmist efnisákvæðum EES-samningsins.

20. Stefnandi telur að frávik frá réttinum til frjálsra fjármagnsflutninga skv. 43. gr. EES-samningsins séu efnislega sambærileg við önnur frávik í kaflanum um fjármagn eða, almennt séð, við frávik frá öðrum grundvallarréttindum, og séu þeim í reynd engu frábrugðin. Hann telur ekkert benda til þess að undantekningarákvæði 43. gr. hafi víðtækara gildissvið en þær takmarkanir sem heimilaðar eru í öðrum greinum samningsins, né að EES-ríkin hafi aukið svigrúm til mats við beitingu slíkra verndarráðstafana. Stefnandi telur 43. gr. EES-samningsins einungis frábrugðna öðrum reglum hvað form varðar, að því leyti að hún fjallar um tímabundnar aðgerðir sem einungis megi beita við ákveðnar aðstæður.

21. Stefnandi bendir á að þótt ákvæði 43. gr. EES-samningsins gefi EES-ríkjum tækifæri til að beita verndarráðstöfunum, megi þessar

fundamental principles of European law.[1] He submits that the derogations set out in Icelandic legislation are not in conformity with Article 43(2) and (4) EEA, since (i) they delegate unrestricted powers to a state-owned entity, thereby violating the principle of legal certainty,[2] (ii) EEA States cannot determine unilaterally the scope of restrictions on the fundamental freedoms, and (iii) they are contrary to the principles of proportionality and necessity, and the obligation of EEA States to take the least restrictive measures.

22. As regards points (i) and (ii), the Plaintiff submits that restrictive measures may be taken only if the means justify the ends. In the Plaintiff's view, the contested system for restricting movement of capital and the system of rules on exemptions thereto do not contain any objective criteria.

23. The Plaintiff asserts that, according to the Court of Justice of the European Union ("ECJ"), a system for granting exemptions from restrictions on fundamental freedoms must be transparent and foreseeable; the conditions on which approval is granted should be defined, as should the extent of the rights and obligations of individuals.[3]

24. The aim of the protective measures taken by the Defendant was to prevent "serious and substantial monetary and exchange rate instability". Although this aim falls within the ambit of Article 43(2) and (4) EEA, there are no criteria to be found in the rules to determine which transactions pose an actual threat to monetary and exchange rate stability.

25. The Plaintiff contends further that derogations from the fundamental freedoms must include principles which lay down the extent and limitation of the use of restrictions. In the Plaintiff's view, Article 7 of the 1992 Act gives the Defendant authorisation to grant exemptions without any limitation, other than that it must

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1 The Plaintiff refers to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 42.
2 In this regard, the Plaintiff refers to Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraphs 33 to 36.
3 Ibid., paragraphs 36 to 37.

ráðstafanir ekki brjóta í bága við grundvallarreglur Evrópuréttar.[1] Hann telur frávik þau sem finna megi í íslenskri löggjöf ekki samrýmanleg 2. og 4. mgr. 43. gr. EES-samningsins, þar sem þau feli í sér framsal óhefts valds til ríkisstofnunar, og brjóti þar með gegn meginreglunni um réttarvissu (i).[2] Auk þess geti EES-ríki geti ekki einhliða ákveðið umfang takmarkana á grundvallarréttindum (ii). Þá telur stefnandi að frávikin séu ekki nauðsynleg og uppfylli ekki skilyrði um meðalhóf, sem og skyldu EES-ríkja til að velja þá ráðstöfun sem hefur minnsta takmörkun í för með sér (iii).

22. Að því er snertir atriði (i) og (ii), bendir stefnandi á að takmarkandi ráðstafanir megi einungis gera þegar það þjónar markmiðinu sem stefnt er að. Að mati stefnanda, er hvorki að finna nein hlutlæg viðmið í reglum hins umdeilda kerfis um takmarkanir fjármagnsflutninga, né í þeim undanþágum sem því fylgja.

23. Stefnandi heldur því fram að samkvæmt dómaframkvæmd Evrópudómstólsins verði kerfi sem veitir undanþágur frá takmörkunum á grundvallarréttindum, að vera gagnsætt og fyrirsjáanlegt. Skilyrði fyrir veitingu undanþágu verði að vera skilgreind, rétt eins og hver réttindi og skyldur einstaklinga eru.[3]

24. Markmið þeirra verndarráðstafanna sem stefndi greip til var að berjast gegn ,,alvarlegum og verulegum óstöðugleika í gengis- og peningamálum“. Þótt markmiðið falli innan gildissviðs 2. og 4. mgr. 43. gr. EES-samningsins, er engin viðmið að finna í reglunum um hvernig ákvarða skuli hvaða viðskipti teljist í reynd ógna stöðugleika í gengis- og peningamálum.

25. Stefnandi telur einnig að frávik frá grundvallarréttindum verði að fela í sér meginreglur um umfang og skorður þeirra takmarkana sem beitt er. Að sögn stefnanda veitir 7. gr. laga nr. 87/1992, um gjaldeyrismál, Seðlabankanum óhefta heimild til að veita undanþágur og setur ekki aðrar skorður við þeim en að

1 Stefnandi vísar til máls E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, 42. mgr.
2 Stefnandi vísar til máls C-463/00 *Commission* v *Spain* [2003] ECR I-4581, 33.-36. mgr.
3 Sama, 36. -37. mgr.

take into account the aim of the restrictions, the consequences of the restrictions for the applicant, and the impact which an exemption will have on exchange rate and monetary stability. In the Plaintiff's view, such a general, open delegation of power to a state-owned entity paves the way for arbitrary decision-taking.

26. In the view of the Plaintiff, the decisions of the Defendant and the Ministry contain no reasoning on why, pursuant to the rules on exemptions, he is ineligible for such. He argues that no reference is made to the consequences that the restriction will have for him, although they are clearly extremely onerous.

27. As for point (iii), the Plaintiff submits that the decision to refuse his application was based merely on the purpose of the restriction and that the authorities have not proven that there is a risk that the transaction in question will endanger the objective of the legislation, and that the restriction is, thus, necessary. There is, he contends, no evidence or indication that, where a minor amount is to be transferred, it is necessary to deny an exemption from the restrictions.

28. The Plaintiff argues further that it must be examined whether the objective pursued could have been achieved through less restrictive means.[4] In this connection, the Plaintiff submits that the provisions of Chapter 4 in Part III of the EEA Agreement have direct effect.[5]

29. Against this background, the Plaintiff proposes that the Court should answer the question as follows:

It is not compatible with paragraphs 2 and 4 of Article 43 of the EEA Agreement that the Icelandic State prevents an Icelandic national, resident in Britain, from transferring Icelandic krónur, which he purchased on the offshore market in Britain, to Iceland.

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4 The Plaintiff refers to Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraphs 21 to 22, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 22 to 28, and Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 58.

5 Reference is made to *Sanz de Lera and Others*, cited above, paragraphs 41 to 47, Case C-464/98 *Stefan* [2001] ECR I-173, and Case C-213/04 *Burtscher* [2005] ECR I-10309.

Seðlabankinn verði að líta til markmiðanna að baki takmörkunum, afleiðinga þeirra fyrir umsækjandann, og áhrifa undaþágu á stöðugleika í gengis- og peningamálum. Að mati stefnanda getur almennt og óheft framsal valds, með þessum hætti, til ríkisstofnunar leitt til geðþóttaákvarðana.

26. Stefnandi telur enn fremur að ákvörðun stefnda og ráðuneytisins hafi ekki að geyma neinn rökstuðning fyrir því hvers vegna hann hljóti ekki undanþágu í samræmi við reglurnar. Hann segir hvergi fjallað um afleiðingar takmarkananna fyrir hann, þótt þær séu augljóslega mjög þungbærar.

27. Varðandi atriði (iii), telur stefnandi að ákvörðunin um að synja umsókn hans hafi einungis verið byggð á ástæðum takmörkunarinnar. Þá hafi yfirvöld ekki sýnt fram á neina hættu á því að umræddir fjármagnsflutningar tefli markmiði laganna í tvísýnu, og að takmörkunin sé nauðsynleg af þeim sökum. Hann segir það hvorki sannað né að nokkuð bendi til þess að þörf sé á að synja um undanþágu í þeim tilvikum þar sem til stendur að millifæra lágar fjárhæðir.

28. Enn fremur telur stefnandi að skoða verði hvort hægt hefði verið að ná markmiðinu sem stefnt var að með vægari aðgerðum.[4] Heldur stefnandi í þessu sambandi fram að ákvæði 4. kafla í III. hluta EES-samningsins hafi bein réttaráhrif. [5]

29. Samkvæmt framansögðu, leggur stefnandi til að dómstóllinn svari spurningunni með eftirfarandi hætti:

Það samrýmist ekki 2. og 4. mgr. 43. gr. EES-samningsins að íslenska ríkið meini íslenskum ríkisborgara, búsettum í Bretlandi, að flytja íslenskar krónur, sem hann hefur keypt á aflandsmarkaði í Bretlandi, til Íslands.

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4 Stefnandi vísar til sameinaðra mála C-358/93 og C-416/93 *Bordessa and Others* [1995] ECR I-361, 21.-22. mgr., sameinaðra mála C-163/94, C-165/94 og C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, 22.-28. mgr., og máls E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, 58. mgr.

5 Stefnandi vísar til áður tilvitnaðs máls *Sanz de Lera and Others*, 41.- 47. mgr., máls C-464/98 *Stefan* [2001] ECR I-173, og máls C-213/04 *Burtscher* [2005] ECR I-10309.

The Defendant

30. As a preliminary point, the Defendant notes that foreign exchange transactions in Iceland have been subject to capital controls ever since the country's banking system collapsed in late 2008. The loss of confidence triggered by the collapse was bound to cause large capital outflows likely to seriously threaten the reconstruction of the banking system and have adverse effects on an already weakened exchange rate of the Icelandic krónur.

31. The Defendant notes further that in October 2008, Iceland requested economic assistance from the International Monetary Fund ("the IMF") to restore the country's economic stability. On 19 November 2008, the IMF's Executive Board approved a USD 2.1 billion Stand-By Arrangement for Iceland. In the view of the Defendant, it was a precondition for the Stand-By Arrangement that Iceland would impose capital controls, which were necessary for an orderly reconstruction of the banking system, given the complete lack of confidence, domestically and abroad, in the Icelandic krónur and the Icelandic Government's ability to refinance its foreign debt, especially given the large amount of offshore krónur.

32. The exchange rate of Icelandic krónur was, the Defendant continues, extremely volatile in the months following the introduction of the capital controls, and its almost continuous slide did not come to an end until 30 October 2009 when the Defendant issued the Rules on Foreign Exchange No 880/2009. In its opinion, the single most important amendment introduced in the new rules consisted in the outright prohibition on inbound transfer of Icelandic krónur bought on the offshore market.

33. Furthermore, the Defendant points to the fact that on the same day as it issued its first rules restricting cross-border movements of capital, 28 November 2008, the Icelandic Government presented the EFTA Standing Committee as well as the EEA Joint Committee with notifications of protective measures under Article 43 EEA. Neither committee reacted unfavourably to the protective measures. On 1 April 2009, the committees were notified of

Stefndi

30. Stefndi gerir þá almennu athugasemd að höft hafi verið á gjaldeyrisviðskiptum á Íslandi allt frá hruni bankakerfisins síðla árs 2008. Minnkandi tiltrú vegna hrunsins hlaut að hafa í för með sér mikið útstreymi fjármagns sem hefði að líkindum haft í för með sér alvarlega ógnun við uppbyggingu bankakerfisins og haft neikvæð áhrif á hið þegar veika gengi krónunnar.

31. Jafnframt segir stefndi að í október 2008 hafi Ísland leitað til Alþjóðagjaldeyrissjóðsins (AGS) eftir efnahagsaðstoð, til að endurheimta efnahagslegan stöðugleika. Þann 19. nóvember, sama ár, samþykkti stjórn AGS viðbúnaðarlán til Íslands að fjárhæð 2,1 milljarður Bandaríkjadala. Að mati stefnda var forsenda lánsins innleiðing fjármagnshafta af hálfu Íslands. Slík höft voru nauðsynleg skipulegri enduruppbyggingu bankakerfisins, í ljósi algjörs vantrausts, innan- sem utanlands, á íslensku krónunni og getu ríkisstjórnarinnar til að endurfjármagna erlendar skuldir ríkisins, sérstaklega með tilliti til hinnar háu fjárhæðar aflandskróna í umferð.

32. Gengi krónunnar var, að mati stefnda, mjög óstöðugt mánuðina á eftir innleiðingu fjármagnshaftanna, og hið nánast samfellda gengishrun tók fyrst enda 30. október 2009, þegar stefndi setti reglur nr. 880/2009 um gjaldeyrismál. Stefndi telur að afdráttarlaust bann við innflutningi aflandskróna hafi verið sú viðbót í nýju reglunum sem mestu máli skipti.

33. Enn fremur bendir stefndi á að 28. nóvember 2008, sama dag og fyrstu reglurnar sem takmörkuðu fjármagnshreyfingar til og frá landinu voru settar, hafi ríkisstjórn Íslands tilkynnt fastanefnd EFTA-ríkjanna sem og sameiginlegu EES-nefndinni um verndarráðstafanir sínar samkvæmt 43. gr. EES-samningsins. Hvorug nefndin brást neikvætt við ráðstöfununum. Þann 1. apríl 2009, var nefndunum tilkynnt um framvindu mála í tengslum

developments regarding the protective measures. Furthermore, on 30 October 2009, 16 June 2010, and 1 July 2010, the committees were notified of amendments to the protective measures. None of these notifications resulted in any criticism from the committees.

34. The Defendant observes that, on 26 May 2009, the EFTA Surveillance Authority ("ESA") received a complaint against Iceland regarding the capital controls. According to the complaint, the legal measures restricting movement of capital infringed the EEA Agreement. Moreover, on 30 December 2009, ESA received a complaint concerning the restrictions on inbound transfers of Icelandic krónur based on the Central Bank's Rules on Foreign Exchange No 880/2009. On 17 November 2010, ESA decided to close the cases, stating, *inter alia*, that it had not been presented with any information that might suggest that the conditions for Iceland to apply Article 43(2) and (4) EEA were not fulfilled, and, moreover, that the measures had been notified to the EEA Joint Committee in accordance with Article 45 of the EEA Agreement.

35. The Defendant submits that the rules restricting inbound transfer of Icelandic krónur equally apply to Icelandic as well as non-Icelandic citizens and irrespective of whether the owner of the krónur is resident in Iceland or not. In its view, the question referred to the EFTA Court is consequently not one of discrimination.

36. Moreover, the Defendant asserts that since the EEA Joint Committee and the EFTA Standing Committee were presented with notifications on the day the protective measures were introduced and, subsequently, have been notified of amendments thereto the process followed conforms to the requirements of Protocol 18 to the EEA and is in accordance with Articles 44 and 45 EEA.

37. In this regard, the Defendant submits that the notifications, exchange of information, and consultations would be rendered meaningless if the outcome of such a process were irrelevant

við verndarráðstafanirnar. Enn fremur var nefndunum tilkynnt um breytingar á þeim 30. október 2009, 16. júní 2010 og 1. júlí 2010. Engin þessara tilkynninga leiddi til gagnrýni frá nefndunum.

34. Stefndi bendir á að Eftirlitsstofnun EFTA (ESA) hafi móttekið kvörtun vegna fjármagnshaftanna í Íslandi 26. maí 2009. Í kvörtuninni var því haldið fram að hin lagalegu úrræði sem takmörkuðu hreyfingar fjármagns væru brot á EES-samningnum. ESA barst önnur kvörtun 30. desember sama ár sem laut að takmörkunum á innflutningi króna á grundvelli reglna Seðlabankans nr. 880/2009 um gjaldeyrismál. Þann 17. nóvember 2010 hafi ESA ákveðið að ljúka málunum og meðal annars vísað til þess að fyrir stofnunina hefðu ekki verið lagðar neinar upplýsingar sem bentu til þess að skilyrði fyrir því að Ísland beitti 2. og 4. mgr. 43. gr. EES-samningsins væru ekki uppfyllt. Auk þess hafi stofnunin bent á að aðgerðirnar hefðu verið tilkynntar sameiginlegu EES-nefndinni í samræmi við 45. gr. EES-samningsins.

35. Stefndi segir að reglurnar um takmörkun innflutnings króna eigi jafnt við um íslenska sem erlenda ríkisborgara, óháð því hvort eigandi þeirra sé búsettur á Íslandi. Þar af leiðandi snýst spurningin sem beint er til EFTA-dómstólsins ekki að neinu leyti um mismunun, að mati stefnda.

36. Stefndi telur einnig að þar sem sameiginlegu EES-nefndinni og fastanefnd EFTA-ríkjanna hafi verið tilkynnt um verndarráðstafanirnar sama dag og þær tóku gildi, og síðar um breytingar þar á, uppfylli aðgerðirnar skilyrðin í bókun 18 við EES-samninginn og samræmist 44. og 45. gr. EES-samningsins.

37. Stefndi telur, hvað þetta varðar, að ferli tilkynninga, upplýsingaskipta og samráðs væri marklaust, ef niðurstaða þess hefði enga lagalega þýðingu. Þess vegna telur stefndi að mat á nauðsyn

in legal terms. Therefore, it continues, an assessment of the necessity of the measures falls outside the jurisdiction of the EFTA Court pursuant to Article 34 SCA.

38. However, should the Court consider it appropriate to assess the necessity for Iceland to prohibit inbound transfer of Icelandic krónur, the Defendant submits that the collapse of Iceland's banking system together with the Central Bank's limited foreign currency reserves entailed (i) that a situation governed by Article 43(2) and (4) EEA existed, (ii) that such situation was liable in particular to jeopardise the functioning of the EEA, and (iii) that this allowed Iceland to take protective measures without prior consultations and exchange of information.

39. The Defendant proposes that the Court should answer the question as follows:

Articles 43, 44 and 45 of the EEA must be interpreted as not precluding an EFTA State from taking protective measures pursuant to national rules, which have been enacted in accordance with those provisions, under which the inbound transfer of the EFTA State's domestic currency, obtained outside of the purview of the domestic authorities, is prohibited.

The Icelandic Government

40. The Icelandic Government notes that Article 43 EEA sets out public interest grounds – macroeconomic reasons – on the basis of which an EEA State may depart from the principle of free movement of capital. In its view, Article 43 EEA differs from other provisions in the Agreement under which restrictions on fundamental freedoms may be justified, e.g. Articles 13 and 33 EEA, in that the circumstances that it contemplates cannot be anything but extraordinary. Whereas restricting the free movement of goods for public health reasons is a recurrent matter; balance of payment difficulties is not. Therefore, it continues, measures introduced under Article 43 EEA are, by their very nature, temporary, and the EEA State concerned introduces them out of dire necessity, and not out of wish.

aðgerðanna falli utan lögsögu EFTA-dómstólsins samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls.

38. Ef dómstóllinn telur engu að síður þörf á að meta hvort bann Íslands við innflutningi íslenskra króna hafi verið nauðsynlegt, er það mat stefnda að hrun íslenska bankakerfisins, ásamt takmörkuðum gjaldeyrisforða Seðlabankans, hafi leitt til þess að aðstæður þær sem um getur í 2. og 4. mgr. 43. gr. EES-samningsins hafi skapast (i), auk þess sem slíkar aðstæður hafi verið sérstaklega til þess fallnar að stefna framkvæmd EES-samningsins í hættu (ii). Það hafi heimilað Íslandi að grípa til verndarráðstafana án samráðs og upplýsingaskipta (iii).

39. Stefndi leggur til að dómstóllinn svari spurningunni með eftirfarandi hætti:

Túlka ber ákvæði 43., 44. og 45. gr. EES-samningsins á þann veg að þau útiloki ekki að EFTA-ríki grípi til verndarráðstafana, samkvæmt innlendum reglum sem settar hafa verið í samræmi við fyrrnefnd ákvæði, þar sem lagt er bann við innflutningi á innlendum gjaldmiðli EES-ríkis sem keyptur hefur verið utan áhrifasvæðis yfirvalda þess.

Ríkisstjórn Íslands

40. Ríkisstjórn Íslands bendir á að 43. gr. EES-samningsins tilgreini almannahagsmuni – þjóðhagfræðileg rök – sem grundvöll þess að EES-ríki megi víkja frá meginreglunni um frjálsa fjármagnsflutninga. Að mati ríkisstjórnarinnar er 43. gr. EES-samningsins frábrugðin öðrum ákvæðum samningsins, t.d. 13. gr. og 33. gr., hvað varðar réttlætingu takmörkunar grundvallarréttinda, að því leyti að aðstæðurnar sem fjallað er um séu afar óvenjulegar. Þótt reglulega sé þörf á takmörkunum á frjálsum vöruflutningum vegna lýðheilsusjónarmiða, á hið sama ekki við um örðugleika vegna greiðslujöfnunar. Þar af leiðandi eru ráðstafanir samkvæmt 43. gr. EES-samningsins í eðli sínu tímabundnar og EES-ríkið sem til þeirra grípur gerir það af brýnni nauðsyn en ekki vegna þess að því býður svo við að horfa.

41. In its view, given the utmost importance of the macroeconomic public interests at stake, recourse to Article 43 EEA is subject to specific conditions, which do not find their parallel under the provisions concerning the other freedoms.

42. According to the Icelandic Government, since an EEA State's recourse to Article 43 EEA is "implemented" through "procedures", it follows that an EEA State that observes those procedures may rely on the fact that its measures are permitted under the EEA Agreement. Given the gravity of the circumstances envisaged by Article 43, it continues, there is an imperative need for the EEA State to ensure in advance that its acts are in accordance with the Agreement.

43. The Icelandic Government notes that, for the purposes of the EFTA pillar, scrutiny of the measures adopted by an EEA State pursuant to Article 43 EEA is entrusted to the EFTA Standing Committee. In its view, since the scrutiny is not entrusted to ESA, the normal surveillance procedures do not apply and, as a consequence, ESA will not be able to open infringement procedures against the notifying State. Nor has ESA any powers in respect of the EFTA Standing Committee. Moreover, according to the Icelandic Government, examination of the compatibility with Article 40 EEA of measures that have been introduced under Articles 43 EEA and, in accordance with the procedures referred to in Article 44 EEA, scrutinised by the EFTA Standing Committee and the EEA Joint Committee, is, for the purposes of the EFTA pillar, beyond the remit of judicial review. In other words, judicial scrutiny must be limited to an assessment of whether the EEA State concerned followed the procedures prescribed. However, in its view, if the actions of an EEA State are not in conformity with the opinions of the EFTA Standing Committee or the EEA Joint Committee, the State will be liable to the application of Articles 111 to 114 EEA (on the settlement of disputes and safeguard measures).

44. Against this background, the Icelandic Government submits that the issue subject to judicial review in the present case is simply whether the enactment of the measures at issue – Rules on

41. Að teknu tilliti til hins mikla þjóðhagslega mikilvægis þeirra almannahagsmuna sem í húfi eru, telur ríkisstjórn Íslands að beiting 43. gr. EES-samningsins sé háð sérstökum skilyrðum sem eigi sér ekki samsvörun í ákvæðum er varða önnur grundvallarréttindi.

42. Ríkisstjórnin heldur því fram að þar sem beiting 43. gr. EES-samningsins fylgi tilteknum reglum geti EES-ríki sem fylgt hefur reglunum treyst því að aðgerðir þess séu heimilar samkvæmt EES-samningnum. Þegar litið sé til þess hversu alvarlegar þær aðstæður eru sem 43. gr. EES-samningsins tekur til, sé jafnframt knýjandi þörf á að EES-ríki geti fyrirfram verið fullvisst um að aðgerðir þess séu í samræmi við samninginn.

43. Ríkisstjórn Íslands tekur fram að innan EFTA-stoðarinnar sé athugun á ráðstöfunum EES-ríkis, samkvæmt 43. gr. EES-samningsins, í höndum fastanefndar EFTA-ríkjanna. Þar sem ESA hefur ekki þessa athugun með höndum og hin venjulega tilhögun eftirlits á ekki við, telur ríkisstjórnin að ESA geti ekki hafið formlegt athugunarferli vegna brota þess ríkis sem tilkynnt hefur um ráðstafanir í samræmi við 43. gr. EES-samningsins. ESA hafi heldur ekki vald yfir fastanefnd EFTA-ríkjanna. Enn fremur telur ríkisstjórnin að athugun á því hvort ráðstafanir sem gerðar hafa verið samkvæmt 43. gr. EES-samningsins standist 40. gr. samningsins, og hvort málsmeðferð 44. gr. EES-samningsins hafi verið fylgt, að lokinni skoðun fastanefndar EFTA-ríkjanna og sameiginlegu EES-nefndarinnar, falli, hvað EFTA-stoðina varðar, utan endurskoðunarvalds dómstóla. Endurskoðun dómstóla verður með öðrum orðum að takmarkast við mat á því hvort EES-ríki hafi fylgt þeirri málsmeðferð sem mælt er fyrir um í samningnum. Ríkisstjórnin telur hins vegar að ef aðgerðir EES-ríkis eru ekki í samræmi við álit fastanefndar EFTA-ríkjanna og sameiginlegu EES-nefndarinnar megi beita 111. gr. og 114. gr. EES-samningsins (um lausn deilumála og öryggisráðstafanir) gegn því.

44. Að þessu virtu, telur ríkisstjórn Íslands að það álitamál sem til skoðunar dómstólsins kemur í máli þessu sé einfaldlega hvort framkvæmd hinna umdeildu ráðstafana – reglna nr. 880/2009

Foreign Exchange No 880/2009 – complied with the procedural requirements established in Articles 44 and 45 EEA. In its view, this question must be answered in the affirmative.

45. Should the Court take a different view and, consequently, seek to assess the necessity of the measures taken, the Icelandic Government asserts that the measures are clearly necessary, as without those measures the stabilisation of the currency would not have taken place. In any case, it would be for the referring court to apply the necessity test as the order for reference does not contain the elements sufficient for the Court to carry out that assessment.[6]

46. The Icelandic Government proposes that the Court should answer the question as follows:

Articles 43 and 44 EEA must be interpreted as not to preclude national rules that have been enacted in accordance with those provisions, such as those at issue in the main proceedings, under which an Icelandic national, resident in the United Kingdom, may not transfer to Iceland Icelandic krónur, purchased on the offshore market in the United Kingdom.

The EFTA Surveillance Authority

47. ESA observes that the main proceedings raise the question whether the requirements of Article 43(2) and (4) EEA were fulfilled when Iceland put in place currency controls following the financial crisis that hit the country in the autumn of 2008. More specifically, it raises the issue whether the requirements were met in relation to the prohibition on import into Iceland of Icelandic krónur bought on the offshore market; a prohibition introduced through the enactment of Rules on Foreign Exchange No 880/2009, which entered into force on 31 October 2009.

48. In ESA's view, the order for reference contains very limited factual information on the elements relevant for the purposes of determining whether the conditions established in Article 43(2)

[6] Reference is made to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 57.

um gjaldeyrismál – sé í samræmi við málsmeðferð þá sem mælt er fyrir um í 44. og 45. gr. EES-samningsins. Að mati ríkisstjórnarinnar verður að svara þeirri spurningu játandi.

45. Komist dómstóllinn að annarri niðurstöðu og ákveði að leggja mat á nauðsyn ráðstafananna, heldur ríkisstjórn Íslands því fram að þær séu bersýnilega nauðsynlegar þar sem stöðugleika gjaldmiðilsins hefði ekki verið hægt að ná fram með öðrum hætti. Það sé hlutverk Héraðsdóms Reykjavíkur að leggja mat á þetta atriði þar sem beiðni hans feli ekki í sér nægilegar forsendur fyrir EFTA-dómstólinn til að framkvæma matið. [6]

46. Ríkisstjórn Íslands leggur til að dómstóllinn svari spurningunni með eftirfarandi hætti:

Ákvæði 43. og 44. gr. EES-samningsins verður að túlka með þeim hætti að þau útiloki ekki að settar séu innlendar reglur sem meina íslenskum ríkisborgara, búsettum í Bretlandi, að flytja til Íslands íslenskar krónur, sem hann hefur keypt á aflandsmarkaði í Bretlandi, þegar reglurnar séu í samræmi við fyrrnefndar greinar samningsins, líkt og við á í máli því sem rekið er fyrir landsdómstólnum.

Eftirlitsstofnun EFTA

47. ESA heldur því fram að málið sem rekið er fyrir Héraðsdómi Reykjavíkur veki upp þá spurningu, hvort skilyrðum 2. og 4. mgr. 43. gr. EES-samningsins hafi verið fullnægt þegar Ísland kom á gjaldeyrishöftum í kjölfar fjármálakreppunnar sem skall á landinu haustið 2008. Nánar tiltekið vakni sú spurning hvort skilyrðunum hafi verið fullnægt þegar sett var bann við innflutningi á íslenskum krónum, keyptum á aflandsmarkaði, til Íslands. Banninu var komið á með setningu reglna um gjaldeyrismál nr. 880/2009, sem tóku gildi 31. október 2009.

48. Að mati ESA felur beiðnin um ráðgefandi álit í sér afar takmarkaðar upplýsingar um staðreyndir sem skipta máli til að hægt sé að ákvarða hvort skilyrðin sem kveðið er á um í 2. og

[6] Ríkisstjórn Íslands vísar til máls E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, 57. mgr.

and (4) EEA were fulfilled. ESA observes that these provisions of the EEA Agreement were based on Article 73(1) and Article 108(1) of the EEC Treaty. However, in ESA's view, the case-law of the ECJ on those latter provisions is of limited value for the purposes of giving a ruling in the present case because those judgments dealt with issues very different to those which fall to be examined in the present case.[7]

49. ESA contends that in submitting the notifications of 30 October 2009 to the EFTA Standing Committee and the EEA Joint Committee, in which the Icelandic Government notified the changes made to the currency controls by the Rules on Foreign Exchange No 880/2009, the Icelandic Government complied with its procedural obligations under Article 1 of Protocol 2 to the Agreement on a Standing Committee and Article 45 EEA when enacting those rules. It has not come to ESA's attention that any of the other EEA States disputed the fact that the conditions for having recourse to those procedures were fulfilled. Moreover, the order for reference does not contain any indications to that effect.

50. As regards the substance of the conditions established by Article 43(2) and (4) EEA, according to ESA, application of those conditions calls for a complex economic assessment of various macroeconomic factors. In its view, there can, in principle, be little doubt that in the wake of the financial crisis, the situation in the Icelandic economy met the conditions for the applications of those provisions. The inherent complexity involved in the assessment of Article 43(2) and (4) EEA suggests to ESA that the EEA State in question enjoys a certain margin of discretion when determining whether those conditions are satisfied and the exact measures to be undertaken as they may in many cases concern fundamental choices of economic policy. This conclusion is also supported by the fact that the other EEA States have an opportunity to make their views on the measures known through the procedure laid down in Article 45 EEA and that the EFTA Standing Committee may, according to Article 2 of Protocol 2 to

[7] Reference is made to Case 203/80 *Casati* [1981] ECR 2595 and Case 157/85 *Brugnoni* [1986] ECR 2013.

4. mgr. 43. gr. EES-samningsins séu uppfyllt. ESA bendir á að umrædd ákvæði séu byggð á 1. mgr. 73. gr. og 1. mgr. 108. gr. EBE-sáttmálans. Hins vegar telur ESA að dómaframkvæmd Evrópudómstólsins varðandi síðarnefndu ákvæðin hafi takmarkaða þýðingu fyrir niðurstöðu þessa máls þar sem þau fjalli um álitaefni mjög óskyld þeim sem eru til athugunar í þessu máli.[7]

49. ESA fullyrðir að með tilkynningu sinni 30. október 2009, til fastanefndar EFTA-ríkjanna og sameiginlegu EES-nefndarinnar, þar sem tilkynnt var um breytingar á gjaldeyrishöftum með reglum um gjaldeyrismál nr. 880/2009, hafi ríkisstjórn Íslands, með setningu reglnanna, uppfyllt skyldur sínar samkvæmt 1. gr. bókunar 2 við samninginn um fastanefnd EFTA-ríkjanna og 45. gr. EES-samningsins. ESA hefur ekki vitneskju um að nokkurt annað EES-ríki hafi andmælt þeirri staðreynd að skilyrðin fyrir því að grípa til þessara aðgerða hafi verið uppfyllt. Enn fremur sé ekkert í fyrirliggjandi beiðni um ráðgefandi álit sem bendi til þess að svo sé.

50. Hvað varðar meginatriði skilyrðanna, sem sett eru í 2. og 4. mgr. 43. gr. EES-samningsins, krefst beiting þeirra, að mati ESA, flókins hagfræðilegs mats á ýmsum þjóðhagfræðilegum þáttum. ESA telur það tæpast vafa undirorpið að í kjölfar fjármálakreppunnar hafi aðstæður í íslensku efnahagslífi uppfyllt skilyrðin fyrir beitingu þessara ákvæða. Hið flókna mat sem óhjákvæmilega fylgi 2. og 4. mgr. 43. gr. EES-samningsins, bendi til þess að samningsríki hafi ákveðið svigrúm til að ákveða hvort umrædd skilyrði teljist uppfyllt og til hvaða ráðstafana beri að grípa, þar sem slíkt geti í mörgum tilvikum snúist um grundvallaratriði við mörkun efnahagsstefnu. Þessi niðurstaða styðst einnig við þá staðreynd að önnur EES-ríki hafa tækifæri til að koma skoðunum sínum á ráðstöfununum á framfæri, samkvæmt þeirri málsmeðferð sem mælt er fyrir um í 45. gr. EES-samningsins, og að fastanefnd EFTA-ríkjanna geti, í samræmi

[7] ESA vísar til máls 203/80 *Casati* [1981] ECR 2595 og máls 157/85 *Brugnoni* [1986] ECR 2013.

the Agreement on a Standing Committee, make recommendations regarding amendments to the measures notified to it. In this regard, ESA notes that, to the best of its knowledge, the Icelandic notifications did not result in any response from the other EEA States or recommendations from the EFTA Standing Committee.

51. Moreover, ESA notes that it has dealt with a complaint concerning the restrictions on capital movements in question, which it closed by a decision of 17 November 2010. In that decision, ESA held that it "has not been presented with any information that might suggest that the conditions for Iceland to apply Articles 43(2) and 43(4) were not fulfilled". In ESA's view, the order for reference in the present case contains no information capable of leading to a different conclusion.

52. ESA proposes that the Court should answer the question as follows:

Consideration of the question raised has disclosed no factor of such a kind as to suggest that it is incompatible with Article 43(2) and (4) of the EEA Agreement for the Icelandic State to have prevented an Icelandic national, residing in Britain, from transferring to Iceland, Icelandic krónur which he had purchased on the offshore market in Britain.

The European Commission

53. The European Commission ("the Commission") notes that Article 43(2) and (4) EEA expressly permits an EEA State to take "protective measures" where there is either a disturbance in the functioning of its capital market, or the State is in difficulties as regards its balance of payments. It asserts that a detailed assessment of the existence of such a situation is primarily a matter for the EFTA Standing Committee under Protocol 18 to the EEA Agreement and for ESA. The Commission observes that it is clearly not in a position to be able to comment on this in detail. It notes, however, that within the Union context, the former safeguard clause for disturbances in the capital markets was invoked only once, by Denmark in the period 1979-1984. In its

við 2. gr. bókunar 2 við samninginn um fastanefnd EFTA-ríkjanna, sett fram tillögur að úrbótum á þeim breytingum sem nefndinni er tilkynnt um. Í þessu samhengi tekur ESA fram, að samkvæmt bestu vitund hafi tilkynningar Íslands hvorki leitt til viðbragða annarra EES-ríkja né til tillagna frá fastanefnd EFTA-ríkjanna.

51. ESA tekur einnig fram að stofnunin hafi móttekið kvörtun varðandi umræddar takmarkanir á fjármagnshreyfingum. ESA lauk því máli með ákvörðun 17. nóvember 2010. Í ákvörðuninni segir að ESA „hafi ekki borist nein gögn sem bent gætu til þess að Ísland uppfyllti ekki skilyrði fyrir beitingu 2. og 4. mgr. 43. gr. EES-samningsins“. Að mati ESA felur beiðnin um ráðgefandi álit dómstólsins í máli þessu ekki í sér neinar upplýsingar sem leitt gætu til annarrar niðurstöðu.

52. ESA leggur til að dómstóllinn svari spurningunni með eftirfarandi hætti:

Umfjöllun um spurningu Héraðsdóms Reykjavíkur hefur ekki leitt neitt í ljós sem gefur til kynna að það samrýmist ekki 2. og 4. mgr. 43. gr. EES-samningsins að íslenska ríkið hafi meinað íslenskum ríkisborgara, búsettum í Bretlandi, að flytja til Íslands íslenskar krónur, sem hann keypti á aflandsmarkaði í Bretlandi.

Framkvæmdastjórn Evrópubandalaganna

53. Framkvæmdastjórn Evrópubandalaganna bendir á að 2. og 4. mgr. 43. gr. EES-samningsins heimili EES-ríki með skýrum hætti að grípa til „verndarráðstafana“ þegar um sé að ræða röskun á starfsemi fjármálamarkaðar þess, eða að ríkið eigi í örðugleikum með greiðslujöfnuð. Framkvæmdastjórnin telur að mat á því hvort slíkar aðstæður séu fyrir hendi sé fyrst og fremst innan verkahrings fastanefndar EFTA-ríkjanna, samkvæmt bókun 18 við EES-samninginn, og ESA. Framkvæmdastjórnin segist ekki vera í aðstöðu til að tjá sig um slíkt í smáatriðum. Hún tiltekur hins vegar að hvað Evrópusambandið varðar hafi fyrra verndarákvæðinu, vegna röskunar á fjármagnsmörkuðum, einungis einu sinni verið beitt, þegar Danmörk greip til þess á árunum 1979-1984. Að mati framkvæmdastjórnarinnar væri

view, it would be difficult to suggest that this situation was as severe or critical as that affecting Iceland in 2008.

54. The Commission notes further that the protective measures adopted by Iceland were designed to prevent transactions which would "cause serious and substantial monetary and exchange rate instability", primarily by encouraging foreign currency into the domestic market to increase foreign currency reserves to stabilise the exchange rate of the Icelandic krónur. In its view, the imposition of such a system of exchange control, including the specific prohibition on importing krónur into Iceland, is clearly capable of constituting a "protective measure" within the meaning of Article 43(2) and (4) EEA. In this regard, it adds that the measures taken by Iceland apparently reflect commitments made to the IMF as a condition for receiving financial assistance.

55. As regards the proportionality of the prohibition on import of krónur into Iceland, the Commission notes that an individual such as the Plaintiff who wishes to pay off debts in Iceland may continue to do so, since Article 3 of the Rules expressly enables non-residents to purchase krónur from Icelandic financial institutions, that is, on the onshore market. Putting it another way, it submits that the prohibition does not deprive an individual of the possibility to pay his debts, but merely places an additional financial burden upon him by effectively requiring him to do so via the onshore market rather than by "taking advantage" of the more favourable offshore market.

56. The Commission notes that the Plaintiff has sought to argue that an exemption should be granted in his case because the amounts involved were relatively small and a transfer to Iceland could not properly be considered to affect the stability of the krónur. In the Commission's view, however, such argument fails to take account of the fact that if all holders of offshore krónur sought to carry out the same type of operation as the Plaintiff, there would clearly be a major impact.

57. In this regard, the Commission submits that, in the absence of further information on the criteria for granting exemptions, simply the existence itself of an exemption scheme tends to reinforce

hæpið að halda því fram að aðstæður þá hafi verið jafn alvarlegar eða aðkallandi og þær sem uppi voru á Íslandi árið 2008.

54. Framkvæmdastjórnin bendir jafnframt á að verndarráðstöfununum sem Ísland greip til hafi verið stefnt gegn fjármagnsflutningum sem „valdið gætu alvarlegum og verulegum óstöðugleika í gengis- og peningamálum“, einkum með því að hvetja til innflutnings erlends gjaldeyris til landsins til að auka gjaldeyrisforða og ná fram stöðugleika krónunnar. Framkvæmdastjórnin telur að slíkt kerfi gjaldeyriseftirlits, þar með talið sérstakt bann við innflutningi króna, geti augljóslega talist „verndarráðstöfun“ í skilningi 2. og 4. mgr. 43. gr. EES-samningsins. Í þessu sambandi bætir framkvæmdastjórnin því við að ráðstafanirnar sem Ísland greip til virðast hafa verið hluti af samkomulagi ríkisins við AGS, til að hljóta efnahagsaðstoð frá sjóðnum.

55. Við athugun á því hvort meðalhófs hafi verið gætt við setningu banns við innflutningi króna til Íslands, bendir framkvæmdastjórnin á að einstaklingur, líkt og stefnandi, sem vill greiða af skuldum sínum á Íslandi, geti gert svo áfram, þar sem 3. gr. reglnanna heimili erlendum aðilum sérstaklega að kaupa innlendan gjaldeyri hjá fjármálafyrirtæki á Íslandi. Með öðrum orðum kemur bannið ekki í veg fyrir að einstaklingur greiði skuldir sínar, heldur leggur einungis á hann auknar fjárhagslegar kvaðir með því að fara fram á að hann framkvæmi greiðslurnar á innanlandsmarkaði frekar en að „færa sér í nyt“ hagstæðari aflandsmarkað.

56. Framkvæmdastjórnin bendir á að stefnandi hafi reynt að færa rök fyrir því að veita bæri honum undanþágu vegna þess að fjárhæðin í hans tilviki væri tiltölulega lág og flutningur hennar til Íslands gæti ekki með réttu talist hafa áhrif á stöðugleika krónunnar. Það er hins vegar álit framkvæmdastjórnarinnar að með slíkum rökstuðningi sé sú staðreynd ekki tekin með í reikninginn að ef allir eigendur aflandskróna myndu leitast við að framkvæma sams konar gerning og stefnandi, myndi slíkt augljóslega hafa veruleg áhrif.

57. Í þessu tilliti heldur framkvæmdastjórnin því fram að þótt frekari upplýsingar skorti um skilyrði fyrir veitingu undanþágu, renni sjálf

the view that the measures comply with the requirements of proportionality.

58. The Commission proposes that the Court should answer the referring court's questions as follows:

A measure such as that contained in the Rules on Foreign Exchange No 880/2009 which prevents an Icelandic national resident in the UK from transferring Icelandic krónur purchased on the offshore market in the UK to Iceland is in principle compatible with Article 43(2) and (4) of the EEA Agreement.

Per Christiansen

Judge-Rapporteur

tilvist slíks undanþágukerfis frekari stoðum undir þá skoðun að meðalhófs hafi verið gætt.

58. Framkvæmdastjórnin leggur til að dómstóllinn svari spurningu Héraðsdóms Reykjavíkur með eftirfarandi hætti:

Ráðstöfun, eins og sú sem felst í reglum um gjaldeyrismál nr. 880/2009, sem meinar íslenskum ríkisborgara, búsettum í Bretlandi, að flytja íslenskar krónur, sem keyptar voru á aflandsmarkaði í Bretlandi, til Íslands, samrýmist að meginreglu til ákvæðum 2. og 4. mgr. 43. gr. EES-samningsins.

Per Christiansen
Framsögumaður

Case E-8/11

EFTA Surveillance Authority
v
Iceland

CASE E-8/11

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfil its obligations - Directive 2002/49/EC on the assessment and management of environmental noise)

Summary of the Judgment

1. According to Article 7(1) of the Directive, EEA States are required to ensure that strategic noise maps were drawn up by 30 June 2007 for all major roads which have more than six million vehicle passages a year.

2. Article 7(1) and Article 8(1) apply to major roads which have more than 6 million vehicle passages a year irrespective of whether or not they are situated within an agglomeration with more than 100 000 but less than 250 000 inhabitants.

3. The question of whether an EEA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion.

JUDGMENT OF THE COURT

14 December 2011

(Failure by a Contracting Party to fulfil its obligations – Directive 2002/49/EC on the assessment and management of environmental noise)

In Case E-8/11,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Florence Simonetti, Senior Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Bergþór Magnússon, Director at the Ministry for Foreign Affairs, assisted by Glóey Finnsdóttir, Head of Division at the Ministry for the Environment, acting as Agents,

defendant,

APPLICATION for a declaration that, by failing to ensure that its competent authorities have made and, where relevant, approved strategic noise maps and drawn up noise action plans for all major roads on its territory which have more than six million vehicle passages a year, and to ensure that the information from strategic noise maps and summaries of the action plans as referred to in Annex VI to the Directive are sent to the EFTA Surveillance Authority, Iceland has failed to fulfil its obligations arising from Articles 7(1), 8(1) and 10 of the Act referred to at point 32g of Annex XX to the EEA Agreement (Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise) as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of:

– the European Commission, represented by Eric White, Legal Adviser, and Ken Mifsud-Bonnici, Member of its Legal Service, acting as Agents,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I THE APPLICATION

1 By application lodged at the Court Registry on 11 April 2011 the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), for a declaration that by failing to ensure that its competent authorities had made and, where relevant, approved strategic noise maps and drawn up noise action plans for all major roads on its territory which have more than six million vehicle passages a year, and ensured that the information from strategic noise maps and summaries of the action plans as referred to in Annex VI to the Directive were sent to ESA, Iceland had failed to fulfil its obligations arising from Articles 7(1), 8(1) and 10 of the Act referred to at point 32g of Annex XX to the EEA Agreement (Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise) as adapted to the EEA Agreement by Protocol 1 thereto.

II LEGAL BACKGROUND

EEA law

2 Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise ("the Directive") is referred to at point 32g of Annex XX to the EEA Agreement. The Directive is adapted to the EEA Agreement by way of Protocol 1 thereto.

3 Article 3 of the Directive reads as follows:

For the purposes of this Directive:

...

(k) 'agglomeration' shall mean part of a territory, delimited by the Member State, having a population in excess of 100 000 persons and a population density such that the Member State considers it to be an urbanised area;

...

(n) 'major road' shall mean a regional, national or international road, designated by the Member State, which has more than three million vehicle passages a year;

...

(r) 'strategic noise map' shall mean a map designed for the global assessment of noise exposure in a given area due to different noise sources or for overall predictions for such an area;

...

(t) 'action plans' shall mean plans designed to manage noise issues and effects, including noise reduction if necessary

4 Article 7 of the Directive reads as follows:

1. Member States shall ensure that no later than 30 June 2007 strategic noise maps showing the situation in the preceding calendar year have been made and, where relevant, approved by the competent authorities, for all agglomerations with more than 250 000 inhabitants and for all major roads which have more than six million vehicle passages a year, major railways which

have more than 60 000 train passages per year and major airports within their territories.

...

2. *Member States shall adopt the measures necessary to ensure that no later than 30 June 2012, and thereafter every five years, strategic noise maps showing the situation in the preceding calendar year have been made and, where relevant, approved by the competent authorities for all agglomerations and for all major roads and major railways within their territories.*

...

5 Article 8 of the Directive reads as follows:

1. *Member States shall ensure that no later than 18 July 2008 the competent authorities have drawn up action plans designed to manage, within their territories, noise issues and effects, including noise reduction if necessary for:*

   (a) *places near the major roads which have more than six million vehicle passages a year, major railways which have more than 60 000 train passages per year and major airports;*

   (b) *agglomerations with more than 250 000 inhabitants. Such plans shall also aim to protect quiet areas against an increase in noise.*

...

2. *Member States shall ensure that, no later than 18 July 2013, the competent authorities have drawn up action plans notably to address priorities which may be identified by the exceeding of any relevant limit value or by other criteria chosen by the Member States for the agglomerations and for the major roads as well as the major railways within their territories.*

...

6 Article 10(2) of the Directive reads as follows:

The Member States shall ensure that the information from strategic noise maps and summaries of the action plans as referred to in Annex VI are sent to the Commission within six months of the dates laid down in Articles 7 and 8 respectively.

7 Annex IV of the Directive reads as follows:

...

3. Strategic noise maps for agglomerations shall put a special emphasis on the noise emitted by:

— road traffic,

— rail traffic,

— airports,

— industrial activity sites, including ports.

...

8. For agglomerations separate strategic noise maps must be made for road-traffic noise, rail-traffic noise, aircraft noise and industrial noise. Maps for other sources may be added.

...

8 Annex VI of the Directive reads as follows:

The data to be sent to the Commission are as follows:

1. For agglomerations

...

1.5. The estimated number of people (in hundreds) living in dwellings that are exposed to each of the following bands of values of L_{den} in dB 4m above the ground on the most exposed façade: 55-59, 60-64, 65-69, 70-74, > 75, separately for noise from road, rail and air traffic, and from industrial sources. ....

1.6. The estimated total number of people (in hundreds) living in dwellings that are exposed to each of the following bands of values of L_{night} in dB 4m above the ground on the most exposed façade: 50-54, 55-59, 60-64, 65-69, > 70, separately for road, rail and air traffic and for industrial sources....

...

2. For major roads, major railways and major airports

...

2.2. A characterisation of their surroundings: agglomerations, villages, countryside or otherwise, information on land use, other major noise sources.

...

2.5. The estimated total number of people (in hundreds) living outside agglomerations in dwellings that are exposed to each of the following bands of values of L_{den} in dB 4 m above the ground and on the most exposed façade:

55-59, 60-64, 65-69, 70-74, > 75.

...

2.6. The estimated total number of people (in hundreds) living outside agglomerations in dwellings that are exposed to each of the following bands of values of L_{night} in dB 4m above the ground and on the most exposed façade:

50-54, 55-59, 60-64, 65-69, > 70. ...

2.7. The total area (in km^2) exposed to values of L_{den} higher than 55, 65 and 75 dB respectively. The estimated total number of dwellings (in hundreds) and the estimated total number of people (in hundreds) living in each of these areas must also be given. Those figures must include agglomerations.

The 55 and 65 dB contours must also be shown on one or more maps that give information on the location of villages, towns and agglomerations within those contours.

III FACTS AND PRE-LITIGATION PROCEDURE

9 By letter dated 5 November 2009, ESA requested Iceland to provide information related, in particular, to the list of roads, airports, railways and agglomerations, falling within the scope of the obligation to draw up noise maps and noise action plans. The request also concerned the noise maps and noise action plans themselves.

10 By letter dated 18 February 2010, Iceland submitted to ESA part of the requested information. According to the letter, there is no

agglomeration with more than 250 000 inhabitants in Iceland, the largest airport in the country (Keflavík) does not fall under the definition of a major airport according to the Directive and there are no railways in Iceland. However, there are six major roads with more than six million vehicle passages a year in Iceland, all of which are situated within the Reykjavík agglomeration. These are: Highway 1 (Hringvegur); Highway 40 (Hafnarfjarðarvegur); Highway 41 (Reykjanesbraut); Highway 49 (Nesbraut); Highway 413 (Breiðholtsbraut) and Highway 418 (Bústaðavegur).

11 ESA issued a supplementary request for information dated 24 February 2010, to which Iceland replied on 15 April 2010. Iceland stated that work on the strategic noise maps had begun after the adoption of the Icelandic Regulation No 1000/2005 but had then been delayed. Subsequently, it had been decided that since there were only a few roads with more than six million vehicle passages a year in Iceland, strategic noise maps for these roads would be prepared at the same time as for all the other major roads falling within the scope of the Directive. The work would therefore be completed by 1 July 2012.

12 ESA concluded that the Icelandic authorities had neither prepared noise maps nor drawn up noise action plans for the infrastructure in Iceland falling within the scope of the Directive, i.e. the six major roads with more than six million vehicle passages a year. Consequently, ESA sent a letter of formal notice to the Icelandic Government on 26 May 2010, in which it concluded that Iceland had failed to fulfil its obligations arising from Articles 7(1), 8(1) and 10 of the Directive.

13 In its reply to the letter of formal notice on 19 July 2010, Iceland indicated that draft noise maps had been drawn up within the boundary of the Reykjavík municipality and requested more time in order to provide further information on the work on the strategic noise maps and action plans before the end of September 2010.

14 ESA issued a reasoned opinion on 13 October 2010, in which it concluded that Iceland had failed to fulfil its obligations arising from Articles 7(1), 8(1) and 10 of the Directive.

15 In its reply to the reasoned opinion dated 17 December 2010, Iceland disagreed with ESA's assessment, contending that it was not in breach of the Directive. ESA was not satisfied with that reply and accordingly decided to bring the present action.

IV PROCEDURE BEFORE THE COURT

16 The present application was lodged at the Court Registry on 11 April 2011. Iceland's statement of defence was registered at the Court Registry on 16 June 2011. On 5 July 2011, ESA submitted a reply to the defence lodged by Iceland. The rejoinder was lodged on 8 August 2011.

17 Pursuant to Article 20 of the Statute of the Court, written observations were received from the European Commission.

18 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

V ARGUMENTS OF THE PARTIES

19 ESA asserts that Article 7(1) of the Directive explicitly provides for the mapping of both large agglomerations and major sources of noise pollution, regardless of whether the sources are within the large agglomeration or not. Secondly, ESA contends that Article 8(1) of the Directive lays down an unambiguous requirement to draw up noise action plans to manage noise both in places near the major roads and in agglomerations. The interpretation that the national authorities shall make maps and noise plans for both major roads of more than six million vehicle passages a year and agglomerations is confirmed by the requirements laid down in Annex VI to the Directive. ESA contends that according to Annex VI to the Directive, EFTA States must provide ESA with information on the agglomerations crossed by major roads and information concerning the effects of noise from the roads inside agglomerations. If the Directive had intended to exclude roads with agglomerations from the mapping requirement, it would not have required the State to provide information on the noise

exposure caused by such roads. ESA notes that while there is a distinction made between information concerning roads located within or outside an agglomeration, this does not mean that the Directive excludes roads within an agglomeration from the mapping requirement.

20 As a result, ESA contends, major roads within agglomerations with 100 000 inhabitants are to be included in two strategic noise maps: one concerning the noise from the road itself, to be completed by 30 June 2007, and a second, to be completed by 30 June 2012, for the agglomeration taking into account major and smaller roads as well as airports and industrial activity sites, with the same principles applying to the drafting of noise action plans.

21 Consequently, ESA submits that Iceland is in breach of Articles 7(1), 8(1) and 10 of the Directive for failing to ensure that its competent authorities fulfilled their obligations to have made and, where relevant, approved strategic noise maps and drawn up noise action plans for all major roads on its territory which have more than six million vehicle passages a year, and to ensure that the information from strategic noise maps and summaries of the action plans, as referred to in Annex VI to the Directive, are sent to ESA.

22 Iceland submits that Article 7(1) of the Directive when read together with points 3 and 8 of Annex IV, leads to the conclusion that all noise emitted by road traffic within an agglomeration, including traffic on major roads, should be mapped at the same time, and be included in the submission for the agglomeration in question. If Articles 7(1) and 8(1) were to be interpreted to the effect that major roads within an agglomeration were to be mapped separately, it would result in misleading and even incorrect noise emission data. Consequently, a strategic noise map for agglomerations must take into account all road traffic within that agglomeration. That a road is defined as a "major road" under the Directive does not mean that it should be mapped separately. Therefore, the references to "major roads which have more than six million vehicle passages a year" in

Articles 7(1) and 7(2) of the Directive can only be understood as referring to such roads outside of agglomerations.

23 Iceland contends that as the only roads which have more than six million vehicle passages are to be found within the Greater Reykjavík Area ("GRA") agglomeration, which has more than 100 000 but fewer than 250 000 inhabitants, the time limits for the submission of a strategic noise map and an action plan for the agglomeration are 30 June 2012 and 18 July 2013 as laid down in Articles 7(2) and 8(2) respectively of the Directive. In its Rejoinder, Iceland submits that when Article 7(1) of the Directive is read together with Annex VI, points 1.5, 1.6, 2.5 and 2.6, it is clear that all environmental noise within agglomerations must be mapped at the same time.

24 Due to the fact that certain roads in the GRA agglomeration meet two different requirements of Articles 7 and 8 of the Directive, Iceland submits that these roads should be a part of the noise mapping exercise and action plan set out for the agglomeration size to which they belong and therefore the time limits in Articles 7(2) and 8(2) of the Directive are applicable.

25 The European Commission entirely supports the views taken by ESA.

VI FINDINGS OF THE COURT

26 The parties dispute the correct interpretation of Articles 7, 8, and 10 of the Directive. In particular, the parties disagree as to whether Article 7(1) and Article 8(1) of the Directive require strategic noise maps and action plans to be drawn up for major roads which have more than six million vehicle passages a year which are situated within an agglomeration with fewer than 250 000 inhabitants, i.e. by 30 June 2007 and 18 July 2008 respectively, or whether it is sufficient to produce the strategic noise maps and action plans for these roads together with the strategic noise maps and action plans for the agglomeration itself by 30 June 2012 and 18 July 2013 respectively.

27 According to Article 7(1) of the Directive, EEA States are required to ensure that strategic noise maps must have been drawn up

by 30 June 2007 for all major roads which have more than six million vehicle passages a year. Consequently, the competent Icelandic authorities were obliged to draw up by 30 June 2007 strategic noise maps for all such major roads within the territory of Iceland. This requirement is independent of the obligation on EEA States to ensure that strategic noise maps are drawn up for agglomerations with more than 250 000 inhabitants.

28 Article 8(1) of the Directive similarly requires EEA States to ensure that no later than 18 July 2008 noise action plans have been drawn up for places near those major roads with more than six million vehicle passages a year.

29 The wording of Article 7 and Article 8 of the Directive contains no indication that the obligation to produce strategic noise maps and action plans, in 2007 and 2008 respectively, for major roads which have more than 6 million vehicle passages a year applies only to such roads which are situated outside agglomerations with more than 100 000 but fewer than 250 000 inhabitants.

30 Likewise, there is nothing in the annexes to the Directive that would suggest that major roads which have more than 6 million vehicle passages a year and which are situated within an agglomeration with more than 100 000 but fewer than 250 000 inhabitants would be excluded from the scope of application of Article 7(1) and Article 8(1). While it is apparent from these annexes that major roads are subject to noise mapping both within and outside of agglomerations, there is no indication as to the year in which the noise mapping is supposed to be due, or that an exception is applicable for major roads which have more than 6 million passengers a year and which are situated within an agglomeration with more than 100 000 but fewer than 250 000 inhabitants.

31 Regarding Iceland's argument that it would lead to an unnecessary repetition of noise mapping and be misleading for the public to require separate strategic noise maps for major roads which have more than 6 million vehicle passages a year and the agglomeration in which these roads are situated, the

Court notes that it is apparent from Article 7(2) of the Directive that strategic noise maps must be made every 5 years. Thus, whereas Article 7(1) aims only at the most important sources of environmental noise which are to be assessed by 2007, as of 2012, strategic noise maps for all major sources of environmental noise, including those referred to in Article 7(1), need to be produced every 5 years.

32 It follows from the above that that Article 7(1) and Article 8(1) apply to major roads which have more than 6 million vehicle passages a year irrespective of whether or not they are situated within an agglomeration with more than 100 000 but fewer than 250 000 inhabitants.

33 Article 10(2) of the Directive obliges EEA States to ensure that the information from strategic noise maps and summaries of the action plans as referred to in Annex VI to the Directive are sent to the European Commission or to ESA within six months of the dates laid down in Articles 7 and 8 of the Directive respectively.

34 The question of whether an EEA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, e.g., Case E-5/11 *EFTA Surveillance Authority* v *The Kingdom of Norway*, judgment of 20 September 2011, not yet reported, paragraph 28). It is undisputed that by the expiry of the time-limit given in the reasoned opinion, there were six major roads which had more than six million vehicle passages a year within the territory of Iceland and that the Icelandic authorities had neither made strategic noise maps nor drawn up action plans for these roads.

35 It follows from the above that Iceland failed to produce the required strategic noise maps and action plans in accordance with the time-limits contained in Articles 7(1) and 8(1) of the Directive. Iceland failed to send the information concerning the strategic noise maps and summaries of the action plans as referred to in Annex VI to the Directive to ESA in accordance with Article 10(2) of the Directive.

36 It must therefore be held that by failing to ensure that within the time-limits prescribed its competent authorities made and, where relevant, approved strategic noise maps and drew up noise action plans for all major roads on its territory which have more than six million vehicle passages a year, and to ensure that the information from strategic noise maps and summaries of the action plans as referred to in Annex VI to the Directive were sent to ESA, Iceland has failed to fulfil its obligations arising from Articles 7(1), 8(1) and 10(2) of the Act referred to at point 32g of Annex XX to the EEA Agreement (Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise) as adapted to the EEA Agreement by Protocol 1 thereto.

VII COSTS

37 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Iceland be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, Iceland must be ordered to pay the costs. The costs incurred by the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing to ensure that within the time-limits prescribed its competent authorities made and, where relevant, approved strategic noise maps and drew up noise action plans for all major roads on its territory which have more than six million vehicle passages a year, and to ensure that the information from strategic noise maps and summaries of the action plans as referred to in Annex VI to the Directive were sent to the EFTA Surveillance Authority, Iceland has failed to fulfil its obligations arising from Articles 7(1), 8(1) and 10 of the Act referred to at point 32g of Annex XX to the EEA Agreement (Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise) as adapted to the EEA Agreement by Protocol 1 thereto.**

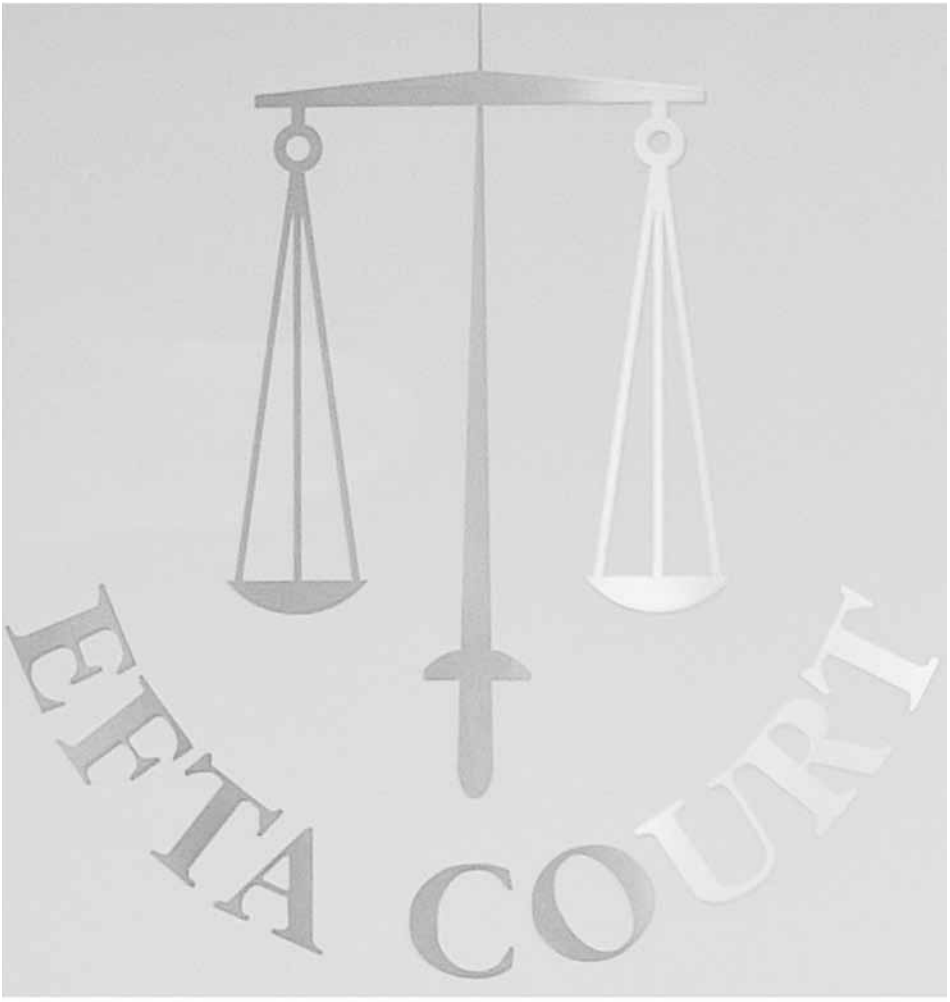
2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 14 December 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President


EFTA COURT

Case E-1/11

Dr A

CASE E-1/11

Dr A

(Free movement of persons – Directive 2005/36/EC – Recognition of professional qualifications – Protection of public health - Non-discrimination - Proportionality)

Summary of the Judgment

1. An EEA State is not permitted under Directive 2005/36/EC to make the recognition of professional qualifications of doctors subject to any further conditions. The system of automatic recognition would be jeopardised if it were open to EEA States at their discretion to question the merits of a decision taken by the competent authorities of another EEA State to award the formal evidence of qualification.

2. However, an EEA State may make an authorisation to practice medicine conditional upon the applicant having the linguistic knowledge necessary for practising the profession on its territory. A doctor's ability to communicate with patients, administrative authorities, colleagues and professional bodies constitutes a general public interest such as to justify making the authorisation to practise as a doctor subject to language requirements. However, such requirements should not go beyond what is necessary to attain that objective.

3. As for other factors concerning personal aptitude of a migrant applicant, the effect of recognition of professional qualifications by the host EEA State is that the beneficiary is allowed to gain access to the same profession as that for which he was qualified in the home EEA State, and to pursue it in the host EEA State under the same conditions as its nationals. However, this is without prejudice to compliance by the migrant professional with any non-discriminatory conditions of pursuit which might be laid down by the authorities of the host State provided that these are objectively

SAK E-1/11

Dr. A

(Fri bevegelighet for personer – Direktiv 2005/36/EF – Godkjenning av yrkeskvalifikasjoner – Vern av offentlig helse - Ikke-diskriminering - Forholdsmessighet)

Domssammendrag

1. En EØS-stat er etter direktivet forhindret fra å gjøre godkjenning av yrkeskvalifikasjoner for leger betinget av ytterligere krav. Systemet med automatisk godkjenning ville bli komme i fare dersom det var anledning for EØS-stater etter eget skjønn å stille spørsmål ved verdien av en beslutning tatt av de kompetente myndigheter i en annen EØS-stat om å tildele det formelle kvalifikasjonsbevis.

2. Imidlertid kan en EØS-stat gjøre en autorisasjon til å praktisere medisin betinget av den språkkunnskap som er nødvendig for utøvelsen av yrket i etableringsstaten. En leges evne til å kommunisere med pasienter, administrative myndigheter, kolleger og faglige organer er av generell offentlig interesse. Det er derfor berettiget å la autorisasjon til å praktisere som lege bero på språklige krav. Slike krav kan imidlertid ikke gå utover det som er nødvendig for å oppnå dette mål.

3. Hva gjelder andre faktorer vedrørende personlig egnethet for en migrerende søker, følger det av direktivets artikkel 4 nr. 1 at virkningen av vertsstatens godkjenning av yrkeskvalifikasjoner er at den begunstigede får adgang til det samme yrke i vertsstaten som vedkommende er kvalifisert til i hjemstaten og til å utøve det i vertsstaten under samme vilkår som vertsstatens borgere. De individuelle rettigheter som følger av direktivet berører således ikke den migrerende søkers plikt til å overholde alle ikke-diskriminerende vilkår for utøvelse som måtte være fastsatt av vertsstatens myndigheter, under forutsetning av at disse er objektivt begrunnet og

justified and proportionate, inter alia, with regard to ensuring a high level of health and consumer protection.

4. Accordingly, the EEA States retain the competence to take disciplinary action and impose criminal sanctions against migrant medical professionals and, where appropriate, to suspend or withdraw the authorisation to practise if the respective conditions under national law are fulfilled, provided that the general principles of EEA law are respected.

5. However, the requirements on the pursuit of a profession must reflect objective criteria known in advance. They must adequately circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily, thereby eliminating discretionary conduct liable to deprive the Directive of its full effectiveness. Furthermore, the requirements which an EEA State may impose must be non-discriminatory, able to ensure achievement of the objective of protecting public health and not go beyond what is necessary for that purpose. This is for the EEA State concerned to demonstrate.

6. Provided that the relevant information that led to the refusal of the complainant's application would have given grounds for a suspension or withdrawal of an existing authorisation in compliance with EEA law, national authorities cannot be obliged to grant an authorisation when there is a necessity to revoke it. Under such circumstances, national authorities must be entitled to deny an authorisation.

forholdsmessige, for eksempel med hensyn til å sikre et høyt nivå for helse og forbrukervern.

4. Følgelig beholder EØS-statene kompetansen til å treffe disiplinærtiltak og ilegge strafferettslige sanksjoner mot migrerende medisinske fagfolk og eventuelt til å suspendere eller kalle tilbake autorisasjonen til å praktisere, forutsatt at de aktuelle vilkår for dette i nasjonal rett er oppfylt, og at EØS-rettens generelle prinsipper blir respekter.

5. Imidlertid må krav til utøvelsen av et yrke gjenspeile objektive kriterier kjent på forhånd. De må begrense nasjonale myndigheters skjønnsutøvelse, slik at den ikke benyttes på vilkårlig vis, for på den måten å eliminere skjønnsmessig atferd som kan frata direktivet sin fulle effektivitet. Videre må de krav som en EØS-stat kan stille være ikke-diskriminerende, egnet til å sikre oppnåelse av målet om å beskytte folkehelsen og ikke gå lenger enn det som er nødvendig for formålet. Dette er det opp til den aktuelle EØS-stat å godtgjøre.

6. Forutsatt at den relevante informasjon som ledet till at klagerens søknad ble avslått ville ha gitt grunnlag for suspensjon eller tilbakekall av en eksisterende autorisasjon i samsvar med EØS-retten, kan nasjonale myndigheter ikke være forpliktet til å gi en autorisasjon når det er nødvendig å kalle den tilbake. Under slike omstendigheter må nasjonale myndigheter ha rett til å nekte godkjenning.

JUDGMENT OF THE COURT

15 December 2011*

(Free movement of persons – Directive 2005/36/EC – Recognition of professional qualifications – Protection of public health – Non-discrimination - Proportionality)

In Case E-1/11,

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 Norwegian Appeal Board for Health Personnel (Statens helsepersonellnemnd) in the case of

Dr A

concerning the interpretation of Directive 2005/36/EC and other EEA law.

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur) Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– the Czech Government, represented by Martin Smolek and David Hadroušek, acting as Agents,

– the Polish Government, represented by Maciej Szpunar, Undersecretary in the Ministry of Foreign Affairs, acting as Agent,

– the Spanish Government, represented by Juan Manuel Rodríguez Cárcamo, State Advocate (Abogado del Estado), acting as Agent,

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Markus Schneider, Officer, Department of Legal & Executive Affairs, acting as Agents, and

* Language of the request: Norwegian.

EFTA-DOMSTOLENS DOM

15. desember 2011*

(Fri bevegelighet for personer – Direktiv 2005/36/EF – Godkjenning av yrkeskvalifikasjoner – Vern av offentlig helse – Ikke-diskriminering – Forholdsmessighet)

I sak E-1/11,

ANMODNING til EFTA-domstolen i medhold av artikkel 34 i Avtalen mellom EFTA-landene om opprettelse av et Overvåkingsorgan og en Domstol, fra Statens helsepersonellnemnd, i saken

Dr. A

vedrørende tolkning av direktiv 2005/36/EF og EØS-avtalen, avsier

DOMSTOLEN,

sammensatt av: Carl Baudenbacher, president, Per Christiansen, dommer, og Páll Hreinsson, saksforberedende dommer,

justissekretær: Skúli Magnússon,

etter å ha tatt i betraktning de skriftlige innlegg fremmet av:

– Tsjekkias regjering, representert ved Martin Smolek og David Hadroušek,

– Polens regjering, representert ved Maciej Szpunar, Undersecretary i Ministry of Foreign Affairs,

– Spanias regjering, representert ved Juan Manuel Rodríguez Cárcamo, State Advocate (Abogado del Estado),

– EFTAs overvåkingsorgan ("ESA"), representert ved Xavier Lewis, Director, og Markus Schneider, Officer, Department of Legal & Executive Affairs, og

* Språket i anmodningen om rådgivende uttalelse: norsk.

– the European Commission ("the Commission"), represented by Hans Stovlbaek and Nicola Yerell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Norwegian Government, represented by Fanny Platou Amble, the Czech Government, represented by David Hadroušek, the Polish Government, represented by Dorota Lutostańska, ESA, represented by Markus Schneider, and the Commission, represented by Nicola Yerrell, at the hearing on 20 September 2011,

gives the following

JUDGMENT

I FACTS AND PROCEDURE

1 By a decision of 25 January 2011, the Norwegian Appeal Board for Health Personnel ("the Appeal Board") made a request for an Advisory Opinion, registered at the Court on 31 January 2011, in a case pending before it concerning Dr A ("the Complainant").

2 The question referred has arisen in appeal proceedings before the Appeal Board concerning the refusal of the Norwegian Registration Authority for Health Personnel ("Registration Authority") to grant the Complainant licence to practise as a medical doctor in Norway.

3 According to the request, the Complainant was trained as a medical doctor in Bulgaria and has an additional specialisation in psychiatry. She has extensive professional experience as a psychiatrist in Bulgaria.

4 On 25 January 2007 and on 19 August 2008, the Complainant applied to the Registration Authority for a licence to practise as a medical doctor. The Complainant was given a practical training licence for medical practice in Norway ("turnus"). The licence granted a right to work as a medical candidate under professional guidance and the supervision of a responsible medical doctor.

– Europakommisjonen ("Kommisjonen"), representert ved Hans Stovlbaek og Nicola Yerell, medlemmer av Kommisjonens juridiske tjeneste,

med henvisning til rettsmøterapporten

og etter å ha hørt muntlige innlegg fra Norges regjering, representert ved Fanny Platou Amble, Tsjekkias regjering, representert ved David Hadroušek, Polens regjering, representert ved Dorota Lutostańska, ESA, representert ved Markus Schneider, og Europakommisjonen, representert ved Nicola Yerrell, i rettsmøte den 20. september 2011,

slik

DOM

I FAKTUM OG SAKSGANG

1 Ved beslutning 25. januar 2011 fremsatte Statens helsepersonellnemnd ("helsepersonellnemnda") en anmodning om en rådgivende uttalelse, mottatt ved EFTA-domstolen 31. januar 2011, i en verserende sak for helsepersonellnemnda vedrørende Dr. A ("klageren").

2 Det forelagte spørsmål har oppstått i forbindelse med klagebehandlingen for helsepersonellnemnda angående Statens autorisasjonskontor for helsepersonells ("autorisasjonskontoret") nektelse av å gi klageren autorisasjon til å praktisere som lege i Norge.

3 Ifølge anmodningen ble klageren utdannet som lege i Bulgaria og har en tilleggsspesialisering i psykiatri. Hun har omfattende erfaring som psykiater i Bulgaria.

4 Den 25. januar 2007 og 19. august 2008 søkte klageren autorisasjonskontoret om lisens for å arbeide som lege, og ble innvilget turnuslisens til legevirksomhet i Norge uten avtjent turnustjeneste. Lisensen ga en rett til å arbeide som medisisnk kandidat under

It did not grant a right to independently practise medicine, perform second-call night duties, or participate in the municipal emergency medical services scheme.

5 On 15 February 2008 the Complainant started practical training at a Norwegian hospital, but the training was not approved. After 10 days the Complainant was not allowed to continue working by the hospital. In a letter dated 5 June 2008 to the Registration Authority, the hospital noted that the Complainant "at the present time and with the level of assistance the employer can provide, would not be able to complete and obtain an approval of the practical training". It was further remarked that the Complainant had insufficient understanding of Norwegian which was incompatible with the requirement of due care in the treatment of patients. Moreover, it was noted, the Complainant lacked theoretical knowledge and had shown signs of insufficient insight in her own professional evaluation. On the basis of the information provided by the hospital, the Complainant was removed from practical training and her practical training licence was revoked by a decision of the Registration Authority dated 17 June 2008. As a consequence, the hospital terminated the Complainant's employment as a medical doctor in training on 27 June 2008.

6 Between 18 August 2008 and 30 April 2009, the Complainant carried out pre-practical training at the renal and hormonal diseases department of another hospital. The chief physician at that hospital certificated on 23 April 2009 that the Complainant had demonstrated professional progress in addition to an improved ability to converse in Norwegian with patients, their relatives and colleagues, but that it was still recommended that she continue pre-practical training. The chief physician detailed the evaluation of Dr A's training period in a conference call with representatives from the Registration Authority. He stated that the Complainant needed to acquire more professional experience before she would be ready to commence the practical training with the objective of achieving full authorisation. In his opinion, she was not yet able to begin in a practical training post.

faglig veiledning og tilsyn av overordnet lege. Lisensen ga ikke rett til å utøve legevirksomhet av selstendig karakter, være bakvakt, eller til å delta i kommunal legevaktordning.

5 Den 15. februar 2008 begynte klageren å arbeide som turnuslege ved et norsk sykehus, men praksisen ble ikke godkjent. Etter 10 dager ble klageren nektet å fortsette arbeidet og 5. juni 2008 bemerket sykehuset i et brev til autorisasjonskontoret at klageren "på nåværende tidspunkt og med de tilrettelegginger arbeidsgiver kan gi, ikke vil kunne klare å gjennomføre og få godkjent turnustjeneste". Videre ble det bemerket at klageren hadde manglende språkforståelse som ikke var forenlig med forsvarlig pasientbehandling. Dessuten hadde hun mangelfulle faglige kunnskaper og hadde vist tegn på manglende innsikt i egen faglig vurdering. På grunnlag av opplysningene fra sykehuset ble klageren tatt ut av turnustjenesten og hennes turnuslisens ble kalt tilbake ved autorisasjonskontorets vedtak 17. juni 2008. Den 27. juni 2008 ble klageren som følge av nevnte forhold oppsagt fra sin stilling som turnuslege ved sykehuset.

6 I perioden mellom 18. august 2008 og 30. april 2009 hopsiterte klageren ved sengepost for nyre- og hormonsykdommer ved et annet sykehus. Det fremgår i attest av 23. april 2009 fra klinikksjef ved sykehuset at klageren har vist faglig fremgang samt bedring i evnen til å bruke og forstå norsk i samtale med pasienter, pårørende og kolleger, men at hun er anbefalt fortsatt hospitering. Klinikksjefen utdypet sin vurdering av opplæringsperioden i en telefonkonferanse med representanter fra autorisasjonskontoret. Her fremholdt han at klageren burde tilegne seg mer faglig tyngde før hun er klar for å påbegynne turnustjeneste med det formål å oppnå full autorisasjon. Etter hans mening var hun ennå ikke klar for å begynne i en turnusstilling.

7 On 23 February 2009 the Complainant applied for authorisation as a medical doctor in Norway. By decision of 2 March 2009 the Registration Authority only granted the Complainant an extension of her licence. On 15 May 2009 the Complainant applied once more for authorisation to practise as a medical doctor in Norway. This time, a statement from the Bulgarian authorities was attached to the application confirming that the Complainant, on the basis of her education and professional experience as a medical doctor in Bulgaria, was covered by Directive 2005/36/EC.

8 By decision of 12 August 2009, the Registration Authority rejected the Complainant's application. It recognised that although, in principle, the Complainant had a right to authorisation on the basis of acquired rights under Article 23 of Directive 2005/36/EC, in its assessment, the Complainant lacked the necessary aptitude required under Article 48(3)(c) of the Norwegian Health Personnel Act. In support of that conclusion, the Registration Authority noted that the Complainant had previously been refused approval of her practical training in Norway due to language and communication problems, insufficient theoretical skills and signs of poor insight in her own functioning. However, the Registration Authority considered that there were grounds to grant the Complainant a one-year licence to work as a subordinate medical doctor in accordance with Article 49 of the Health Personnel Act.

9 On 11 September 2009, Dr A brought an appeal against that decision. The matter was eventually brought before the Appeal Board on 22 June 2010.

10 The Appeal Board referred the following question to the Court:

Does Directive 2005/36/EC or other EEA law allow the authorities of Member States to apply national rules providing for a right to deny an authorisation as a medical doctor or only to grant a limited authorisation as a medical doctor to applicants with insufficient professional qualifications, to a migrant applicant from another Member State who formally fulfils requirements under Directive

7 Den 23. februar 2009 søkte klageren om norsk autorisasjon som lege, men i vedtak av 2. mars 2009 innvilget autorisasjonskontoret bare en forlengelse av klagerens lisens. Klageren søkte 15. mai 2009 igjen om norsk autorisasjon som lege. Denne gang var søknaden vedlagt en erklæring fra bulgarske myndigheter med bekreftelse på at klageren var omfattet av direktiv 2005/36/EF om godkjenning av yrkeskvalifikasjoner på grunnlag av sin utdanning og yrkespraksis som lege i Bulgaria.

8 I vedtak av 12. august 2009 avslo autorisasjonskontoret søknaden. I vedtaket anerkjente autorisasjonskontoret at selv om klageren i utgangspunktet hadde rett til autorisasjon på grunnlag av ervervede rettigheter i medhold av artikkel 23 i direktiv 2005/36/EF om godkjenning av yrkeskvalifikasjoner, manglet klageren etter autorisasjonskontorets vurdering de nødvendige ferdigheter påkrevet etter den norske helsepersonellov § 48 tredje ledd bokstav c. Til støtte for denne konklusjon bemerket autorisasjonskontoret at klageren tidligere hadde fått underkjent turnustjeneste i Norge grunnet kommunikasjons- og språkproblemer, manglende faglige ferdigheter og tegn på manglende innsikt i egen yrkesutøvelse. Samtidig vurderte autorisasjonskontoret det slik at det var grunnlag for å innvilge klageren en ett-årig lisens for å arbeide som underordnet lege, jf. helsepersonelloven § 49.

9 Den 11. september 2009 påklaget Dr. A vedtaket og saken ble 22. juni 2009 oversendt helsepersonellnemnda for behandling.

10 Helsepersonellnemnda har forelagt EFTA-domstolen følgende spørsmål:

Gir direktiv 2005/36/EF eller EØS-retten for øvrig rom for at medlemsstatenes myndigheter kan anvende nasjonale regler, som hjemler rett til å nekte autorisasjon som lege eller til kun å gi begrenset autorisasjon som lege til søker med utilstrekkelige faglige kvalifikasjoner, overfor en migrerende søker fra en annen medlemsstat som formelt oppfyller krav i direktiv 2005/36/EF for rett til gjensidig

2005/36/EC for a right to mutual recognition of professional qualifications (authorisation as a medical doctor without limitations), when the professional experience of the applicant in Norway has unveiled insufficient professional qualifications?

II LEGAL BACKGROUND

EEA law

11 Article 30 of the EEA Agreement ("EEA") reads:

In order to make it easier for persons to take up and pursue activities as workers and self-employed persons, the Contracting Parties shall take the necessary measures, as contained in Annex VII, concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications, and the coordination of the provisions laid down by law, regulation or administrative action in the Contracting Parties concerning the taking up and pursuit of activities by workers and self-employed persons.

12 Decision 142/2007 of 26 October 2007 of the EEA Joint Committee amended Annex VII to the EEA Agreement by adding Directive 2005/36/EC ("the Directive") to point 1 of that Annex (OJ 2005 L 255, p. 22). The Decision entered into force on 1 July 2009. The Directive was subsequently amended in Commission Regulation (EC) 1430/2007 of 5 December 2007 and in Commission Regulation (EC) 755/2008 of 31 July 2008, which were incorporated into the EEA Agreement by Joint Committee Decisions 50/2008 and 127/2008 respectively.

13 Article 1 of the Directive states:

This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

anerkjennelse av yrkeskvalifikasjoner (autorisasjon som lege uten begrensninger), men hvor det gjennom vedkommendes yrkespraksis i Norge er avdekket utilstrekkelige faglige kvalifikasjoner?

II RETTSLIG BAKGRUNN

EØS-rett

11 EØS-avtalen artikkel 30 lyder:

For å lette adgangen til å starte og utøve virksomhet som arbeidstager og selvstendig næringsdrivende skal avtalepartene treffe de nødvendige tiltak, som fastsatt i vedlegg VII, for gjensidig godkjennelse av diplomer, eksamensbevis og andre kvalifikasjonsbevis og samordning av de bestemmelser som avtalepartene har gitt ved lov eller forskrift om adgangen til å starte og utøve virksomhet som arbeidstager og selvstendig næringsdrivende.

12 Ved EØS-komiteens beslutning 142/2007 av 26. oktober 2007, ble Vedlegg VII til EØS-avtalen endret ved at direktiv 2005/36/EF ("direktivet") ble tilføyd til punkt 1 i Vedlegget (EUT 2005 L 255, s. 22). Beslutningen trådte i kraft 1. juli 2009. Direktivet ble deretter endret ved kommisjonsforordning (EF) nr. 1430/2007 av 5. desember 2007 og kommisjonsforordning (EF) nr. 755/2008 av 31. juli 2008, som ble inkorporert i EØS-avtalen ved EØS-komiteens beslutninger nr. 50/2008 og 127/2008.

13 Direktivets artikkel 1 lyder:

Dette direktiv fastsetter regler for hvordan en medlemsstat (heretter kalt vertsstaten) som gjør tilgang til og utøvelse av et regulert yrke innenfor sitt territorium avhengig av at utøveren innehar bestemte yrkeskvalifikasjoner, skal godkjenne yrkeskvalifikasjoner som er oppnådd i ett eller flere andre medlemsstater (heretter kalt hjemstaten) og som gjør det mulig for innehaveren av de nevnte kvalifikasjoner å utøve det samme yrket der, samt regler for tilgang til og utøvelse av yrket.

14 Article 2 of the Directive reads:

Scope

1. *This Directive shall apply to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.*

2. *Each Member State may permit Member State nationals in possession of evidence of professional qualifications not obtained in a Member State to pursue a regulated profession within the meaning of Article 3(1)(a) on its territory in accordance with its rules. In the case of professions covered by Title III, Chapter III, this initial recognition shall respect the minimum training conditions laid down in that Chapter.*

...

15 Article 4 of the Directive reads:

Effects of recognition

1. *The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.*

2. *For the purposes of this Directive, the profession which the applicant wishes to pursue in the host Member State is the same as that for which he is qualified in his home Member State if the activities covered are comparable.*

16 In Title III of Directive 2005/36, which is entitled 'Freedom of Establishment', Article 21 provides:

1. *Each Member State shall recognise evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor.... listed in Annex V, points 5.1.1, 5.1.2,.... respectively, which satisfy the minimum training conditions referred to in Articles 24, 25,....*

14 Direktivets artikkel 2 lyder:

Omfang

1. *Dette direktiv kommer til anvendelse på alle borgere i en medlemsstat som ønsker å utøve et lovregulert yrke, herunder frie yrker, i en annen medlemsstat enn der de tilegnet seg sine yrkeskvalifikasjoner, enten som selvstendig næringsdrivende eller som lønnsmottaker.*

2. *Hver av medlemsstatene vil kunne tillate medlemstatsborgere som innehar dokumentasjon på yrkeskvalifikasjoner som ikke er oppnådd i den aktuelle medlemsstat, å utøve et regulert yrke i den forstand som angitt i artikkel 3(1)(a,) på sitt territorium i samsvar med medlemsstatens regler. Med hensyn til yrker som omfattes av kapittel III i del III, skal godkjenningen i utgangspunktet respektere de minimumsvilkår for opplæring som fastsettes i det kapitlet.*

...

15 Direktivets artikkel 4 lyder:

Virkninger av godkjenningen

1. *Vertsstatens godkjenning av yrkeskvalifikasjoner tillater at den begunstigede i den aktuelle medlemsstaten får adgang til det samme yrket som vedkommende er kvalifisert til i hjemstaten og til å utøve det i vertsstaten under samme vilkår som medlemsstatens borgere.*

2. *For dette direktivs formål er yrket som søkeren ønsker å utøve i vertsstaten det samme som denne er kvalifisert for i sin hjemstat dersom virksomheten yrket omfatter er tilsvarende.*

16 I del III av direktiv 2005/36, som har overskriften "Etableringsfrihet", fastsetter artikkel 21:

1. *Hver av medlemsstatene skal godkjenne dokumentasjon av formelle kvalifikasjoner som lege som gir adgang til yrkesaktivitet som lege med grunnutdanning og spesialistlege.... etter liste i vedlegg V, punktene 5.1.1 og 5.1.2..., som tilfredsstiller de minimumsbetingelser for opplæring som det vises til i artiklene*

respectively, and shall, for the purposes of access to and pursuit of the professional activities, give such evidence the same effect on its territory as the evidence of formal qualifications which it itself issues.

Such evidence of formal qualifications must be issued by the competent bodies in the Member States and accompanied, where appropriate, by the certificates listed in Annex V, points 5.1.1, 5.1.2.... respectively.

The provisions of the first and second subparagraphs do not affect the acquired rights referred to in Articles 23, 27....

...

17 Article 23 of the Directive reads:

Acquired rights

1. *Without prejudice to the acquired rights specific to the professions concerned, in cases where the evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor, as nurse responsible for general care, as dental practitioner, as specialised dental practitioner, as veterinary surgeon, as midwife and as pharmacist held by Member States nationals does not satisfy all the training requirements referred to in Articles 24, 25,...., each Member State shall recognise as sufficient proof evidence of formal qualifications issued by those Member States insofar as such evidence attests successful completion of training which began before the reference dates laid down in Annex V, points 5.1.1, 5.1.2,.... and is accompanied by a certificate stating that the holders have been effectively and lawfully engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate.*

...

6. *Each Member State shall recognise as sufficient proof for Member State nationals whose evidence of formal qualifications as a doctor,.... does not correspond to the titles given for that Member State in Annex V, points 5.1.1, 5.1.2,.... evidence of formal*

24 og 25,....og skal med hensyn til tilgang til og utøvelse av yrkesaktiviteter, gi slik dokumentasjon den samme virkning på sitt teritorium som den dokumentasjon for formelle kvalifikasjoner som staten selv utsteder.

Slik dokumentasjon for formelle kvalifikasjoner må avgis fra kompetente organer i medlemsstatene og i tilfelle være ledsaget av de sertifikater som er opplistet i vedlegg V, punktene 5.1.1 og 5.1.2....

Bestemmelsene i første og annet ledd påvirker ikke de ervervede rettigheter som det vises til i artiklene 23 og 27....

...

17 Direktivets artikkel 23 lyder:

Ervervede rettigheter

1. *Uten at dette berører de ervervede rettigheter som er særegne for de yrkene de gjelder, og i tilfeller der kvalifikasjonsbevis som lege gir adgang til yrkesvirksomhet som lege med grunnutdanning og med spesialistutdanning, som sykepleier med ansvar for alminnelig sykepleie, som tannlege, som tannlege med spesialistutdanning, som veterinær, som jordmor og som farmasøyt som innehas av borgere i medlemsstatene ikke oppfyller alle de krav til utdanning som er nevnt i artikkel 24, 25, ..., skal alle medlemsstater godkjenne som tilstrekkelig bevis kvalifikasjonsbevis utstedt av disse medlemsstatene i den utstrekning slike bevis bevitner bestått fullføring av utdanning som var påbegynt før referansedatoene fastsatt i vedlegg V nr. 5.1.1, 5.1.2 ..., og blir ledsaget av en attest som slår fast at innehaverne har vært faktisk og rettmessig beskjeftiget i de aktuelle virksomheter i minst tre sammenhengende år i løpet av de siste fem år før tildelingen av attesten.*

...

6. *Hver av medlemsstatene skal godkjenne som tilstrekkelig bevis for medlemstatsborgere hvis kvalifikasjonsbevis som lege,.... ikke tilsvarer de oppføringer som er gitt for den aktuelle medlemsstat i vedlegg V, punktene 5.1.1 og 5.1.2, ... dokumentasjon av*

qualifications issued by those Member States accompanied by a certificate issued by the competent authorities or bodies.

The certificate referred to in the first subparagraph shall state that the evidence of formal qualifications certifies successful completion of training in accordance with Articles 24, 25, 28.... respectively and is treated by the Member State which issued it in the same way as the qualifications whose titles are listed in Annex V, points 5.1.1, 5.1.2...

18 Under Title IV Detailed rules for pursuing the profession, Article 53 of the Directive reads:

Knowledge of languages

Persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State.

National law

19 Article 48 of the Health Personnel Act - authorisation – reads as follows:

(1) Authorisation pursuant to this act is granted to the following categories of health personnell:

...

n) Medical Practitioner (Lege)

...

(2) The right to be granted an authorisation following an application belongs to anyone who:

a) has passed an examination in the relevant subject at a Norwegian university or college or through occupational training at a secondary level,

b) has completed practical training in accordance with regulations laid down by the Ministry,

c) is under 75 years of age and

formelle kvalifikasjoner avgitt fra disse medlemsstater og ledsaget av en bekreftelse utstedt av kompetente myndigheter eller organer.

Den bekreftelse som det vises til i første ledd skal erklære at kvalifikasjonsbeviset bevitner at innehaveren har bestått en utdanning i samsvar med artiklene 24, 25 og 28 ... og blir behandlet av medlemsstaten som utstedte det på samme måte som de kvalifikasjoner hvis titler er opplistet i vedlegg V, punktene 5.1.1, 5.1.2, ...

18 Direktivets artikkel 53, under del IV – Detaljerte regler for yrkesutøvelse – lyder:

Kjennskap til språk

Personer som nyter godt av godkjenning av yrkeskvalifikasjoner skal ha de språkkunnskaper som er nødvendig for å praktisere yrket i vertsstaten.

Nasjonal rett

19 Helsepersonelloven § 48 – Autorisasjon – lyder:

(1) Autorisasjonsordningen etter denne lov omfatter følgende grupper helsepersonell:

...

n) lege

...

(2) Rett til autorisasjon etter søknad har den som:

a) har bestått eksamen i vedkommende fag ved norsk universitet, høgskole eller videregående opplæring,

b) har gjennomført praktisk tjeneste fastsatt i forskrift gitt av departementet,

c) er under 75 år og

d) is not considered to be unfit for the profession.

...

(3) The right to be granted an authorisation following an application also belongs to anyone who:

...

b) has passed an examination which is recognised in accordance with agreement on mutual recognition pursuant to section 52,

...

20 Article 52 of the Health Personel Act – International agreements – reads as follows:

(1) Based on agreements with other countries relating to mutual recognition, authorisation, licence and certificates of completion of specialist training may be granted to aliens.

(2) The Ministry may in regulations stipulate further provisions to supplement the first paragraph, and may among them stipulate special requirements for recognition that are necessary in order to comply with international agreements.

21 The Directive is implemented in Norwegian law through Regulation No 1130 of 8 October 2008 on the authorisation, license and certification of the completion of specialist training of health personnel for professional qualifications from other EEA countries ("the Regulation").

22 Article 6 of the Regulation which transposes Article 23 of the Directive on acquired rights essentially sets out that an applicant who fulfils the requirements of Article 23 of the Directive, "is entitled to authorisation or licence as a medical doctor".

23 According to Article 24 of the Regulation which transposes Article 53 of the Directive health professionals who receive authorisation to practice in accordance with the Regulation, shall possess the language skills necessary for practicing the profession.

24 Under Article 53(2) of the Health Personnel Act, Norwegian authorities may deny an applicant: the authorisation; licence; the right to temporarily exercise as a member of the health

d) ikke er uegnet for yrket

...

(3) Rett til autorisasjon etter søknad har også den som:

...

b) har utenlandsk eksamen som er anerkjent etter avtale om gjensidig godkjenning etter § 52,

...

20 Helsepersonelloven § 52 – Internasjonale avtaler – lyder:

1. På grunnlag av folkerettslige regler som Norge er forpliktet av kan autorisasjon, lisens, spesialistgodkjenning og rett til å utøve yrke som helsepersonell midlertidig i Norge uten norsk autorisasjon, lisens eller spesialistgodkjenning, gis til norsk eller utenlandsk statsborger.

2. Departementet kan i forskrifter gi nærmere bestemmelser til utfylling av første ledd, og kan herunder fastsette særlige vilkår for godkjenning som er nødvendige for å oppfylle internasjonale avtaler.

21 Direktivet er gjennomført i norsk rett gjennom forskrift 8. oktober 2008 nr. 1130 om autorisasjon, lisens og spesialistgodkjenning for helsepersonell med yrkeskvalifikasjoner fra andre EØS-land ("forskriften").

22 Paragraf 6 i forskriften, som gjennomfører direktivets artikkel 23, fastsetter at en søker som oppfyller kravene i direktivets artikkel 23 "har rett til autorisasjon eller lisens som lege".

23 Ifølge § 24 i forskriften, som gjennomfører direktivets artikkel 53, skal helsepersonell som får autorisasjon i medhold av forskriften inneha de språkkunnskaper som er nødvendige for en forsvarlig yrkesutøvelse.

24 Etter helsepersonelloven § 53 annet ledd kan norske myndigheter nekte en søker autorisasjon, lisens, spesialistgodkjenning eller rett til å utøve yrke som helsepersonell midlertidig i Norge uten

personnel in Norway without Norwegian authorisation; or licence or certificate of having completed specialist training if there are circumstances which constitute grounds for a revocation pursuant to Article 57 of the Health Personnel Act.

25 Under Article 57 of the Health Personnel Act, a decision of revocation may be adopted where, for instance, the holder is unfit to practise medicine in a responsible manner for reasons of gross lack of professional insight or lack of due care.

26 Pursuant to Article 22 of the Regulation, the possibility of denying authorisation, license or specialist approval on the basis of circumstances which would have led to revocation of such a right, applies also to persons benefiting from mutual recognition in accordance with the Regulation.

27 The Appeal Board is established pursuant to Article 68 of the Health Personnel Act. Its competence, organisation and procedure are laid down in Articles 69 to 71 of the Act and in Regulation No 1383 of 21 December 2000.

28 According to Article 68(2) of the Health Personnel Act, the Appeal Board is competent to adopt decisions in appeal cases brought by health personnel concerning the refusal of applications for an authorisation, a licence or a certificate of completion of specialist training; concerning warnings and revocations and suspensions of an authorisation, a licence or a certificate of completion of specialist training and the right of requisition; and concerning limitation of an authorisation and refusals of applications for a new authorisation and a new right to prescribe medication.

29 The composition of the Appeal Board is laid down in further detail in Article 69 of the Health Personnel Act. According to Article 69(1) the Appeal Board shall be an independent body with a high level of expertise in the fields of health and law. It follows from Article 71 of the Act that decisions by the Appeal Board may only be reviewed by the courts.

norsk autorisasjon, lisens eller spesialistgodkjenning, hvis det foreligger omstendigheter som ville gitt grunnlag for tilbakekall etter helsepersonelloven § 57.

25 Etter helsepersonelloven § 57 kan det foretas vedtak om tilbakekall blant annet dersom innehaveren er uegnet til å utøve sitt yrke forsvarlig på grunn av grov mangel på faglig innsikt eller uforsvarlig virksomhet.

26 Ifølge forskriftens § 22 gjelder muligheten for å nekte autorisasjon, lisens eller spesialistgodkjenning på grunnlag av forhold som ville ha ført til tilbakekall av slik rett, også overfor personer som drar nytte av gjensidig godkjenning i samsvar med forskriften.

27 Helsepersonellnemnda er etablert i medhold av helsepersonelloven § 68. Helsepersonellnemndas kompetanse, organisering og saksbehandlingsregler er fastsatt i lovens §§ 69 til 71 og i forskrift av 21. desember 2000 nr. 1383 om Statens helsepersonellnemnd – organisering og saksbehandlingsregler.

28 Ifølge helsepersonelloven § 68 annet ledd har helsepersonellnemnda kompetanse til å fatte vedtak i klagesaker som fremmes av helsepersonell vedrørende avslag på søknader om autorisasjon, lisens eller bekreftelse av fullført spesialistopplæring; vedrørende advarsler, tilbakekall og suspensjon av autorisasjon, lisens eller bekreftelse av fullført spesialistopplæring og rekvireringsrett; og vedrørende begrensninger i en autorisasjon og avslag på søknader om ny autorisasjon og ny rekvireringsrett.

29 Sammensetningen av helspersonellnemnda er nærmere fastsatt i helsepersonellloven § 69. Ifølge § 69 første ledd skal helsepersonellnemnda være et uavhengig organ med høy juridisk og helsefaglig ekspertise. Det følger av lovens § 71 at helsepersonellnemndas vedtak bare vil kunne overprøves av domstolene.

30 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 insofar as is necessary for the reasoning of the Court.

III THE QUESTION

Admissibility

31 It must first be determined whether the Appeal Board is a court or tribunal for the purposes of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") and, accordingly, whether the request for an Advisory Opinion is admissible.

32 Under Article 34 SCA any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers it necessary to enable it to give judgment.

33 The Norwegian Government has contested the admissibility of the request and argued that the Appeal Board does not qualify as a court or tribunal under Article 34 SCA. To this effect, the Norwegian Government contends that the Appeal Board lacks the necessary independence, due to its status as a party in national judicial proceedings and organisational links to other administrative authorities, demonstrated by its power to order other authorities to conduct a further examination of a case. Further, it is submitted that the lack of inter partes procedure is manifest, in that the private party in question is the sole party in the review proceedings before the Appeal Board and that the Appeal Board itself handles the investigation of cases brought.

34 The purpose of Article 34 SCA is to establish co-operation between the Court and the national courts and tribunals. It is intended as a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-1/94 *Ravintoloitsijain Liiton Kustannus*

30 Det henvises til rettsmøterapporten for en mer utførlig redegjørelse for den rettslige ramme, de faktiske forhold, saksgangen og de skriftlige innlegg fremmet for EFTA-domstolen, som i det følgende bare vil bli omtalt eller drøftet så langt dette er nødvendig for domstolens begrunnelse.

III RETTENS BEMERKNINGER

Avvisning

31 Det må først tas stilling til om helsepersonellnemnda er en domstol etter artikkel 34 i Avtalen mellom EFTA-landene om opprettelse av et Overvåkingsorgan og en Domstol (ODA), og følgelig om anmodningen om en rådgivende uttalelse kan tas under realitetsbehandling.

32 Ifølge ODA artikkel 34 kan enhver domstol i en EFTA-stat forelegge spørsmål om fortolkningen av EØS-avtalen for EFTA-domstolen, dersom den aktuelle domstol anser det nødvendig for å være i stand til å treffe en avgjørelse.

33 Norges regjering har anført at helsepersonellnemda ikke er en domstol etter ODA artikkel 34 og bestrider dermed at det er adgang til å ta anmodningen under realitetsbehandling. Norges regjering hevder at helsepersonellnemnda mangler den nødvendige uavhengighet, på grunnlag av dens status som part i nasjonale retterganger, og sine organisatoriske bånd til andre forvaltningsmyndigheter, illustrert ved dens myndighet til å pålegge andre organer å gjennomføre ytterligere undersøkelser av en sak. Videre anføres det at fraværet av kontradiktorisk partsrettergang er åpenlys i og med at den aktuelle private part er den eneste part i klagesaken for helsepersonellnemnda, og at nemnda selv tar hånd om undersøkelsen av de saker som kommer opp til behandling.

34 Formålet med ODA artikkel 34 er å etablere samarbeid mellom EFTA-domstolen og de nasjonale domstoler. Foreleggelsesprosedyren er ment som et middel for å sikre en homogen tolkning av EØS-retten og å yte assistanse til domstolene i EFTA-statene i saker der de må anvende EØS-rett (se sak E-1/94 *Ravintoloitsijain*

Oy Restamark [1994-1995] EFTA Ct. Rep. 15, paragraph 25). Accordingly, the purpose of this procedure does not require a strict interpretation of the terms court and tribunal.

35 In order to determine whether a referring body qualifies as a court or tribunal within the meaning of Article 34 SCA the Court takes account of a number of factors. These include, in particular, whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies rules of law, is independent and, as the case may be, whether its procedure is *inter partes* and similar to the procedure in court (see Case E-4/09 *Inconsult Anstalt*, [2009-2010] EFTA Ct. Rep 86, at paragraph 23 and case-law cited).

36 The composition and powers of the Appeal Board are defined in the legislative provisions described in paragraphs 27 to 29 above. According to those provisions, the Appeal Board is established by law and has a permanent character. It is not readily apparent from the case-file and the description of the national rules provided whether the procedure before the Appeal Board is, in fact, *inter partes*. It must, however, be noted that the requirement that the procedure be *inter partes*, is not an absolute criterion under Article 34 SCA (see *Restamark*, cited above, paragraphs 27 to 31).

37 The concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision.

38 There are two aspects to that concept. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.

39 The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings (see, for comparison, Case

Liiton Kustannus Oy Restamark, EFTA Ct. Rep. 1994-1995 s. 15, avsnitt 25). Følgelig foranlediger hensikten med foreleggelsesprosedyren ikke en streng tolkning av domstolsbegrepet.

35 For å ta stilling til om et foreleggende organ utgjør en domstol etter ODA artikkel 34, må EFTA-domstolen ta i betraktning flere faktorer. Blant disse er hvorvidt det foreleggende organ er opprettet ved lov, om det har en permanent eksistens, har bindende avgjørelsesmyndighet, anvender rettsregler, er uavhengig og eventuelt om saksbehandlingen er en partsprosess og tilsvarer rettergangen i ordinære domstoler (se sak E-4/09 *Inconsult Anstalt,* EFTA Ct. Rep. 2009-2010 s. 86, avsnitt 23 og den rettspraksis som det vises til der).

36 Helsepersonellnemndas sammensetning og myndighet er definert i de lovbetsmmelser som er beskrevet i avsnitt 27 til 29 over. I henhold til disse bestemmelser er helsepersonellnemnda opprettet ved lov og har en permanent karakter. Det fremgår ikke klart av sakens dokumenter og den fremlagte beskrivelse av de nasjonale regler om saksbehandlingen for helsepersonellnemnda er en partsprosess. Det må imidlertid bemerkes at kravet om partsprosess ikke er et absolutt vilkår etter ODA artikkel 34 (se *Restamark*, som omtalt over, avsnitt 27 til 31).

37 Prinsippet om uavhengighet, som er grunnleggende for dømmende virksomhet, forutsetter fremfor alt at det aktuelle organ opptrer som en tredjepart overfor det myndighetsorgan som fattet vedtaket som står til prøving.

38 Det er to aspekter ved dette prinsipp. Det første aspekt, som gjelder utad, innebærer at organet er beskyttet mot påvirkning eller press utenfra som kan være egnet til å svekke medlemmenes mulighet til en uavhengig bedømmelse av den enkelte sak.

39 Det andre aspekt, som gjelder innad, er knyttet til upartiskhet og søker å sikre like muligheter for sakens parter og deres respektive interesser i saken (jf. sak C-517/09 *RTL Belgium SA*, dom av

C-517/09 *RTL Belgium SA*, judgment of 22 December 2010, not yet reported, paragraphs 38 to 40, and case-law cited).

40 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (compare Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 53).

41 In relation to the referring body in the current proceedings, it must be observed first of all that, according to Article 69(1) of the Health Personnel Act, mentioned at paragraph 29 of this judgment, the Appeal Board carries out its task independently. The respective provisions demonstrate that the Appeal Board gives rulings on appeal cases brought by health personnel, including cases concerning the refusal of applications for an authorisation or a licence or a certificate of completion of specialist training, without receiving any external instructions and with total impartiality. Furthermore, the Appeal Board is established as a specialist body for reviewing the decisions of the Registration Authority and is the final arbiter in the administrative procedure.

42 The Appeal Board has a status that is sufficiently separate and independent from the authority which adopted the decision under appeal. Thus, the Court finds that the Appeal Board exercises a judicial or semi-judicial function and as such qualifies as a court or tribunal within the meaning of Article 34 SCA.

Substance

43 By its question, the Appeal Board essentially asks whether the Directive or any other provision of EEA law precludes an EEA State from denying an authorisation to practise as a medical doctor or to grant limited authorisation to an applicant with insufficient professional qualifications if that person fulfils the requirements provided for in the Directive.

22. desember 2010, ennå ikke i Sml., avsnitt 38 til 40, og den rettspraksis som det vises til der).

40 Disse garantier for uavhengighet og upartiskhet forutsetter at det finnes regler om blant annet organets sammensetning og oppnevning, funksjonsperiode, når organets medlemmer ikke kan delta i behandlingen av en sak, på hvilket grunnlag de har plikt til å vike sete, samt på hvilket grunnlag de kan avsettes, som gjør det mulig å fjerne enhver rimelig tvil hos utenforstående om at organet er upåvirket av ytre faktorer og nøytralt i forhold til de interesser som står mot hverandre (jf. sak C-506/04 *Wilson*, Sml. 2006 s. I-8613, avsnitt 53).

41 Når det gjelder det foreleggende organ i vår sak, må det først og fremst bemerkes at etter helsepersonelloven § 69 første ledd, nevnt i avsnitt 29 over, utøver helsepersonellnemnda sin virksomhet på en uavhengig måte. De nevnte bestemmelser viser at nemnda – uten å motta instruksjoner utenfra og på et fullstendig upartisk grunnlag – fatter avgjørelser i klagesaker som fremmes av helsepersonell, inkludert saker om avslag på søknader om autorisasjon eller lisens eller bekreftelse av fullført spesialistopplæring. Nemnda er etablert som et spesialorgan for overprøving av autorisasjonskontorets vedtak og er den endelige administrative klageinstans.

42 Helsepersonellnemnda har derfor en status som er separat og uavhengig av den myndighet som har fattet det påklagede vedtak. Følgelig finner EFTA-domstolen at helsepersonellnemnda har en dømmende eller domstolslignende funksjon og må anses som en domstol etter ODA artikkel 34.

Sakens materielle side

43 Ved sin anmodning spør helsepersonellnemnda om direktivet eller andre bestemmelser i EØS-retten er til hinder for at en EØS-stat kan nekte autorisasjon til å praktisere som lege eller til å innvilge bare en begrenset autorisasjon til en søker med utilstrekkelige yrkeskvalifikasjoner, dersom søkeren oppfyller de krav som oppstilles i direktivet.

44 According to the information provided by the referring body, the Registration Authority has recognised that the Complainant, in principle, had a right to an authorisation on the basis of acquired rights under Article 23 of the Directive. However, the Registration Authority found that given her lack of necessary aptitude, "due to language and communication problems, insufficient theoretical skills and signs of poor insight in her own functioning", she should only be granted a one year licence which would allow her to work as a subordinate medical doctor under Article 49 of the Health Personnel Act.

45 It follows from the provisions of national law referred to and the description of facts in the request that recognition of professional qualifications is a condition that a migrant applicant must fulfil in order to acquire an authorisation to practise medicine in Norway. Thus, the Norwegian legislation appears to make a distinction between the recognition of the professional qualifications of doctors listed in the Directive and subsequent authorisation to practise the profession. In any event, it is clear that the legislation gives the national authorities the right to deny authorisation if there are circumstances which would have led to revocation of authorisation to practise.

46 In light of the above, the Court finds it appropriate to first examine whether an authorisation to practise medicine, such as the one in the case at hand, can be made subject to further requirements regarding the pursuit of the profession as a doctor, such as knowledge of language. Moreover, the question must be addressed as to whether and to what extent, concerns regarding the Complainant's alleged lack of necessary aptitude as referred to in paragraph 44 of this judgment, may constitute a legitimate reason for not granting full authorisation, even though she appears to meet the conditions of the Directive for recognition of her professional qualifications.

Observations submitted to the Court

47 The Governments of the Czech Republic and Poland argue that if Dr A has been able to produce evidence of formal qualifications issued by Bulgaria, her professional qualifications

44 Ifølge opplysningene gitt av det henvisende organ, har autorisasjonskontoret erkjent at Dr. A i prinsippet hadde rett til autorisasjon på grunnlag av prinsippet om ervervede rettigheter i direktivets artikkel 23. Autorisasjonskontoret fant imidlertid at gitt hennes mangel på nødvendig egnethet, "på grunn av språk- og kommunikasjonsproblemer, manglende faglige ferdigheter og tegn på dårlig innsikt i sin egen fungering", kunne hun bare innvilges en ett-årig lisens som ville gi henne mulighet til å arbeide som underordnet lege, jf. helsepersonelloven § 49.

45 Det følger av de refererte bestemmelser i nasjonal rett og av saksfremstillingen i anmodningen at godkjenning av yrkeskvalifikasjoner er en betingelse som en migrerende søker må oppfylle for å oppnå autorisasjon til å praktisere medisin i Norge. Norsk lovgivning synes således å være basert på et skille mellom godkjenning av legers yrkeskvalifikasjoner i henhold til opplistingen i direktivet, og etterfølgende autorisasjon til å praktisere yrket. I alle fall er det klart at lovgivningen gir de nasjonale myndigheter rett til å nekte autorisasjon dersom det foreligger omstendigheter som ville ha ført til tilbakekall av autorisasjon til å praktisere.

46 I lys av det ovenstående finner EFTA-domstolen det formålstjenlig først å undersøke om en autorisasjon til å praktisere medisin, slik som i den foreliggende sak, kan gjøres betinget av ytterligere krav til utøvelsen av yrket som lege, slik som språkkunnskaper. Videre må det tas stilling til om og i tilfelle i hvilken utstrekning slike hensyn som klagerens påståtte mangel på nødvendig egnethet, som omtalt i avsnitt 44 over, vil kunne utgjøre en legitim grunn til ikke å innvilge full autorisasjon, selv om hun synes å oppfylle betingelsene i direktivet for godkjenning av sine yrkeskvalifikasjoner.

Innlegg inngitt til EFTA-domstolen

47 Tsjekkias og Polens regjeringer anfører at dersom klageren er i stand til å fremlegge dokumentasjon for formelle kvalifikasjoner utstedt av Bulgaria, må hennes yrkeskvalifikasjoner godkjennes

must be recognised directly on the basis of the Directive. This is without prejudice to Article 53 of the Directive, according to which persons benefiting from the recognition of professional qualifications shall have knowledge of languages necessary for practising the profession in the host EEA State.

48 In this regard, the Government of the Czech Republic contends that the recognition of professional qualifications cannot, as such, be subject to linguistic knowledge unless such knowledge is linked to the qualifications, as in the case of speech therapists. Although Article 53 of the Directive provides national authorities with a certain margin of discretion, this discretion cannot be used to deny the recognition of professional qualifications. It follows that insufficient linguistic knowledge can influence a person's right to exercise a profession, but generally not the right to have professional qualifications recognised.

49 In contrast, the Government of Spain contends that Article 53 of the Directive allows EEA States to refuse the recognition when the person concerned does not have the necessary linguistic knowledge. It is submitted that under a literal interpretation of Article 53 of the Directive, all rights recognised by the Directive to the persons concerned are conditional on their linguistic knowledge.

50 However, the Government of Spain also argues that language requirements constitute an obstacle to the exercise of the fundamental freedoms, which can only be justified by overriding reasons of general interest, such as the reliability of communication with patients as well as administrative authorities and professional bodies.

51 As regards the level of knowledge which may be required, national courts will need to apply the principle of proportionality. Accordingly, the linguistic knowledge demanded should not exceed the level objectively required to ensure that patients' interests are protected. In cases where a person has already been practising in the host EEA State for a number of years without displaying any linguistic inadequacy, a language test

direkte på grunnlag av direktivet. Dette gjelder med forbehold for direktivets artikkel 53, som bestemmer at personer som nyter godt av godkjenning av yrkeskvalifikasjoner skal ha de språkkunnskaper som er nødvendig for å praktisere yrket i vertsstaten.

48 I denne sammenheng anfører Tsjekkias regjering at godkjenning av yrkeskvalifikasjoner ikke kan gjøres avhengig av språkkunnskap med mindre slik kunnskap er en del av kvalifikasjonen, eksempelvis for taleterapeuter. Selv om direktivets artikkel 53 gir de nasjonale myndigheter et visst rom for skjønn, kan ikke dette skjønnet anvendes til å nekte godkjenning av yrkeskvalifikasjoner. Utilstrekkelig språkkunnskap kan med andre ord ha innvirkning på en persons rett til å utøve et yrke, men i alminnelighet ikke på retten til å få yrkeskvalifikasjoner godkjent.

49 I kontrast til dette hevder Spanias regjering at direktivets artikkel 53 gir rom for at EØS-statene kan nekte godkjenning når vedkommende person ikke har de nødvendige språkkunnskaper. Det anføres at på grunnlag av ordlyden i direktivets artikkel 53, er rettighetene som følger av direktivet betinget av språkkunnskaper.

50 Imidlertid anfører Spanias regjering også at språkkravene utgjør en hindring for utøvelse av grunnrettighetene, og at slike hindringer bare kan rettferdiggjøres på grunnlag av tvingende allmenne hensyn, slik som påliteligheten av kommunikasjon med pasienter, administrative myndigheter og faglige organer.

51 Med hensyn til hvilke språkkunnskaper som vil kunne kreves, må de nasjonale domstoler anvende prinsippet om forholdsmessighet. I henhold til dette prinsipp må ikke de språkkunnskaper som kreves overskride det som er objektivt nødvendig for å sikre at pasientenes interesser er beskyttet. I tilfelle hvor en person allerede har praktisert i vertsstaten i et antall år uten å ha vist tegn til språklige mangler, vil en språktest som eneste grunnlag

on the sole basis of which he could be disqualified might well infringe the principle of proportionality. In the view of the Spanish Government, the practical training used by the Norwegian authorities appears to be a proportionate method of determining the linguistic knowledge of persons who have the right, under Article 23 of the Directive, to the recognition of their qualifications as doctors.

52 The Government of Spain submits further that the Directive does not provide for a refusal of recognition on the basis of a lack of sufficient professional qualifications revealed by the professional experience of an applicant. A distinction ought to be made between the recognition of qualifications and the granting or revoking of an authorisation. While the first of these matters is covered by the Directive, the second aspect would fall within the field of application of the fundamental freedoms. It is argued that while an EEA State has the obligation to recognise the qualifications of other EEA nationals under the Directive, it does not have the obligation to allow these nationals to develop their activity without supervision, when its own nationals are subject to such supervision. In this regard, the Government of Spain recalls that the question of the national court refers specifically to the granting of an authorisation, and not to the recognition of a qualification.

53 It is submitted that, according to case-law, national measures which restrict the exercise of fundamental freedoms can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; be justified by overriding reasons in the general interest; be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective. In the view of the Government of Spain, the Norwegian system meets all these requirements.

54 ESA contends that it is important to distinguish between the two separate steps of the recognition procedure, i.e. that relating to the access to the profession and that relating to the pursuit of that profession. The minimum requirements on education and

for en diskvalifisering kunne være i strid med forholdsmessighetsprinsippet. Etter Spanias regjerings oppfatning synes den praktiske opplæring som anvendes av norske myndigheter å være en forholdsmessig ordning for å fastslå språkkunnskaper for personer som etter direktivets artikkel 23 har rett til godkjenning av sine kvalifikasjoner som lege.

52 Spanias regjering anfører videre at direktivet ikke gir grunnlag for å nekte godkjenning på grunnlag av mangel på tilstrekkelige faglige kvalifikasjoner som avdekkes gjennom søkerens yrkespraksis. Det bør skilles mellom godkjenning av kvalifikasjoner og tildeling eller tilbakekall av en autorisasjon. Det første aspekt omfattes av direktivet, mens det andre vil falle innenfor anvendelsesområdet for grunnfrihetene. Det anføres at mens en medlemsstat er forpliktet etter direktivet til å godkjenne kvalifikasjonene til andre EØS-borgere, foreligger det ingen forpliktelse til å tillate EØS-borgere å drive sin virksomhet uten tilsyn, når landets egne borgere er underlagt tilsyn. I den forbindelse understreker Spanias regjering at anmodningen om en rådgivende uttalelse formulerer spørsmålet med spesifikk referanse til innvilgelse av autorisasjon, og ikke til godkjenning av kvalifikasjoner.

53 Det anføres at i henhold til rettspraksis kan nasjonale tiltak som gjør inngrep i grunnfrihetene bare rettferdiggjøres dersom de oppfyller fire betingelser: De må anvendes på en ikke-diskriminerende måte; være berettiget ut fra tvingende allmenne hensyn; være egnet for å sikre oppnåelse av det mål de er satt til å oppnå; og de må ikke gå ut over det som er nødvendig for å oppnå dette mål. Etter Spanias regjerings oppfatning tilfredsstiller den norske ordning alle disse krav.

54 ESA anfører at det er viktig å skille mellom to separate trinn for den automatiske godkjenningsprosedyre, dvs. det som gjelder tilgangen til yrket, og det som gjelder utøvelsen av yrket. Minstekravene til utdanning og opplæring for å kvalfisere til yrkene som

training to qualify for those professions listed in the Directive are harmonised. The minimum harmonisation guarantees an agreed level of quality, and that the host State neither needs, nor is supposed to individually assess qualifications of migrant medical doctors. Thus, if a given diploma is listed in Annex V to the Directive, the minimum requirements under Articles 24, 25 and 28 are deemed to be fulfilled, and the recognition of a professional qualification shall not be refused by the host State. In cases that fall within the remit of Article 23 of the Directive, which concerns acquired rights, ESA submits that no substantive assessment of individual applications may be carried out by the competent authorities of the host State, but only a formal check of authenticity of the documents that have been submitted.

55 As regards the pursuit of the profession of medical doctor in the host State, ESA notes that once a person has been recognised and authorised to practise in another EEA State, that individual is subject to the national rules governing the profession, including those on professional conduct, consumer protection and safety. Knowledge of the host State's language or languages falls under the aspect of pursuit of profession, as long as that proficiency does not form part of the qualification itself, as it does for speech therapists or language teachers.

56 Nonetheless, the host State authorities may, in ESA's view, examine whether the applicant fulfils all the requirements regarding the pursuit of the profession. As regards Dr A's alleged lack of language skills, Article 53 of the Directive allows EEA States to require that applicants have certain language skills in order to be allowed to practise as part of a regulated profession. How this linguistic knowledge is assessed is left to the individual interpretation of the EEA States. However, the linguistic requirements cannot go beyond the objectives striven for. The principle of proportionality implies that EEA States cannot demand systematic language exams.

57 Moreover, the authorities may indicate to applicants that they may be subject to disciplinary sanctions in the event of fault or negligence due to insufficient grasp of a language. In ESA's view,

direktivet omhandler er harmonisert. Minimumsharmoniseringen garanterer et omforent kvalitetsnivå, og at vertsstaten verken trenger eller er ment å foreta individuelle vurderinger av kvalifikasjonene for migrerende leger. Hvis et gitt kvalifikasjonsbevis er oppført i direktivets vedlegg V, skal dermed minstekravene etter artiklene 24, 25 og 28 anses å være oppfylt, og vertsstaten kan ikke nekte godkjenning av yrkeskvalifikasjoner. I tilfelle som faller innenfor direktivets artikkel 23, som gjelder ervervede rettigheter, fremholder ESA at de kompetente myndigheter i vertsstaten ikke kan foreta innholdsmessige vurderinger av individuelle søknader; kun en formell kontroll av ektheten av de dokumenter som er innsendt.

55 Når det gjelder utøvelsen av yrket som lege i vertsstaten bemerker ESA at så snart en person er blitt godkjent og autorisert til å praktisere i en annen EØS-stat, er vedkommende underlagt de nasjonale regler for profesjonen, inkludert profesjonsetiske regler og regler om forbrukerbeskyttelse og sikkerhet. Kjennskap til vertsstatens språk faller også inn under yrkesutøvelse, så lenge språkkyndighet ikke utgjør en del av selve kvalifikasjonen, slik det er for taleterapeuter og språklærere.

56 Etter ESAs oppfatning vil vertsstatens myndigheter likevel kunne undersøke hvorvidt en søker oppfyller alle krav vedørende utøvelse av yrket. Hva angår Dr. As påstått manglende språkkunnskaper, gir direktivets artikkel 53 EØS-statene adgang til å kreve visse språkferdigheter av søkerne for å gi adgang til å praktisere et regulert yrke. Hvordan disse språkkunnskaper vurderes, overlates til EØS-statenes individuelle fortolkning. Imidlertid kan språkkravene ikke gå lenger enn de formål som søkes oppnådd. Prinsippet om forholdsmessighet innebærer blant annet at EØS-statene ikke kan forlange systematiske språktester.

57 Dessuten kan myndighetene påpeke overfor søkere at de kan bli underlagt disiplinære sanksjoner i tilfelle av feil eller uaktsomhet som kan tilskrives en mangelfull forståelse av

it follows that the Directive lays down provisions which allow a State to refuse the pursuit of a profession, even where the recognition of the qualification itself must automatically occur.

58 In the event that after the automatic recognition, it turns out that an individual lacks substantive knowledge of the profession while pursuing the profession in the host State, the competent national authorities may, in ESA's view, apply their national rules, inter alia requiring additional training, limiting the authorisation or, in case of professional fault, applying disciplinary sanctions, which may ultimately lead to withdrawal of the authorisation to practise. However, these are matters for national rules subject to the respect of the principle of non-discrimination.

59 If the authorities of the host state learn of a lack of competence of an applicant prior to the automatic recognition, ESA submits that they must still grant recognition.

60 The Commission essentially concurs with ESA on the effect of Articles 21 and 23 of the Directive. Although the principle of mutual recognition ensures that a doctor qualified in Bulgaria, and fulfilling the requirements of Articles 21 or 23 of the Directive, must automatically be recognised in Norway, he or she remains subject to the same obligations as Norwegian doctors in carrying out that profession. By way of example, it appears that Article 57 of the Norwegian Health Personnel Act envisages that authorisation to practise as a doctor may be revoked in cases of misconduct or gross lack of professional insight. Similarly, it should be emphasised that the recognition of medical qualifications does not create a right to be recruited to a particular post.

61 The Commission contends that it follows from the express wording of Article 53 of the Directive that a language requirement cannot be applied as a pre-condition for the recognition of qualifications or for access to the profession in the host EEA State. It is only once automatic recognition of professional qualifications has been granted pursuant to the Directive, that national authorities entrusted with the supervision of medical

språket. Etter ESAs oppfatning følger det av dette at direktivet fastsetter bestemmelser som gir den enkelte stat adgang til å nekte utøvelsen av et yrke, også i tilfelle hvor godkjenning av kvalifikasjonen må gjennomføres automatisk.

58 Dersom det etter den automatiske godkjenning blir tydelig under utøvelse av yrket i vertsstaten at en person mangler vesentlige fagkunnskaper, vil de nasjonale myndigheter etter ESAs oppfatning kunne anvende regler i nasjonal lovgivning som for eksempel gir hjemmel til å sette krav om tilleggsopplæring, begrense autorisasjonen eller, i tilfelle av profesjonsfeil, anvende disiplinære sanksjoner som i siste omgang vil kunne føre til tilbakekall av autorisasjonen. Imidlertid hører slike spørsmål under nasjonal lovgivning, forutsatt at prinsippet om ikke-diskriminering blir respektert.

59 Dersom myndighetene i vertsstaten får kjennskap til en manglende kompetanse hos en søker forut for den automatiske godkjenning, fremholder ESA at myndighetene likevel må innvilge godkjenning.

60 Kommisjonen er i det vesentlige enig med ESA vedrørende virkningen av artiklene 21 og 23 i direktivet. Selv om prinsippet om gjensidig godkjenning sikrer at en lege som er kvalifisert i Bulgaria og som oppfyller kravene i artikkel 21 eller 23 i direktivet automatisk må godkjennes i Norge, vil vedkommende i utøvelsen av yrket være underlagt de samme forpliktelser som norske leger. Som et eksempel fremgår det at helsepersonelloven § 57 forutsetter at autorisasjon til å praktisere som lege vil kunne tilbakekalles i tilfeller av tjenesteforsømmelse eller "grov mangel på faglig innsikt". Likeledes må det understrekes at godkjenning av medisinske kvalifikasjoner ikke medfører en rett til å bli ansatt i noen bestemt stilling.

61 Kommisjonen fremholder at det følger uttrykkelig av ordlyden i direktivets artikkel 53 at språkkrav ikke kan pålegges som en forutsetning for godkjenning av kvalifikasjoner eller for tilgang til yrket i vertsstaten. Det er først når automatisk godkjenning av

doctors are permitted to take, at any time, the necessary measures available under national law to address any lack of aptitude to properly perform the duties of a medical doctor provided that any such measures are applied in the same way regardless of where the medical doctors obtained their qualifications or completed their training.

Findings of the Court

62 Directive 2005/36/EC is part of the legal framework designed to facilitate professional mobility of doctors who are EEA nationals and have undergone medical training. The aim of the Directive is to establish rules on the recognition of professional qualifications in order to allow holders of those qualifications to pursue a regulated profession whether on a self-employed or employed basis. According to recital 19 of the preamble to the Directive, the profession of doctor is subject to a special system for the automatic recognition of professional qualifications, which also concerns the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, and pharmacist.

63 It follows from recital 3 of the preamble that in the case of professions covered by this system, an EEA State retains the right to lay down non-discriminatory conditions to ensure the quality of services provided on its territory. However, an EEA State may not require qualifications, which are generally laid down only in terms of the diplomas awarded under its national educational system, where the person concerned has already obtained all or part of those qualifications in another EEA State. An EEA State in which a profession is regulated must therefore take account of the qualifications obtained in another EEA State and assess whether they correspond to those which it requires.

64 Moreover, according to recital 44 of the preamble the scheme for the recognition of professional qualifications provided for by the Directive, including the special system for automatic recognition, does not prevent an EEA State from making a person pursuing a profession on its territory subject to national measures necessary to ensure a high level of health and consumer protection.

yrkeskvalifikasjoner er gitt i henhold til direktivet, at nasjonale myndigheter med ansvar for tilsyn med leger kan gjennomføre tiltak som etter nasjonal rett er nødvendige for å bøte på manglende skikkethet til adekvat å utføre forpliktelsene som lege, forutsatt at alle slike tiltak tas likt i bruk uansett hvor legene har oppnådd sine kvalifikasjoner og hvor de har fullført sin opplæring.

Rettens bemerkninger

62 Direktiv 2005/36/EF er en del av det juridiske rammeverk utformet for å tilrettelegge for faglig mobilitet av leger som er EØS-borgere og som har oppnådd medisinske kvalifikasjoner i en EØS-stat. Målet med direktivet er å etablere regler om godkjenning av yrkeskvalifikasjoner for å la innehaverne av disse kvalifikasjoner utøve et lovregulert yrke som selvstendig næringsdrivende eller som ansatt. Ifølge punkt 19 i fortalen til direktivet er legeyrket underlagt et spesielt system for automatisk godkjenning av yrkeskvalifikasjoner, som også gjelder yrkene sykepleier, tannlege, veterinær, jordmor, arkitekt og farmasøyt.

63 Det følger av punkt 3 i fortalen at i relasjon til yrker som omfattes av dette system, beholder en EØS-stat retten til å fastsette ikke-diskriminerende vilkår for å sikre kvaliteten på tjenestene som tilbys på dens territorium. Imidlertid kan en EØS-stat ikke pålegge en borger i en medlemsstat å tilegne seg kvalifikasjoner som hovedsakelig fastsettes ved å henvise til diplomer utstedt i henhold til statens nasjonale utdanningssystem, dersom vedkommende person allerede helt eller delvis har tilegnet seg disse kvalifikasjoner i en annen medlemsstat. En EØS-stat der et yrke er regulert må derfor ta hensyn til kvalifikasjoner oppnådd i en annen EØS-stat og vurdere om de svarer til det som kreves.

64 I tillegg følger det av punkt 44 i fortalen til direktivet at ordningen for godkjenning av yrkeskvalifikasjoner fastsatt i direktivet, herunder det spesielle system for automatisk godkjenning, ikke berører nasjonale tiltak som er nødvendige for å sikre et høyt nivå for helse og forbrukervern.

65 The Directive operates on the premise that the free movement and mutual recognition of doctors' formal qualifications shall be based on the fundamental principle of automatic recognition of the respective evidence on the basis of coordinated minimum conditions for training. Accordingly, access in the EEA States to the professions of doctor, is made conditional upon the possession of a given qualification ensuring that the person concerned has undergone training which meets the minimum conditions laid down in the Directive.

66 An EEA State is not permitted to make the recognition of professional qualifications of doctors meeting the criteria of the Directive subject to any further conditions. The system of automatic recognition would be jeopardised if it were open to EEA States at their discretion to question the merits of a decision taken by the competent authority of another EEA State to award the formal evidence of qualification (concerning Council Directive 93/16/EEC see, for comparison, Case C-110/01, *Tennah-Durez* [2003] ECR I-6239, paragraph 75).

67 Accordingly, since the Directive is based on automatic recognition, the Court finds that it, in principle, precludes the authorities of the host EEA State from applying national rules providing for a right to deny an authorisation as a medical doctor to an applicant who fulfils the requirements under the Directive.

68 In relation to requirements that may be made in relation to A's linguistic skills, Article 53 of the Directive stipulates that persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for the practice of the profession in the host EEA State.

69 A doctor's ability to communicate with patients, administrative authorities, colleagues and professional bodies constitutes a general public interest. It is therefore justified to make the authorisation to practise as a doctor subject to language requirements. Dialogue with patients, compliance with rules of professional conduct and law specific to doctors in an EEA State of establishment and performance of administrative tasks require

65 Direktivet bygger på en forutsetning om at fri bevegelighet og gjensidig godgjenning av legers formelle kvalifikasjoner skal være basert på det grunnleggende prinsipp om automatisk godkjenning av de respektive kvalifikasjonsbevis på grunnlag av samordnede minstekrav for utdanning. Følgelig er tilgang i EØS-statene til legeyrket gjort betinget av besittelse av en gitt kvalifikasjon som bekrefter at vedkommende har gjennomgått utdanning som tilfredsstiller minimumskravene fastsatt i direktivet.

66 En EØS-stat er forhindret fra å gjøre godkjenning av yrkeskvalifikasjoner for leger som oppfyller kriteriene i direktivet betinget av ytterligere krav. Systemet med automatisk godkjenning ville bli komme i fare dersom det var anledning for EØS-stater etter eget skjønn å stille spørsmål ved verdien av en beslutning tatt av de kompetente myndigheter i en annen EØS-stat om å tildele det formelle kvalifikasjonsbevis (jf., vedrørende Rådsdirektiv 93/16/EØF, sak C-110/01 *Tennah-Durez*, Sml. 2003 s. I-6239, avsnitt 75).

67 Siden direktivet er basert på automatisk godkjenning, finner EFTA-domstolen følgelig at direktivet i prinsippet forhindrer myndighetene i vertsstaten fra å anvende nasjonale regler som fastsetter en rett til å nekte autorisasjon som lege til en søker som oppfyller kravene i direktivet.

68 Når det gjelder krav som kan gjøres gjeldende vedørende Dr. As språklige ferdigheter, fastsetter direktivets artikkel 53 at personer som nyter godt av godkjenning av yrkeskvalifikasjoner skal ha de språkkunnskaper som er nødvendig for å praktisere yrket i vertsstaten.

69 En leges evne til å kommunisere med pasienter, administrative myndigheter, kolleger og faglige organer er av generell offentlig interesse. Det er derfor berettiget å la autorisasjon til å praktisere som lege bero på språklige krav. Dialog med pasienter, overholdelse av profesjonsnormer og særskilt lovgivning for leger i etableringsstaten, samt utførelse av administrative oppgaver

an appropriate knowledge of the language or languages of that State (see for comparison, *mutatis mutandis* Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 59). Accordingly, an EEA State may make an authorisation to practise medicine conditional upon linguistic knowledge which is necessary for the exercise of the profession in the EEA State of establishment.

70 Requirements regarding linguistic skills shall ensure, in particular, that the doctor will be able to communicate effectively with patients, whose mother tongue is that of the EEA State concerned. However, such requirements should not go beyond what is necessary to attain that objective.

71 Moreover, any assessment of linguistic abilities which requires performance that is not normally part of a doctor's work, would risk being discriminatory or disproportionate (see, for comparison, Opinion of Advocate General Jacobs in Case C-238/98 *Hocsman* [2000] ECR I-6623, point 57). It also follows from the principle of proportionality that the authorities of EEA States are to ensure that applicants found lacking in necessary language skills have the opportunity to acquire these missing skills.

72 As for other factors concerning personal aptitude of a migrant applicant, it is important to note that it follows from Article 4(1) of the Directive that the effect of recognition of professional qualifications by the host EEA State is that the beneficiary is allowed to gain access to the same profession as that for which he is qualified in the home EEA State, and to pursue it in the host EEA State under the same conditions as its nationals. Thus, the rights conferred on individuals under the Directive are without prejudice to compliance by the migrant professional with any non-discriminatory conditions of pursuit which might be laid down by the authorities of the host State provided that these are objectively justified and proportionate, *inter alia*, with regard to ensuring a high level of health and consumer protection (see also paragraphs 63 and 64 of this judgment).

73 Accordingly, the EEA States retain the competence to take disciplinary action and impose criminal sanctions against migrant

krever relevant språkkunnskap i denne stat (jf. sak C-424/97 *Haim*, Sml. 2000 s. 5123, avsnitt 59). Følgelig kan en EØS-stat gjøre en autorisasjon til å praktisere medisin betinget av den språkkunnskap som er nødvendig for utøvelsen av yrket i etableringsstaten.

70 Krav om språklige ferdigheter skal særlig sikre at legen vil være i stand til å kommunisere effektivt med sine pasienter, som har språket i den aktuelle EØS-stat som sitt morsmål. Slike krav kan imidlertid ikke gå utover det som er nødvendig for å oppnå dette mål.

71 Videre er det fare for at enhver vurdering av språklige ferdigheter som krever innsats som ikke vanligvis er en del av en leges arbeid, vil være diskriminerende eller uforholdsmessig (se, for sammenligning, generaladvokat Jacobs' forslag til avgjørelse i sak C-238/98 *Hocsman*, Sml. 2000 s. I-6623, avsnitt 57). Det følger også av prinsippet om forholdsmessighet at myndighetene i EØS-statene skal sikre at søkere som ikke har de nødvendige språkkunnskaper gis en mulighet til å tilegne seg disse.

72 Hva gjelder andre faktorer vedrørende personlig egnethet for en migrerende søker, følger det av direktivets artikkel 4 nr. 1 at virkningen av vertsstatens godkjenning av yrkeskvalifikasjoner er at den begunstigede får adgang til det samme yrke i vertsstaten som vedkommende er kvalifisert til i hjemstaten og til å utøve det i vertsstaten under samme vilkår som vertsstatens borgere. De individuelle rettigheter som følger av direktivet berører således ikke den migrerende søkers plikt til å overholde alle ikke-diskriminerende vilkår for utøvelse som måtte være fastsatt av vertsstatens myndigheter, under forutsetning av at disse er objektivt begrunnet og forholdsmessige, for eksempel med hensyn til å sikre et høyt nivå for helse og forbrukervern (se også avsnitt 63 til 64 over).

73 Følgelig beholder EØS-statene kompetansen til å treffe disiplinærtiltak og ilegge strafferettslige sanksjoner mot migrerende

medical professionals and, where appropriate, to suspend or withdraw the authorisation to practise if the respective conditions under national law are fulfilled, provided that the general principles of EEA law are respected.

74 However, the requirements on the pursuit of a profession must reflect objective criteria known in advance. They must adequately circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily, thereby eliminating discretionary conduct liable to deprive the Directive of its full effectiveness.

75 Furthermore, the requirements which an EEA State may impose must be non-discriminatory, able to ensure achievement of the objective of protecting public health and not go beyond what is necessary for that purpose. This is for the EEA State concerned to demonstrate.

76 In the present case, it was not an existing authorisation that was suspended or withdrawn. Rather, it was Dr A's application for an authorisation that was rejected. The rejection was based on the ground that relevant information regarding the applicant was available to the Registration Authority at the time of the assessment of the application. This may be an exceptional circumstance with regard to recognition of professional qualifications under the Directive. However, provided that the relevant information would have given grounds for a suspension or withdrawal of an existing authorisation in compliance with EEA law, national authorities cannot be obliged to grant an authorisation when there is a necessity to revoke it. Under such circumstances, national authorities must be entitled to deny an authorisation outright.

77 The Court cannot on the basis of the case-file make an informed assessment regarding whether the deficiencies ascribed to Dr A in the proceedings before the national authorities, may constitute objective and therefore legitimate grounds for denying an authorisation. It is thus for the Appeal Board to decide on the basis of the facts, along with the criteria described in paragraphs 74 to 76 of this judgment.

medisinske fagfolk og eventuelt til å suspendere eller kalle tilbake autorisasjonen til å praktisere, forutsatt at de aktuelle vilkår for dette i nasjonal rett er oppfylt, og at EØS-rettens generelle prinsipper blir respektert.

74 Imidlertid må krav til utøvelsen av et yrke gjenspeile objektive kriterier kjent på forhånd. De må begrense nasjonale myndigheters skjønnsutøvelse, slik at den ikke benyttes på vilkårlig vis, for på den måten å eliminere skjønnsmessig atferd som kan frata direktivet sin fulle effektivitet.

75 Videre må de krav som en EØS-stat kan stille være ikke-diskriminerende, egnet til å sikre oppnåelse av målet om å beskytte folkehelsen og ikke gå lenger enn det som er nødvendig for formålet. Dette er det opp til den aktuelle EØS-stat å godtgjøre.

76 I den foreliggende sak var det ikke en eksisterende autorisasjon som ble suspendert eller tilbakekalt. Snarere var det en søknad om autorisasjon som ble avslått. Avslaget var basert på at relevante opplysninger om søkeren var tilgjengelig for autorisasjonskontoret på tidspunktet for vurdering av søknaden. Dette kan være en eksepsjonell situasjon i relasjon til godkjenning av yrkeskvalifikasjoner i medhold av direktivet. Men forutsatt at den relevante informasjon ville ha gitt grunnlag for suspensjon eller tilbakekall av en eksisterende autorisasjon i samsvar med EØS-retten, kan nasjonale myndigheter ikke være forpliktet til å gi en autorisasjon når det er nødvendig å kalle den tilbake. Under slike omstendigheter må nasjonale myndigheter ha rett til å nekte godkjenning med det samme.

77 EFTA-domstolen kan ikke på grunnlag av sakens dokumenter foreta en fullstendig vurdering av om manglene tilskrevet Dr. A i den aktuelle sak kan utgjøre objektive og dermed legitime grunner for å nekte autorisasjon. Det ligger dermed til helsepersonellnemnda å avgjøre dette på grunnlag av de faktiske forhold i saken, sammen med kriteriene beskrevet i avsnitt 74 til 76 over.

78 However, the Court notes that as for the premise in the decision of the Registration Authority that Dr A has insufficient theoretical skills, it should be recalled that the automatic recognition of the evidence of formal qualifications is based on coordinated minimum conditions for training. Moreover, the conclusion by the Registration Authority that Dr A showed signs of poor insight in her own functioning seems to contain a discretionary assessment which is incompatible with the purpose of the Directive, unless this ground is given more substance.

79 A part of the question is related to the grant of a limited authorisation to Dr A as a medical doctor. If sufficient and valid reasons exist for the Registration Authority to lawfully suspend or withdraw an authorisation, it follows from the spirit of the Directive, which leaves the EEA States the freedom to strive for a high level of health and consumer protection, that a limited authorisation is granted rather than that the authorisation is suspended or revoked altogether.

IV COSTS

80 The costs incurred by the Czech Government, the Norwegian Government, the Polish Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Appeal Board, any decision on costs for Dr A, who is a party to those proceedings, is a matter for that body.

78 Når det gjelder grunnlaget i autorisasjonskontorets vedtak om at Dr. A har utilstrekkelige faglige ferdigheter, må man huske at automatisk godkjenning av kvalifikasjonsbevis er basert på samordnede minstekrav for utdanning. Videre synes autorisasjonskontorets konklusjon om at Dr. A viste tegn på dårlig innsikt i egen yrkesutøvelse å inneholde en skjønnsmessig vurdering som er uforenlig med direktivets formål, med mindre dette grunnlag underbygges nærmere.

79 En del av spørsmålet er knyttet til innvilgelse av en begrenset autorisasjon som lege til Dr. A. EFTA-domstolen nevner at dersom det foreligger tilstrekkelige og gyldige grunner for at autorisasjonskontoret lovlig kan suspendere eller kalle tilbake en tillatelse, følger det av direktivets ånd – som gir EØS-statene frihet til å etterstrebe et høyt nivå for helse og forbrukerbeskyttelse – at en begrenset autorisasjon innvilges snarere enn at autorisasjonen suspenderes eller kalles tilbake helt.

IV SAKSOMKOSTNINGER

80 Omkostninger som er påløpt for Tsjekkias regjering, Norges regjering, Polens regjering, ESA og Europakommisjonen, som har inngitt innlegg for EFTA-domstolen, kan ikke kreves dekket. Ettersom foreleggelsen for EFTA-domstolen utgjør ledd i behandlingen av saken som står for Statens helsepersonellnemnd, hvor Dr. A er part, hører det under nemnda å ta en eventuell avgjørelse om saksomkostninger for Dr. A.

On those grounds,

THE COURT

in answer to the question referred to it by the Appeal Board hereby gives the following Advisory Opinion:

– **In principle, Directive 2005/36/EC precludes the authorities of EEA States from applying national rules providing for a right to deny an authorisation as a medical doctor to a migrant applicant from another EEA State who fulfils the requirements under the Directive for a right to mutual recognition of professional qualifications.**

– **However, an EEA State may make an authorisation conditional upon the applicant having a knowledge of languages necessary for practising the profession on its territory.**

– **Moreover, an EEA State may suspend or withdraw an authorisation to pursue the profession of medical doctor based on information concerning the personal aptitude of a migrant doctor relating to the professional qualification other than language skills, such as the ones in question, only if such requirements are objectively justified and proportionate to achieve the objective of protecting public health and if the same information would also entail a suspension or withdrawal of authorisation for a national doctor. If such grounds for suspension or withdrawal are available to the competent authorities at the time of assessment, the authorisation may be denied.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 15 December 2011.

Moritz Am Ende
Acting Registrar

Carl Baudenbacher
President

På dette grunnlag avgir

EFTA-DOMSTOLEN

som svar på spørsmålet forelagt den av Statens helsepersonellnemnd, følgende rådgivende uttalelse:

– **I prinsippet hindrer direktiv 2005/36/EF myndighetene i EØS-statene fra å anvende nasjonale regler som fastsetter en rett til å nekte en autorisasjon som lege til en migererende søker fra en annen EØS-stat som oppfyller kravene i direktivet for en rett til gjensidig godkjenning av yrkeskvalifikasjoner.**

– **Imidlertid kan en EØS-stat gjøre en autorisasjon betinget av at søkeren innehar de språkkunnskaper som er nødvendige for å praktisere yrket på dens territorium.**

– **Videre kan en EØS-stat suspendere eller kalle tilbake en autorisasjon til å utøve legevirksomhet basert på informasjon om en migrerende leges personlige egnethet knyttet til andre faglige kvalifikasjoner enn språklige ferdigheter, slik som i den foreliggende sak, bare hvis slike krav er saklig begrunnet og forholdsmessige for å oppnå målet om å beskytte folkehelsen, og hvis den samme informasjon også ville innebære suspensjon eller tilbakekall av autorisasjon for en nasjonal lege. Dersom slike grunnlag for suspensjon eller tilbakekall foreligger for de kompetente myndigheter på tidspunktet for å vurdere autorisasjon, kan autorisasjon nektes.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Avsagt i åpen rett i Luxembourg den 15. desember 2011.

Moritz Am Ende
Fungerende justissekretær

Carl Baudenbacher
President

REPORT FOR THE HEARING

in Case E-1/11

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 Norwegian Appeal Board for Health Personnel (Statens helsepersonellnemnd) in the case of

Dr A

concerning the interpretation of Directive 2005/36/EC and the EEA Agreement.

I INTRODUCTION

1. By a decision of 25 January 2011, the Norwegian Appeal Board for Health Personnel ("the Appeal Board") made a request for an Advisory Opinion, registered at the Court on 31 January 2011, in a case pending before it between A ("the Complainant") and the Norwegian Registration Authority for Health Personnel ("Registration Authority" or "RAH").

II FACTS AND PROCEDURE

2. The question referred has arisen in the context of appeal proceedings before the Appeal Board concerning the refusal of the Registration Authority to grant the Complainant automatic recognition of her Bulgarian qualifications as a specialised medical doctor.

3. According to the request to the Court, the Complainant is a Bulgarian national, who is qualified as a medical doctor in Bulgaria with an additional specialisation in psychiatry and extensive experience as a psychiatrist in that EEA State.

4. On 15 May 2009, the Complainant applied for an authorisation "as a medical doctor" in Norway and, in that regard, referred to written confirmation by the Bulgarian authorities that, on the basis of her education and professional experience as a medical doctor in Bulgaria, she was covered by Directive 2005/36/EC.

RETTSMØTERAPPORT

i sak E-1/11

ANMODNING til EFTA-domstolen i medhold av artikkel 34 i Avtalen mellom EFTA-landene om opprettelse av et Overvåkingsorgan og en Domstol, fra Statens helsepersonellnemnd, i saken

Dr. A

vedrørende tolkning av direktiv 2005/36/EF og EØS-avtalen.

I INNLEDNING

1. Statens helsepersonellnemnd ("helsepersonellnemnda") har 25. januar 2011 fremmet en anmodning om en rådgivende uttalelse, mottatt ved EFTA-domstolen 31. januar 2011, i en verserende sak for helsepersonellnemnda vedrørende A ("klageren").

II FAKTUM OG SAKSGANG

2. Det henviste spørsmål har oppstått i forbindelse med klagebehandlingen for helsepersonellnemnda angående Statens autorisasjonskontor for helsepersonells ("SAFH") nektelse av å gi klageren en automatisk godkjenning av hennes bulgarske kvalifikasjoner som spesialistlege.

3. I henhold til anmodningen til EFTA-domstolen er klageren en bulgarsk statsborger, som har godkjenning som lege i Bulgaria med tilleggsspesialisering i psykiatri og omfattende erfaring som psykiater i denne EØS-stat.

4. Klageren søkte 15. mai 2009 om autorisasjon "som lege" i Norge og henviste i den forbindelse til skriftlig bekreftelse fra bulgarske myndigheter om at hun på grunnlag av sin utdanning og yrkespraksis som lege i Bulgaria var omfattet av direktiv 2005/36/EF.

5. By decision of 12 August 2009, the Registration Authority rejected the application. In its decision, the Registration Authority recognised that although, in principle, the Complainant had a right to an authorisation on the basis of acquired rights under Article 23 of Directive 2005/36/EC on the recognition of professional qualifications, in its assessment, the Complainant lacked the necessary aptitude under Article 48(3)(c) of the Norwegian Health Personnel Act. In support of that conclusion, the Registration Authority noted that the Complainant had previously been refused approval of her practical training in Norway due to language and communication problems, insufficient theoretical skills and signs of poor insight in her own functioning. At the same time, the Registration Authority considered that there were grounds to grant the Complainant a one-year licence to work as a subordinate medical doctor in accordance with Article 49 of the Health Personnel Act.

6. On 11 September 2009, the Complainant brought an appeal against that decision and the matter was eventually transmitted to the Appeal Board for review on 22 June 2010.

III QUESTION

7. The following question was referred to the Court:

Does Directive 2005/36/EC or other EEA law allow the authorities of Member States to apply national rules providing for a right to deny an authorisation as a medical doctor or only to grant a limited authorisation as a medical doctor to applicants with insufficient professional qualifications, to a migrant applicant from another Member State who formally fulfils requirements under Directive 2005/36/EC for a right to mutual recognition of professional qualifications (authorisation as a medical doctor without limitations), when the professional experience of the applicant in Norway has unveiled insufficient professional qualifications?

5. I vedtak av 12. august 2009 avslo SAFH søknaden. I vedtaket anerkjente SAFH at selv om klageren i utgangspunktet hadde rett til autorisasjon på grunnlag av ervervede rettigheter i medhold av direktiv 2005/36/EF artikkel 23 om godkjenning av yrkeskvalifikasjoner, manglet klageren etter SAFHs vurdering de nødvendige ferdigheter påkrevet etter den norske helsepersonellov § 48 tredje ledd bokstav c. Til støtte for denne konklusjon bemerket SAFH at klageren tidligere hadde blitt nektet godkjenning av sin turnustjeneste i Norge på grunn av kommunikasjons- og språkproblemer, utilstrekkelige faglige ferdigheter og tegn på manglende innsikt i egen fungering. Samtidig vurderte SAFH det slik at det var grunnlag for å innvilge klageren en ett-årig lisens for å arbeide som underordnet lege, jf. helsepersonelloven § 49.

6. Klageren påklaget vedtaket 11. september 2009 og saken ble 22. juni 2010 oversendt helsepersonellnemnda for klagebehandling.

III SPØRSMÅL

7. Følgende spørsmål er forelagt EFTA-domstolen:

Gir direktiv 2005/36/EF eller EØS-retten for øvrig rom for at medlemsstatenes myndigheter kan anvende nasjonale regler, som hjemler rett til å nekte autorisasjon som lege eller til kun å gi begrenset autorisasjon som lege til søker med utilstrekkelige faglige kvalifikasjoner, overfor en migrerende søker fra en annen medlemsstat som formelt oppfyller krav i direktiv 2005/36/EF for rett til gjensidig godkjenning av yrkeskvalifikasjoner (autorisasjon som lege uten begrensninger), men hvor det gjennom vedkommendes yrkespraksis i Norge er avdekket utilstrekkelige faglige kvalifikasjoner?

IV LEGAL BACKGROUND

EEA law

8. Article 30 of the EEA Agreement ("EEA") reads:

> *In order to make it easier for persons to take up and pursue activities as workers and self-employed persons, the Contracting Parties shall take the necessary measures, as contained in Annex VII, concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications, and the coordination of the provisions laid down by law, regulation or administrative action in the Contracting Parties concerning the taking up and pursuit of activities by workers and self-employed persons.*

9. Annex VII to the EEA, the list provided for in Article 30 EEA, refers at point 1 to Directive 2005/36/EC ("the Directive") *on the recognition of professional qualifications*[1] as amended, inter alia, by Council Directive 2006/100/EC of 20 November 2006 *adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania.*[2]

10. Article 2(1) of the Directive reads:

> *This Directive shall apply to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.*

11. Article 4 of the Directive reads:

> *Effects of recognition*
>
> *1. The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.*

1 OJ 2005 L 255, p. 22.
2 OJ 2006 L 363, p. 141.

IV RETTSLIG BAKGRUNN

EØS-rett

8. EØS-avtalen artikkel 30 lyder:

For å lette adgangen til å starte og utøve virksomhet som arbeidstager og selvstendig næringsdrivende skal avtalepartene treffe de nødvendige tiltak, som fastsatt i vedlegg VII, for gjensidig godkjennelse av diplomer, eksamensbevis og andre kvalifikasjonsbevis og samordning av de bestemmelser som avtalepartene har gitt ved lov eller forskrift om adgangen til å starte og utøve virksomhet som arbeidstager og selvstendig næringsdrivende.

9. Vedlegg VII til EØS-avtalen – listen det refereres til i EØS-avtalen artikkel 30 – henviser i punkt 1 til direktiv 2005/36/EF ("direktivet") *om godkjenning av yrkeskvalifikasjoner*[1] slik det er endret ved blant annet rådsdirektiv 2006/100/EF av 20. november 2006 *med tilpasning av enkelte direktiver i området fri bevegelse av personer, som følge av tiltredelse av Bulgaria og Romania.*[2]

10. Direktivets artikkel 2 nr.1 lyder:

Dette direktiv kommer til anvendelse på alle borgere i en medlemsstat som ønsker å utøve et lovregulert yrke, herunder frie yrker, i en annen medlemsstat enn der de tilegnet seg sine yrkeskvalifikasjoner, enten som selvstendig næringsdrivende eller som lønnsmottaker.

11. Direktivets artikkel 4 lyder:

Virkninger av godkjenningen

1. Vertsstatens godkjenning av yrkeskvalifikasjoner tillater at den begunstigede i den aktuelle medlemsstaten får adgang til det samme yrket som vedkommende er kvalifisert til i hjemstaten og til å utøve det i vertsstaten under samme vilkår som medlemsstatens borgere.

1 EUT 2005 L 255 s. 22.
2 EUT 2006 L 363 s. 141.

2. For the purposes of this Directive, the profession which the applicant wishes to pursue in the host Member State is the same as that for which he is qualified in his home Member State if the activities covered are comparable.

12. Article 23(1) of the Directive reads:

Acquired rights

1. Without prejudice to the acquired rights specific to the professions concerned, in cases where the evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor, as nurse responsible for general care, as dental practitioner, as specialised dental practitioner, as veterinary surgeon, as midwife and as pharmacist held by Member States nationals does not satisfy all the training requirements referred to in Articles 24, 25, 31, 34, 35, 38, 40 and 44, each Member State shall recognise as sufficient proof evidence of formal qualifications issued by those Member States insofar as such evidence attests successful completion of training which began before the reference dates laid down in Annex V, points 5.1.1, 5.1.2, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.5.2 and 5.6.2 and is accompanied by a certificate stating that the holders have been effectively and lawfully engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate.

13. Article 25 of the Directive reads:

Specialist medical training

1. Admission to specialist medical training shall be contingent upon completion and validation of six years of study as part of a training programme referred to in Article 24 in the course of which the trainee has acquired the relevant knowledge of basic medicine.

2. Specialist medical training shall comprise theoretical and practical training at a university or medical teaching hospital or, where appropriate, a medical care establishment approved for that purpose by the competent authorities or bodies.

The Member States shall ensure that the minimum duration of specialist medical training courses referred to in Annex V, point 5.1.3

2. For dette direktivs formål er yrket som søkeren ønsker å utøve i vertsstaten det samme som denne er kvalifisert for i sin hjemstat dersom virksomheten yrket omfatter er tilsvarende.

12. Direktivets artikkel 23 nummer 1 lyder:

Ervervede rettigheter

1. Uten at dette berører de ervervede rettigheter som er særegne for de yrkene de gjelder, og i tilfeller der kvalifikasjonsbevis som lege gir adgang til yrkesvirksomhet som lege med grunnutdanning og med spesialistutdanning, som sykepleier med ansvar for alminnelig sykepleie, som tannlege, som tannlege med spesialistutdanning, som veterinær, som jordmor og som farmasøyt som innehas av borgere i medlemsstatene ikke oppfyller alle de krav til utdanning som er nevnt i artikkel 24, 25, 31, 34, 35, 38, 40 og 44, skal alle medlemsstater godkjenne som tilstrekkelig bevis kvalifikasjonsbevis utstedt av disse medlemsstatene i den utstrekning slike bevis bevitner bestått fullføring av utdanning som var påbegynt før referansedatoene fastsatt i vedlegg V nr. 5.1.1, 5.1.2, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.5.2 og 5.6.2 og blir ledsaget av en attest som slår fast at innehaverne har vært faktisk og rettmessig beskjeftiget i de aktuelle virksomheter i minst tre sammenhengende år i løpet av de siste fem år før tildelingen av attesten.

13. Direktivets artikkel 25 lyder:

Spesialistlegeutdanning

1. Adgang til spesialistlegeutdanningen skal være betinget av fullføring og godkjenning av seks års studier som del av et utdanningsprogram som nevnt i artikkel 24, der studenten i løpet av utdanningsperioden har ervervet relevant og grunnleggende medisinsk kunnskap.

2. Spesialistlegeutdanningen skal omfatte teoretisk og praktisk utdanning ved et universitet eller undervisningssykehus eller, der dette er hensiktsmessig, ved en helseinstitusjon godkjent for dette formål av kompetente myndigheter eller organer.

Medlemsstatene skal sikre at minste varighet på kurs for den spesialistlegeutdanning som er nevnt i vedlegg V nr. 5.1.3, ikke er

is not less than the duration provided for in that point. Training shall be given under the supervision of the competent authorities or bodies. It shall include personal participation of the trainee specialised doctor in the activity and responsibilities entailed by the services in question.

3. Training shall be given on a full-time basis at specific establishments which are recognised by the competent authorities. It shall entail participation in the full range of medical activities of the department where the training is given, including duty on call, in such a way that the trainee specialist devotes all his professional activity to his practical and theoretical training throughout the entire working week and throughout the year, in accordance with the procedures laid down by the competent authorities. Accordingly, these posts shall be the subject of appropriate remuneration.

4. The Member States shall make the issuance of evidence of specialist medical training contingent upon possession of evidence of basic medical training referred to in Annex V, point 5.1.1.

5. The minimum periods of training referred to in Annex V, point 5.1.3 may be amended in accordance with the procedure referred to in Article 58(2) with a view to adapting them to scientific and technical progress.

14. Article 51 of the Directive reads:

Procedure for the mutual recognition of professional qualifications

1. The competent authority of the host Member State shall acknowledge receipt of the application within one month of receipt and inform the applicant of any missing document.

2. The procedure for examining an application for authorisation to practise a regulated profession must be completed as quickly as possible and lead to a duly substantiated decision by the competent authority in the host Member State in any case within three months after the date on which the applicant's complete file was submitted. However, this deadline may be extended by one month in cases falling under Chapters I and II of this Title.

3. The decision, or failure to reach a decision within the deadline, shall be subject to appeal under national law.

mindre enn varigheten fastsatt i nevnte nummer. Utdanningen skal gis under tilsyn av vedkommende myndigheter eller organer. Den skal omfatte studentens personlige deltakelse i spesialistlegeutdanningen i den virksomhet og med det ansvar som de aktuelle tjenester medfører.

3. Utdanningen skal gis på heltid ved særlige institusjoner som er godkjent av vedkommende myndigheter. Den skal innebære deltagelse i de samlede medisinske virksomheter ved den avdeling der utdanningen foregår, herunder vakter, slik at studenten i spesialistutdanning i hele den normale arbeidsuke og gjennom hele året bruker hele sin arbeidsinnsats på den praktiske og teoretiske opplæring, i samsvar med de fremgangsmåter som er fastsatt av vedkommende myndigheter. Disse stillinger skal følgelig avlønnes med et passende beløp.

4. Medlemsstatene skal gjøre utstedelse av kvalifikasjonsbevis for spesialistlegeutdanning betinget av at utøveren innehar kvalifikasjonsbevis for medisinsk grunnutdanning som nevnt i i vedlegg V nr. 5.1.1.

5. Minste varighet for utdanningen nevnt i vedlegg V nr. 5.1.3 kan endres i samsvar med fremgangsmåten i artikkel 58 nr.2 med hensyn til å tilpasse dem til den vitenskapelige og tekniske utvikling.

14. Direktivets artikkel 51 lyder:

Fremgangsmåte for gjensidig godkjenning av yrkeskvalifikasjoner

1 Vedkommende myndighet i vertsstaten skal bekrefte mottak av anmodningen innen én måned etter at den er mottatt og informere søkeren om eventuelle manglende dokumenter.

2. Fremgangsmåten for å undersøke om en anmodning om tillatelse til å praktisere et lovregulert yrke må gjennomføres så snart som mulig og føre til en velbegrunnet beslutning av vedkommende myndighet i vertsstaten, i alle tilfeller senest tre måneder etter den dato da søkerens fullstendige dokumentasjon ble oversendt. Denne frist kan imidlertid forlenges med én måned i saker som faller inn under kapittel I og II i denne avdeling.

3. Beslutningen eller at det ikke fattes noen beslutning før fristen utløper, skal være gjenstand for klage i henhold til nasjonal lovgivning.

15. Article 53 of the Directive reads:

Knowledge of languages

Persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State.

National law

16. Article 4 of Act No 64 of 2 July 1999 relating to Health Personnel etc. (Lov 2. juli 1999 nr. 64 om helsepersonell m.v – "the Health Personnel Act") imposes certain requirements upon health personnel concerning due professional care.

17. According to Article 48(2) of the Health Personnel Act, authorisation of an applicant with Norwegian education is contingent on the applicant not being unfit for the profession. However, under Article 49 of the Act, health personnel without a right to authorisation may be granted a licence to work as a medical professional in Norway. This licence may be temporary, limited to a specific position for certain types of health care or restricted in other ways.

18. Under Article 53(2) of the Health Personnel Act, Norwegian authorities may deny an applicant the authorisation, licence, certificate of completion of specialist training, or the right to the interim exercise of the profession of health personnel in Norway without Norwegian authorisation, licence or certificate of completion of specialist training, if there are circumstances which constitute grounds for a revocation pursuant to Article 57 of the Health Personnel Act.

19. Under Article 57 of the Health Personnel Act, a decision of revocation may be adopted where, for instance, the holder is unfit to practise his or her profession in a responsible manner for reasons of gross lack of professional insight or lack of due care.

15. Direktivets artikkel 53 lyder:

Kjennskap til språk

Personer som nyter godt av godkjenning av yrkeskvalifikasjoner skal ha de språkkunnskaper som er nødvendig for å praktisere yrket i vertsstaten.

Nasjonal rett

16. Den norske helsepersonellov (Lov 2. juli 1999 nr. 64 om helsepersonell m.v.) § 4 stiller enkelte krav til faglig forsvarlig yrkesutøvelse for helsepersonell.

17. I henhold til helsepersonelloven § 48 annet ledd er autorisasjon av en søker med norsk utdannelse betinget av at søkeren ikke er uegnet for yrket. Imidlertid kan helsepersonell uten rett til autorisasjon innvilges en lisens til å arbeide som medisinsk yrkesutøver i Norge etter helsepersonelloven § 49. Denne lisens kan være tidsbegrenset, begrenset til bestemte stillinger for enkelte typer helsebehandling eller være begrenset på andre måter.

18. Ifølge helsepersonelloven § 53 annet ledd kan norske myndigheter nekte en søker autorisasjon, lisens, spesialistgodkjenning eller rett til å utøve yrke som helsepersonell midlertidig i Norge uten norsk autorisasjon, lisens eller spesialistgodkjenning, hvis det foreligger omstendigheter som ville gitt grunnlag for tilbakekall etter helsepersonelloven § 57.

19. Etter helsepersonelloven § 57 kan det foretas vedtak om tilbakekall blant annet dersom innehaveren er uegnet til å utøve sitt yrke forsvarlig på grunn av grov mangel på faglig innsikt eller uforsvarlig virksomhet.

V WRITTEN OBSERVATIONS

20. 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 Czech Government, represented by Martin Smolek and David Hadroušek, acting as Agents,
- the Polish Government, represented by Maciej Szpunar, Undersecretary in the Ministry of Foreign Affairs, acting as Agent,
- the Spanish Government, represented by Juan Manuel Rodríguez Cárcamo, State Advocate (Abogado del Estado) in the Legal Service before the Court of Justice of the European Union ("the ECJ"), acting as Agent,
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Markus Schneider, Officer, Department of Legal & Executive Affairs, acting as Agents, and
- the European Commission ("the Commission"), represented by Hans Støvlbæk and Nicola Yerrell, members of its Legal Service, acting as Agents.

The Czech Government

21. The Czech Government observes that the referring tribunal appears to be in no doubt that the case of A in the main proceedings does not fall within the scope of the principle of automatic recognition established in Article 21 of the Directive. In its view, given the reference date for Bulgaria mentioned in Annex V to the Directive, and the fact that the minimum length of training in the field of psychiatry amounts to 10 years, that conclusion is indeed correct. Consequently, in those circumstances, recognition of professional qualifications must be assessed in the light of Article 23 of the Directive to which the national tribunal itself refers.

22. In this regard, the Czech Government submits that if the Complainant has been able to produce evidence of formal qualifications issued by Bulgaria, her professional qualifications

V SKRIFTLIGE INNLEGG

20. I medhold av artikkel 20 i EFTA-domstolens vedtekter og artikkel 97 i rettergangsordningen er skriftlige innlegg inngitt av:

- den tsjekkiske regjering, representert ved Martin Smolek og David Hadroušek,
- den polske regjering, representert ved Maciej Szpunar, Under-secretary i Ministry of Foreign Affairs,
- den spanske regjering, representert ved Juan Manuel Rodríguez Cárcamo, State Advocate (Abogado del Estado) i Legal Service for Den europeiske unions domstol ("EU-domstolen"),
- EFTAs overvåkingsorgan ("ESA"), representert ved Xavier Lewis, Director, og Markus Schneider, Officer, Department of Legal & Executive Affairs, og
- Europakommisjonen ("Kommisjonen"), representert ved Hans Støvlbæk og Nicola Yerrell, medlemmer av av Kommisjonens juridiske tjeneste.

Den tsjekkiske regjering

21. Den tsjekkiske regjering bemerker at den henvisende domstol ikke synes å være i tvil om at klagerens sak ikke faller innenfor rammen av prinsippet om automatisk godkjenning etablert i direktivets artikkel 21. Etter dens syn er denne konklusjon berettiget, gitt den referansedato for Bulgaria som nevnes i direktivets vedlegg V og det faktum at minstelengden for opplæring i psykiatri utgjør 10 år. Følgelig må spørsmålet om godkjenning av yrkeskvalifikasjoner under slike omstendigheter vurderes i lys av direktivets artikkel 23, som den nasjonale domstol også selv viser til.

22. I denne sammenheng anfører den tsjekkiske regjering at dersom klageren er i stand til å fremlegge dokumentasjon for formelle kvalifikasjoner utstedt av Bulgaria, må hennes yrkeskvalifikasjoner

must be recognised, where necessary, by giving direct effect to Article 23 of the Directive. This applies in so far as such evidence attests successful completion of training which began before the relevant reference date laid down in Annex V, and is accompanied by a certificate stating that the Complainant has been effectively and lawfully engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate. In the Government's view, this is without prejudice to Article 53 of the Directive, according to which persons benefiting from the recognition of professional qualifications shall have knowledge of languages necessary for practising the profession in the host Member State.

23. In the opinion of the Czech Government, however, this provision must be interpreted and applied in a manner consistent with the purpose of the Directive and, in the present case, not as to undermine the effectiveness of Article 23 of the Directive. In this regard, the Government refers to the Code of Conduct Approved by the Group of Coordinators for the Directive 2005/36/EC on the Recognition of Professional Qualifications,[3] which identifies as "unacceptable practice", within the ambit of Article 53, practice such as: "(a) making recognition of the qualification subject to linguistics knowledge, unless it belongs to the qualification (e.g. speech therapists); (b) ...; (c) imposing a test systematically".

24. The Czech Government points out that, on the other hand, the Code of Conduct identifies as "best practice", in case of doubt about the accuracy of the qualification or of the document supporting linguistics knowledge, that the competent authority of the host Member State may require confirmation from the authority of the home Member State of the accuracy of the qualification or of the document supporting linguistics knowledge using administrative cooperation.

25. Finally, the Czech Government notes that, where best practice does not apply, the Code of Conduct identifies under the heading

[3] Available on the internal market website of the Commission at http://ec.europa.eu/internal_market/qualifications/docs/future/cocon_en.pdf.

anerkjennes, om nødvendig ved å gi direktivets artikkel 23 direkte virkning. Dette må gjelde i den utstrekning slik dokumentasjon bekrefter en vellykket fullføring av opplæring som er påbegynt før den aktuelle referansedato fastlagt i vedlegg V og det samtidig legges ved sertifikat som stadfester at klageren faktisk og rettmessig har vært beskjeftiget i de aktuelle virksomheter i minst tre sammenhengende år i løpet av de siste fem år før tildelingen av attesten. Etter regjeringens syn gjelder dette med forbehold for direktivets artikkel 53, som bestemmer at personer nyter godt av godkjenning av yrkeskvalifikasjoner skal ha de språkkunnskaper som er nødvendig for å praktisere yrket i vertsstaten.

23. Etter den tsjekkiske regjerings opppfatning må imidlertid denne bestemmelse fortolkes og anvendes på en måte som er i samsvar med direktivets formål, og i den foreliggende sak ikke på en slik måte at effektiviteten av direktivets artikkel 23 undergraves. Regjeringen viser til retningslinjene godkjent av koordinatorgruppen for direktiv 2005/36/EF om godkjenning av yrkeskvalifikasjoner,[3] som identifiserer som "uakseptabel praksis" etter artikkel 53 praksis som: "(a) *å gjøre godkjenning av kvalifikasjonen avhengig av språkkunnskap* med mindre språkkunnskap er en del av kvalifikasjonen (f.eks. for taleterapeuter); (b) ...; (c) *å pålegge en test på en systematisk måte*".

24. Den tsjekkiske regjering påpeker på den annen side at ved tvil om nøyaktigheten av kvalifikasjonene eller av de dokumenter som underbygger språkkunnskapene, identifiserer retningslinjene som "beste praksis" at vedkommende myndighet i vertsstaten gjennom anvendelse av administrativt samarbeid vil kunne kreve bekreftelse fra myndighetene i hjemstaten om nøyaktigheten av kvalifikasjonene eller av de dokumenter som underbygger språkkunnskapene.

25. Endelig bemerker den tsjekkiske regjering at når beste praksis ikke gjelder, fastslår retningslinjene under overskriften

[3] Tilgjengelig på Kommisjonens nettside for det indre marked på http://ec.europa.eu/internal_market/qualifications/docs/future/cocon_en.pdf.

"acceptable practice" that the recognition of professional qualifications cannot be subject to linguistics knowledge unless it belongs to the qualifications (e.g. speech therapists). Moreover, the Code states that language requirements must not exceed what is necessary and proportionate for practising the profession in the host Member State. This can only be considered on an individual case by case basis, where, according to the Code, one of the following documents should be considered as sufficient to attest linguistic knowledge: (a) a copy of a qualification acquired in the language of the host Member State; (b) a copy of a qualification attesting knowledge in the language(s) of the host Member State (e.g. university degree, chamber of commerce qualification; qualifications delivered by recognised language institutions like the Goethe Institute, etc.); (c) evidence of previous professional experience in the host Member State territory; (d) if the migrant does not provide evidence under (a) to (c), an appropriate interview or a test (oral and/or written) may be imposed.

26. On this basis, the Czech Government argues that, although Article 53 of the Directive provides national authorities with a certain margin of discretion, this discretion cannot be used to deny the recognition of professional qualifications.

27. In the opinion of the Czech Government, the same can be deduced from the general purpose underlying the provisions on free movement of workers, which is non-discrimination, that is, equal treatment for workers from another Member State. This is reflected in the wording of Article 4(1) of the Directive, which states that the recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.

28. Therefore, according to the Czech Government, it is clear that, unless professional qualifications equivalent to those held by the Complainant would give a Norwegian national a right to have the job to which the Complainant aspires, she can rely on the Directive to have her professional qualifications recognised in

"akseptabel praksis" at godkjenning av yrkeskvalifikasjoner ikke kan underlegges språkkrav med mindre slike krav er en del av kvalifikasjonene (f.eks. taleterapeuter). Videre fastslår retningslinjene at språkkrav ikke må overskride det som er nødvendig og forholdsmessig for å kunne utøve yrket i vertsstaten. Dette kan bare vurderes individuelt for hvert enkelt tilfelle, hvor i henhold til retningslinjene ett av de følgende dokumenter bør anses som tilstrekkelig for å bekrefte språkkunnskap: (a) en kopi av en kvalifikasjon oppnådd på språket i vertsstaten; (b) en kopi av en kvalifikasjon som bekrefter kunnskap i språket/språkene i vertsstaten (f.eks. universitetsgrad, kvalifikasjon fra handelskammer; kvalifikasjoner levert av anerkjente språkinstitusjoner som Goethe-instituttet, osv.); (c) dokumentasjon for tidligere yrkeserfaring i vertsstatens territorium; (d) dersom den migrerende søker ikke leverer dokumentasjon i henhold til (a) til (c), vil et formålstjenlig intervju eller en test (muntlig og/eller skriftlig) kunne pålegges.

26. På dette grunnlag anfører den tsjekkiske regjering at selv om direktivets artikkel 53 gir de nasjonale myndigheter et visst rom for skjønn, kan ikke dette skjønnet anvendes til å nekte godkjenning av yrkeskvalifikasjoner.

27. Etter den tsjekkiske regjerings oppfatning kan det samme utledes fra det generelle formål som ligger til grunn for bestemmelsene om fri bevegelighet for arbeidstakere, som er ikke-diskriminering, dvs. likebehandling av arbeidstakere fra en annen medlemsstat. Dette gjenspeiles i ordlyden til direktivets artikkel 4 nr. 1, som fastslår at vertsstatens godkjenning av yrkeskvalifikasjoner gjør det mulig for den begunstigede å oppnå tilgang i denne medlemsstat til det samme yrket som vedkommende er kvalifisert til i sin hjemstat og til å utøve yrket i vertsstaten på de samme vilkår som vertsstatens egne borgere.

28. Ifølge den tsjekkiske regjering er det derfor klart at med mindre yrkeskvalifikasjoner tilsvarende de som innehas av klageren ville gi en norsk statsborger rett til en slik jobb som klageren ønsker, kan hun basere seg på direktivet for å få sine yrkeskvalifikasjoner

Norway.[4] However, she cannot rely on the Directive to actually obtain a job.[5]

29. In accordance with these observations, the Czech Government proposes that the question of the referring tribunal be answered as follows:

Without prejudice to Article 53, which must be interpreted in line with the purpose of Directive 2005/36/EC and in line with the principle of proportionality, Directive 2005/36/EC or any other EEA law does not allow the authorities of Member States to apply national rules providing for a right to deny an authorisation as a medical doctor or only to grant a limited authorisation as a medical doctor to applicants with insufficient professional qualifications, to a migrant applicant from another Member State who formally fulfils requirements under Directive 2005/36/EC for a right to mutual recognition of professional qualifications (authorisation as a medical doctor without limitations), when the professional experience of the applicant in Norway has unveiled insufficient professional qualifications. Directive 2005/36/EC, however, cannot be relied on as the basis for a right actually to be recruited.

The Polish Government

30. The Polish Government considers that the question before the Court is whether considerations other than the formal confirmation of acquired rights can be taken into account by the authority responsible for issuing the authorisation to exercise the profession of a medical doctor. In particular, the referring tribunal seeks to establish whether the fact that the Complainant demonstrated insufficient professional qualification during her professional experience in Norway can result in a refusal of authorisation.

31. In this connection, the Polish Government wishes to observe that Article 23 of the Directive provides for automatic recognition of

[4] Reference is made, by analogy, to Case C-285/01 *Burbaud* [2003] ECR I-8219, paragraph 91.

[5] Reference is made to Case C-586/08 *Rubino* [2009] ECR I-12013, paragraph 27.

anerkjent i Norge.[4] Derimot kan hun ikke basere seg på direktivet for rent faktisk å få en jobb.[5]

29. I overensstemmelse med disse merknader anmoder den tsjekkiske regjering at spørsmålet fra den henvisende domstol besvares på følgende måte:

Med forbehold for artikkel 53, som må fortolkes i samsvar med formålet i direktiv 2005/36/EF og i samsvar med prinsippet om forholdsmessighet, gir direktiv 2005/36/EF eller annen EØS-rett ikke rom for at myndighetene i en medlemsstat anvender nasjonale regler som gir hjemmel til å nekte en autorisasjon som lege eller til bare å innvilge en begrenset autorisasjon som lege til søkere med utilstrekkelige faglige kvalifikasjoner, til en migrerende søker fra en annen medlemsstat som formelt oppfyller kravene etter direktiv 2005/36/EF for en rett til gjensidig godkjenning av yrkeskvalifikasjoner (autorisasjon som lege uten begrensninger), når søkerens yrkeserfaring i Norge har avdekket utilstrekkelige faglige kvalifikasjoner. Direktiv 2005/36/EF kan imidlertid ikke danne grunnlag for en rett til rent faktisk å bli ansatt.

Den polske regjering

30. Den polske regjering anser at spørsmålet for EFTA-domstolen dreier seg om hvorvidt andre overveielser enn den formelle bekreftelse av ervervede rettigheter kan tas med i vurderingen av den myndighet som er ansvarlig for å utstede autorisasjon for yrkesutøvelse som lege. I særdeleshet søker den henvisende domstol å få fastslått hvorvidt det faktum at klageren har demonstrert utilstrekkelige faglige kvalifikasjoner under sin yrkeserfaring i Norge vil kunne medføre nektelse av autorisasjon.

31. I denne forbindelse ønsker den polske regjering å bemerke at direktivets artikkel 23 sørger for automatisk godkjenning av

[4] Det vises analogisk til sak C-285/01 *Burbaud* Sml. 2003 s. I-8219 (avsnitt 91).
[5] Det vises til sak C-586/08 *Rubino* Sml. 2009 s. I-12013 (avsnitt 27).

professional qualifications subject only to formal examination of documents provided by the applicant. Moreover, Article 23 of the Directive does not allow EEA States to examine the qualifications of the applicant or to apply compensation measures (aptitude test or adaptation period). Consequently, even if the authority responsible for the recognition of qualifications acquired knowledge about the applicant's qualifications in the course of previous proceedings, according to the Polish Government, this fact should not influence the rights acquired under Article 23 of the Directive.

32. As regards A's insufficient language knowledge, mentioned in the request to the Court, the Polish Government observes that, according to Article 53 of the Directive, the requirement of adequate language knowledge applies to persons benefiting from the recognition of qualifications. Consequently, an applicant's language knowledge can only be assessed after the formal recognition of qualifications. As a result, according to the Government, insufficient language knowledge can influence a person's right to exercise a profession but not to have his/her qualifications recognised.

33. Further, the Polish Government submits that EEA States may not subject the recognition of qualifications under Article 23 of the Directive to the condition of sufficient language knowledge, as this provision does not envisage such discretion.[6] In its view, it is irrelevant whether the information about the applicant's language knowledge was obtained from the bodies supervising the applicant's previous practice in the host Member State or from other sources, such as examination prior to recognition. Instead, the whole idea of acquired rights is based on the assumption that persons possessing the required documents have sufficient qualifications and experience to exercise their profession throughout the EEA. Were it possible, in examining the application for recognition of qualifications under Article 23 of the Directive, to take other than formal considerations into account, that

[6] To this effect, reference is made to Case C-193/05 *Commission* v *Luxembourg* [2006] ECR I-8673, paragraphs 34 to 47.

yrkeskvalifikasjoner, kun underlagt den formelle undersøkelse av de dokumenter som er fremlagt av søkeren. Videre tillater ikke direktivets artikkel 23 EØS-statene noen undersøkelse av søkerens kvalifikasjoner eller anvendelse av kompenserende tiltak (skikkethetstest eller tilpasningsperiode). Selv om den myndighet som er ansvarlig for godkjenning av kvalifikasjoner har mottatt kunnskap om søkerens kvalifikasjoner i løpet av den tidligere behandling, skal dette faktum, ifølge den polske regjering, derfor ikke ha noen betydning for de rettigheter som er ervervet etter direktivets artikkel 23.

32. Når det gjelder klagerens utilstrekkelige språkkunnskaper, nevnt i anmodningen til EFTA-domstolen, bemerker den polske regjering at i henhold til direktivets artikkel 53 gjelder kravet til adekvate språkkunnskaper for personer som har fått anerkjent sine kvalifikasjoner. Følgelig kan en søkers språkkunnskaper kun vurderes etter den formelle godkjenning av kvalifikasjonene. Ifølge regjeringen kan derfor utilstrekkelige språkkunnskaper ha betydning for en persons rett til å utøve et yrke, men ikke for vedkommendes rett til å få sine kvalifikasjoner anerkjent.

33. Videre anfører den polske regjering at EØS-statene ikke kan underkaste godkjenningen av kvalifikasjoner etter direktivets artikkel 23 noen vilkår om tilstrekkelige språkkunnskaper, da bestemmelsen ikke åpner for et slikt skjønn.[6] Etter dens syn er det irrelevant hvorvidt opplysningene om søkerens språkkunnskaper er kommet til veie fra de organer som har hatt tilsyn med søkerens tidligere praksis i vertsstaten eller fra andre kilder, slik som eksamener før godkjenningen. Tvert imot er hele ideen om ervervede rettigheter basert på den forutsetning at personer som innehar de påkrevde dokumenter har de nødvendige kvalifikasjoner og erfaring for utøvelse av sitt yrke i hele EØS-området. Om det ved undersøkelsen av søknaden om godkjenning av kvalifikasjoner etter direktivets artikkel 23 var mulig å ta andre enn formelle hensyn i betraktning, ville

[6] Med hensyn til dette vises det til sak C-193/05 *Kommisjonen* mot *Luxembourg* Sml. 2006 s. I-8673 (avsnittene 34 til 47).

assumption would be undermined, rendering the acquired rights useless.

34. The Polish Government also observes that, if the Appeal Board's question were to be answered in the affirmative, another person, possessing exactly the same evidence of formal qualifications as the Complainant, who, however, had not practised in Norway before applying for recognition of acquired rights under Article 23 of the Directive, would be granted the authorisation automatically without having his/her qualifications or language knowledge examined. As a consequence, those two persons, whose rights under the Directive are identical and who have exactly the same qualifications, would obtain different decisions regarding the recognition of qualifications and only one of them would be entitled to exercise the profession of medical doctor independently. According to the Polish Government, the Directive does not allow for such differentiation.

35. The Polish Government also observes that since A's application for recognition was denied her legal situation has become vague and is no longer determined by the Directive. It notes that Directive 2005/36 does not regulate the situation in which persons who fulfil the formal requirements of Article 23 are denied recognition of qualifications. In particular, there is no provision that allows Member States to apply compensation measures. Correspondingly, the Directive does not include guarantees regarding the legitimate reasons for refusal of authorisation or length of the training period required before the authorisation is granted, similar to those specified in Article 14 of the Directive in connection with compensation measures.

36. Consequently, the Polish Government submits that the decision of Norwegian Registration Authority for Health Personnel to grant the Complainant only a limited licence is completely discretionary and infringes the Directive, depriving Article 23 of its effect. In its view, Article 23 of the Directive specifies an exhaustive list of requirements which have to be fulfilled in order to have professional qualifications recognised. The host EEA State is not allowed to demand proof of qualifications, language knowledge

denne hovedforutsetning undergraves, og de ervervede rettigheter ville gjøres ubrukelige.

34. Den polske regjering bemerker også at dersom helsepersonellnemndas spørsmål skulle besvares bekreftende, ville en annen person med nøyaktig samme dokumentasjon av formelle kvalifikasjoner som klageren, men som ikke hadde praktisert i Norge før avsendelse av søknad om godkjenning av ervervede rettigheter etter direktivets artikkel 23, kunne få innvilget autorisasjon automatisk uten å få sine kvalifikasjoner eller språkkunnskaper undersøkt. Dermed ville disse to personer, som etter direktivet har identiske rettigheter og nøyaktig de samme kvalifikasjoner, kunne oppnå forskjellige vedtak med hensyn til godkjenning av kvalifikasjoner, og bare en av dem ville ha rett til å utøve yrket som lege på selvstendig grunnlag. Ifølge regjeringen gir ikke direktivet rom for noen slik differensiering.

35. Den polske regjering bemerker også at siden klagerens søknad om godkjenning ble nektet, er hennes rettslige situasjon blitt uklar og er ikke lenger bestemt av direktivet. Den bemerker at direktiv 2005/36 ikke regulerer den situasjon at personer som oppfyller de formelle krav i artikkel 23 blir nektet godkjennelse av kvalifikasjoner. I særdeleshet er det ingen bestemmelser som gir medlemsstatene anledning til å anvende kompenserende tiltak. I overensstemmelse med dette omfatter direktivet heller ikke garantier angående legitime grunner for å nekte autorisasjon eller om lengde på påkrevet praksisperiode før autorisasjon kan innvilges, tilsvarende de grunner som er spesifisert i direktivets artikkel 14 i forbindelse med kompenserende tiltak.

36. Følgelig anfører den polske regjering at SAFHs vedtak om å innvilge klageren kun en begrenset lisens er fullstendig skjønnsbasert og strider mot direktivet, idet artikkel 23 unndras sin fulle virkning. Etter dens oppfatning gir direktivets artikkel 23 en uttømmende opplisting av de krav som må være oppfylt for å få godkjent yrkeskvalifikasjoner. EØS-vertsstaten tillates ikke å forlange bevis for kvalifikasjoner, språkkunnskaper eller erfaring ut over det som er nevnt i denne bestemmelse. Ifølge regjeringen

or experience other than as mentioned in that article. According to the Government, this conclusion is confirmed not only by the wording of Article 23 of the Directive, but also by case-law.[7]

37. The Polish Government proposes that the question referred by the Appeal Board be answered as follows:

Neither Directive 2005/36/EC nor other EEA law allow the authorities of Member States to apply national rules providing for a right to deny an authorisation as a medical doctor or only to grant a limited authorisation as a medical doctor to applicants with insufficient professional qualifications, to a migrant applicant from another Member State who formally fulfils requirements under Directive 2005/36/EC for a right to mutual recognition of professional qualifications (authorisation as a medical doctor without limitations), when the professional experience of the applicant in Norway has unveiled insufficient professional qualifications.

The Spanish Government

38. The Spanish Government submits that two separate issues arise in this case as regards the interpretation of Directive 2005/36.

39. The first is the knowledge of languages. Although the Spanish Government acknowledges that the question referred does not include a specific reference to this point, it believes that this is one of the main grounds underlying the rejection by the Norwegian authorities of the Complainant's application. Therefore, it respectfully requests the Court to analyse the knowledge of languages as a separate issue, thereby redrafting the question referred.

40. In this regard, the Spanish Government contends primarily that Article 53 of the Directive allows Member States to refuse recognition when the person concerned does not have the necessary knowledge of languages. In its view, on a literal interpretation of Article 53 of the Directive, all rights accorded

[7] Reference is made Case C-417/02 *Commission* v *Greece* [2004] ECR I-7973, paragraph 19, and Case C-36/08 *Commission* v *Greece* [2008] ECR I-135, paragraphs 12 to 16.

blir denne konklusjon bekreftet ikke bare av ordlyden i direktivets artikkel 23, men også av rettspraksis.[7]

37. Den polske regjering foreslår at det spørsmål som er henvist fra helsepersonellnemnda besvares slik:

Hverken direktiv 2005/36/EF eller annen EØS-rett tillater medlemsstatenes myndigheter å anvende nasjonale regler som gir hjemmel for en rett til å nekte autorisasjon som lege eller til kun å innvilge en begrenset autorisasjon som lege til søkere med utilstrekkelige faglige kvalifikasjoner, overfor en migrerende søker fra en annen meldemsstat som formelt oppfyller krav i direktiv 2005/36/EF for rett til gjensidig godkjenning av yrkeskvalifikasjoner (autorisasjon som lege uten begrensninger), hvor det gjennom søkerens yrkespraksis i Norge er avdekket utilstrekkelige faglige kvalifikasjoner.

Den spanske regjering

38. Den spanske regjering anfører at denne saken reiser to adskilte spørsmål vedrørende fortolkningen av direktiv 2005/36.

39. Det første gjelder språkkunnskaper. Selv om den spanske regjering erkjenner at det henviste spørsmål ikke omfatter en spesifikk henvisning til dette punkt, antar regjeringen at dette er en av hovedgrunnene som ligger bak de norske myndigheters avslag på klagerens søknad. Derfor anmodes EFTA-domstolen høfligst om å analysere språkkunnskap som et særskilt spørsmål, og derigjennom omformulere det henviste spørsmål.

40. I den forbindelse anfører den spanske regjering primært at direktivets artikkel 53 gir rom for at medlemsstatene kan nekte godkjenning når vedkommende person ikke har de nødvendige språkkunnskaper. Etter dens oppfatning, basert på en bokstavelig fortolkning av direktivets artikkel 53, vil alle rettigheter tildelt

[7] Det vises til sak C-417/02 *Kommisjonen* mot *Hellas* Sml. 2004 s. I-7973 (avsnitt 19), og sak C-36/08 *Kommisjonen* mot *Hellas* Sml. 2008 s. I-135 (avsnittene 12 til 16).

by the Directive to individuals are conditional on the linguistic knowledge of the person concerned. Given that persons benefiting from the recognition of professional qualifications "shall have a knowledge of languages necessary for practising the profession in the host Member State", EEA States should consequently not recognise the qualifications of persons who do not have this necessary knowledge.

41. The Spanish Government submits further that, from a historical perspective, Article 53 of the Directive constitutes the current version of provisions previously contained in EU Directives on recognition of titles, subsequently repealed by Directive 2005/36. It argues that by way of contrast to Article 20(3) of Directive 93/16/EEC on free movement of doctors[8] a significant change in the wording of the provision can be observed. Under Directive 93/16, Member States only "shall see to it that, where appropriate, the persons concerned acquire, in their interest and in that of their patients, the linguistic knowledge necessary to the exercise of their profession in the host country". However, the current Article 53 goes much further, clearly making the right of the person, and thereby the recognition of his qualifications, conditional on the knowledge of the language, and, thus, allowing for the possibility of a refusal of recognition on this ground alone.

42. The Spanish Government submits that, although Article 53 of Directive 2005/36 has yet to be interpreted by the Union Courts, the interpretation of former versions of the provision was an issue in several cases before the ECJ. In that regard, Advocate General Stix-Hackl took the view that, although language requirements constituted an obstacle to the exercise of the freedoms guaranteed by the Treaty on the Functioning of the European Union ("TFEU"), they could be justified by overriding reasons based on the general interest, such as the reliability of communication with patients as well as administrative authorities and professional bodies.[9]

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8 OJ 1993 L 165, p. 1.

9 Reference is made to the Opinion of Advocate General Stix-Hackl in *Commission* v *Luxembourg*, cited above, point 48.

individene på bakgrunn av direktivet være betinget av språkkunnskaper. Gitt at personer som får godkjent sine yrkeskvalifikasjoner "skal ha de språkkunnskaper som er nødvendig for å praktisere yrket i vertsstaten", bør EØS-statene følgelig ikke anerkjenne kvalifikasjonene for personer som ikke har denne nødvendige kunnskap.

41. Den spanske regjering anfører videre at fra et historisk perspektiv utgjør direktivets artikkel 53 den nåværende versjon av bestemmelser som tidligere inngikk i EU-direktiver om godkjenning av titler, og som ble opphevet av direktiv 2005/36. Den påberoper at i kontrast til artikkel 20 nr. 3 i direktiv 93/16/EØF om fri bevegelse for leger,[8] kan det iakttas en vesentlig endring i bestemmelsens ordlyd. Under direktiv 93/16 kunne medlemsstatene kun "se til at de berørte personer, i sin egen og i sine pasienters interesse, i hensiktsmessig utstrekning oppnår de språkkunnskaper som er nødvendig for deres yrkesutøvelse i vertsstaten". Den nåværende artikkel 53 går imidlertid langt videre, og det fremgår tydelig at rettigheten for personen, og derigjennom godkjenningen av dennes kvalifikasjoner, gjøres betinget av kunnskaper om språket, og bestemmelsen gir dermed rom for muligheten av å nekte godkjenning av denne grunn alene.

42. Den spanske regjering anfører at selv om artikkel 53 i direktiv 2005/36 fortsatt har til gode å bli fortolket av unionens domstoler, var fortolkningen av de tidligere versjoner av bestemmelsen til behandling i flere saker for EU-domstolen. I den sammenheng inntok generaladvokat Stix-Hackl det syn at selv om språkkravene utgjorde en hindring for utøvelse av de friheter som garanteres av traktaten om Den europeiske unions virkemåte ("TEUV"), kunne de rettferdiggjøres av overordnede grunner basert på almeninteressen, så som påliteligheten av kommunikasjon med pasienter samt med administrative myndigheter og faglige organer.[9]

[8] EUT 1993 L 165 s. 1.
[9] Det vises til innstilling fra Generaladvokat Stix-Hackl i *Kommisjonen* mot *Luxembourg*, som sitert over (avsnitt 48).

43. The Spanish Government refers also to *Haim II*[10] which concerned the mutual recognition of diplomas, certificates and other formal qualifications for dentists, under Article 18(3) of Directive 78/686/EEC of 25 July 1978,[11] a predecessor provision to Article 53 of the current Directive. In that case, the Advocate General concluded that in some instances the freedom of movement requires not only possession of a qualification demonstrating what may be called technical knowledge, but also a command of the language or languages of the host State, as Article 18(3) of Directive 78/686 would have no practical effect if a Member State were not able to test for the existence of the necessary linguistic knowledge at any time. In that connection, he observed further that national courts will need to apply the principle of proportionality as regards the level of knowledge which may be required, and that according to that principle, the linguistic knowledge demanded should not exceed the level objectively required to ensure that patients' interests are protected.[12]

44. According to the Spanish Government, that view is broadly supported by the Opinion of Advocate General Jacobs in *Hocsman*[13] on the interpretation of Directive 93/16. In his Opinion, the Advocate General concluded that the ability to communicate accurately and effectively with professional colleagues should be among the criteria to determine the linguistic level of the person concerned.[14] In that regard, he observed that where a person has in fact already been practising in the host Member State for a number of years without displaying any linguistic inadequacy, a language test on the sole basis of which he could be disqualified might well infringe the principle of proportionality.[15] In the view of the Spanish Government, this is a decisive principle which fully applies in the present case. Consequently, where a person has in fact already

10 Case C-424/97 *Haim II* [2000] ECR I-5123.
11 OJ 1978 L 233, p. 1.
12 Reference is made to the Opinion of Advocate General Mischo in *Haim II*, cited above, points 90 to 101.
13 Case C-238/98 *Hocsman* [2000] ECR I-6623.
14 Ibid., Opinion of Advocate General Jacobs, point 56.
15 Ibid., point 57.

43. Den spanske regjering viser også til *Haim II*[10] som dreide seg om den gjensidige godkjenning av diplomer, sertifikater og andre formelle kvalifikasjoner for tannleger, i henhold til artikkel 18 nr. 3 i direktiv 78/686/EØF av 25. juli 1978,[11] en forløperbestemmelse til artikkel 53 i nåværende direktiv. I denne sak konkluderte generaladvokaten med at i noen tilfeller er bevegelsesfrihet ikke bare betinget av besittelse av en kvalifikasjon som demonstrerer det som kan kalles teknisk kunnskap, men også en beherskelse av språket eller språkene i vertsstaten, da artikkel 18 nr. 3 i direktiv 78/686 ikke ville ha noen praktisk virkning hvis ikke en medlemsstat når som helst var i stand til å teste tilstedeværelsen av de nødvendige språkkunnskaper. I den forbindelse bemerket han videre at nasjonale domstoler må anvende prinsippet om forholdsmessighet med hensyn til det kunnskapsnivå som vil kunne kreves, og at i henhold til dette prinsipp må ikke de forlangte språkkunnskaper overskride det nivå som er objektivt påkrevet for å sikre at pasientenes interesser er beskyttet.[12]

44. Ifølge den spanske regjering støttes dette syn av generaladvokat Jacobs' innstilling i *Hocsman*[13] om fortolkningen av direktiv 93/16. I sin innstilling konkluderte generaladvokaten med at evnen til å kommunisere nøyaktig og effektivt med profesjonelle kolleger bør være blant de kriterier som bestemmer det språklige nivå for vedkommende person.[14] I den henseende bemerket han at hvor en person allerede har praktisert i vertsstaten i et antall år uten å ha vist tegn til språklig utilstrekkelighet, vil en språktest som eneste grunnlag for en diskvalifisering kunne være i strid med forholdsmessighetsprinsippet.[15] Etter den spanske regjerings oppfatning er dette et avgjørende prinsipp som fullt ut får anvendelse i den foreliggende sak. Hvor en person allerede har praktisert i vertsstaten et antall år og har vist en åpenbar språklig

10 Sak C-424/97 *Haim II* Sml. 2000 s. I-5123.
11 EUT 1978 L 233 s. 1.
12 Det vises til instilling fra Generaladvokat Mischo i *Haim II*, som sitert over (avsnittene 90 til 101).
13 Sak C-238/98 *Hocsman* Sml. 2000 s. I-6623.
14 Samme sted, instilling fra Generaladvokat Jacobs (avsnitt 56).
15 Samme sted (avsnitt 57).

been practising in the host Member State for a number of years displaying a clear linguistic inadequacy, having regard to Article 53 of the Directive, the competent authorities of the Member States should not recognise that person's qualification under the procedure provided for in Article 23 of the Directive.

45. As regards the case at hand, the Spanish Government indicates that it is apparent from the request to the Court that from February to June 2008 the Complainant "had insufficient understanding of the language which was not compatible with the requirement of due care in the treatment of patients". In April 2009, although she had shown "improved abilities to use and understand Norwegian in dialogue with the patients, relatives and colleagues", she was "still recommended to continue the practices". The refusal of recognition was issued in August 2009. According to the Spanish Government, it should be noted that, notwithstanding that refusal, the Complainant was granted a one-year licence that allowed her to work as a subordinate medical doctor.

46. In the Spanish Government's view, it may be supposed that, if the Complainant has in fact worked during that period or worked further as a subordinate medical doctor, at some stage her "practical training" should be approved. Even if this is not the case, the system of "practical training" used by the Norwegian authorities appears to be proportionate. A system where the person seeking recognition works in direct contact with patients and colleagues under the control of a medical doctor and where there is a periodic testing of his or her knowledge appears to be even more appropriate to attain the intended aim than the traditional test prior to recognition. Further, in relation to the proportionality test, the Spanish Government stresses the difficulty to imagine an alternative system to replace the "practical training" which is equally effective and, at the same time, has less detrimental effects. On the issue of linguistic knowledge, the Spanish Government concludes that the system of practical training used by the Norwegian authorities appears proportionate to determine the linguistic knowledge of persons

utilstrekkelighet, bør vedkommende myndigheter i medlemsstaten – hensett til direktivets artikkel 53 – følgelig ikke anerkjenne denne persons kvalifikasjoner etter den fremgangsmåte som er fastsatt i direktivets artikkel 23.

45 I den foreliggende sak viser den spanske regjering til at det fremgår av anmodningen til EFTA-domstolen at fra februar til juni 2008 hadde klageren "manglende språkforståelse som ikke var forenlig med kravet til forsvarlig pasientbehandling". I april 2009 ble hun "anbefalt fortsatt hospitering", selv om hun hadde vist "bedre evne til å bruke og forstå norsk i dialog med pasienter, pårørende og kolleger". Nektelse av godkjenning ble besluttet i august 2009. Ifølge den spanske regjering bør det bemerkes at til tross for nektelsen ble klageren innvilget en ettårig lisens som ga henne tillatelse til å arbeide som underordnet lege.

46. Det kan antas at dersom klageren faktisk har arbeidet i løpet av denne periode eller har arbeidet videre som underordnet lege, vil hennes praksisopplæring på et eller annet stadium bli godkjent. Selv om dette ikke skulle være tilfellet synes det system for praktisk opplæring som anvendes av norske myndigheter å være forholdsmessig. Et system hvor den person som søker godkjenning arbeider i direkte kontakt med pasienter og kolleger under kontroll av en lege og hvor det er periodiske testinger av hans eller hennes kunnskaper, synes til og med å være mer hensiktsmessig for å oppnå det tilsiktede mål enn den tradisjonelle test forut for godkjennelse. I tilknytning til forholdsmessighetstesten understreker den spanske regjering videre hvor vanskelig det vil være å forestille seg et alternativt system til erstatning for den praktiske opplæring, som vil være like effektivt og på samme tid ha færre ugunstige virkninger. Til spørsmålet om språkkunnskaper konkluderer den spanske regjering med at det system for praktisk opplæring som anvendes av norske myndigheter synes å være forholdsmessig for å fastslå språkkunnskaper for personer som i henhold til direktivets

who have the right, pursuant to Article 23 of the Directive, to the recognition of their qualification as a doctor. It contends, therefore, that Article 53 of the Directive must interpreted to mean that it allows Member States to refuse the recognition of qualifications due to insufficient linguistic knowledge revealed in such a period of practical training and invites the Court to answer the question accordingly.

47. In the view of the Spanish Government, the second issue is whether the lack of sufficient professional qualifications revealed by the professional experience of the Complainant in Norway constitutes a ground on which to refuse the recognition provided for by Directive 2005/36. In its view, the Directive does not provide any specific legal basis for such refusal.

48. However, the Spanish Government considers that the mere fact that a qualification is recognised does not imply that the person benefiting from it can develop his activity without supervision by the competent authorities. In fact, the activity of a Norwegian doctor, who quite obviously does not need to have his qualifications recognised by the Norwegian authorities, is subject to supervision. In that regard, the Spanish Government notes that, according to Article 48(2) of the Norwegian Health Personnel Act, as set out in the request for an advisory opinion, authorisation of an applicant with Norwegian education is contingent on the applicant not being unfit for the profession.

49. From the perspective of the Spanish Government, a distinction ought to be made between recognition of qualifications and the grant and revocation of an authorisation. In its view, whereas the first issue is covered by the Directive, the second aspect falls directly within the scope of the fundamental freedoms, in particular, Article 49 TFEU. Although a Member State has the obligation under Directive 2005/36 to recognise the qualifications of nationals of other EU Member States, it is under no obligation to allow these nationals to develop their activity without supervision, when its own nationals are subject thereto. In that regard, the Spanish Government stresses that the request for an Advisory Opinion formulates the question for the Court with

artikkel 23 har rett til godkjenning av sine kvalifikasjoner som lege. Den hevder derfor at direktivets artikkel 53 må fortolkes slik at den gir medlemsstatene anledning til å nekte godkjenning av kvalifikasjoner på grunn av mangelfulle språkkunnskaper avdekket under en slik periode av praktisk opplæring og inviterer EFTA-domstolen til å besvare spørsmålet overensstemmende.

47. Etter den spanske regjerings oppfatning er det andre spørsmål i saken hvorvidt mangelen på tilstrekkelige faglige kvalifikasjoner som avdekkes gjennom klagerens yrkeserfaring i Norge kan utgjøre et grunnlag for å nekte den rett til godkjenning som direktiv 2005/36 gir. Etter dens oppfatning gir ikke direktivet noe særskilt rettslig grunnlag for slik nektelse.

48. Det faktum alene at en kvalifikasjon er godkjent innebærer ikke at den tilgodesette person kan praktisere uten tilsyn fra kompetente myndigheter. Faktisk er det slik at virksomheten til en norsk lege, som åpenbart ikke har behov for å få sine kvalifikasjoner godkjent av norske myndigheter, er underlagt tilsyn. I henhold til helsepersonelloven § 48 annet ledd, slik bestemmelsen er gjengitt i anmodningen om rådgivende uttalelse, er autorisasjon for en søker med norsk utdannelse betinget av at søkeren ikke er uskikket for yrket.

49. Etter den spanske regjerings syn bør det skilles mellom godkjenning av kvalifikasjoner og tildeling eller tilbakekall av en autorisasjon. Det første spørsmål dekkes av direktivet, mens det andre aspekt faller direkte innenfor rammen av de grunnleggende friheter, i særdeleshet TEUV artikkel 49. Selv om en medlemsstat er forpliktet etter direktiv 2005/36 til å godkjenne kvalifikasjonene til statsborgere av andre medlemsstater i EU, foreligger det ingen forpliktelse til å tillate disse statsborgere å drive sin aktivitet uten tilsyn, når vertsstatens egne statsborgere også underlegges tilsyn. I den forbindelse understreker den spanske regjering at anmodningen om en rådgivende uttalelse formulerer spørsmålet til EFTA-domstolen med spesifikk referanse til innvilgelse av

specific reference to grant of an authorisation and not recognition of qualifications. Consequently, it contends that the law in need of interpretation here is not Directive 2005/36 but Article 49 TFEU.

50. The Spanish Government emphasises that, according to case-law of the ECJ, national measures which restrict the exercise of fundamental freedoms guaranteed can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective.[16]

51. According to the Spanish Government, it would appear from the request to the Court that not only the practical training but also the possibility to revoke an authorisation applies to all doctors in Norway. In fact, it appears that the Complainant was granted a practical training licence before she applied for recognition in accordance with Directive 2005/36. Furthermore, according to the request, the Norwegian legislation provides that authorisations are conditional on applicants not being unfit for the profession. Consequently, in the view of the Spanish Government, the measure satisfies the first condition, as it is not applied in a discriminatory manner.

52. As regards the second condition, the Spanish Government submits that, as confirmed in case-law, the protection of public health is one of the reasons cited in Article 52(1) TFEU as capable of justifying restrictions on the freedom of establishment. Pursuant to Article 61 TFEU, that provision applies to the freedom to provide services. In its view, the denial of an authorisation to an unfit person is covered by this derogation for measures in the general interest as it is aimed at protecting public health.

[16] Reference is made to Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraph 39; *Haim II*, cited above, paragraph 57; Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 34; and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

autorisasjon og ikke til godkjenning av kvalifikasjoner. Følgelig hevder regjeringen at den rett som trenger fortolkning her ikke er direktiv 2005/36 men TEUV artikkel 49.

50. I henhold til EU-domstolens rettspraksis kan nasjonale tiltak som begrenser utøvelsen av de grunnleggende friheter bare rettferdiggjøres dersom de oppfyller fire betingelser: De må anvendes på en ikke-diskriminerende måte; de må være berettiget ut fra overordnede hensyn basert på almeninteressen; de må være hensiktsmessige for å sikre oppnåelse av det mål de er satt til å oppnå; og de må ikke gå ut over det som er nødvendig for å oppnå dette målet.[16]

51. Ifølge den spanske regjering fremgår det av anmodningen til EFTA-domstolen at ikke bare den praktiske opplæringen men også muligheten for å tilbakekalle en autorisasjon gjelder for alle leger i Norge. Faktisk fremgår det at klageren ble innvilget turnuslisens før hun søkte om godkjennelse i henhold til direktiv 2005/36. Videre fremgår det av anmodningen at norsk lovgivning fastsetter at autorisasjon er betinget av at søker ikke er uskikket til yrket. Følgelig tilfredsstiller ordningen etter den spanske regjerings oppfatning den første av betingelsene, da den ikke anvendes på en diskriminerende måte.

52. Hva angår den andre betingelse anfører den spanske regjering at det bekreftes av rettspraksis at beskyttelse av offentlig helse er et av hensynene nevnt i TEUV artikkel 52 nr. 1 som vil kunne berettige begrensninger i etableringsfriheten. I henhold til TEUV artikkel 61 gjelder denne bestemmelsen for friheten til å yte tjenester. Etter regjeringens oppfatning omfattes nektelse av autorisasjon til en uskikket person av unntaket for inngrep i almenhetens interesse, idet det tar sikte på å beskytte offentlig helse.

[16] Det vises til sak C-294/00 *Gräbner* Sml. 2002 s. I-6515 (avsnitt 39); *Haim II*, som sitert over (avsnitt 57); sak C-212/97 *Centros* Sml. 1999 s. I-1459 (avsnitt 34); og sak C-55/94 *Gebhard* Sml. 1995 s. I-4165 (avsnitt 37).

53. As regards the third condition, the Spanish Government argues that it follows from the facts of the case that the measure is suitable for securing the protection of public health, as the health of patients would be at risk if unfit persons were to treat them.

54. Finally, the Spanish Government submits that the measure does not go beyond what is necessary to ensure such protection. The Complainant has not been prevented from practising medicine. She has been granted a one-year authorisation that allows her to work as a subordinate medical doctor. In the Government's view, therefore, it is a limited measure. Moreover, if the Complainant were to improve her qualifications in the future, she would most probably obtain an authorisation as a medical doctor. Consequently, according to the Government, the reversible and limited character of the measure confirms its proportionality.

55. The Spanish Government respectfully invites the Court to answer the question referred as follows:

Article 53 of Directive 2005/36 shall be interpreted in the sense that it allows Member States to refuse the recognition of qualifications due to insufficient linguistic knowledge unveiled in a practical training. Article 49 TFEU shall be interpreted in the sense that it allows the authorities of Member States to apply national rules providing for a right to deny an authorisation as a medical doctor or only to grant a limited authorisation as a medical doctor to applicants who fulfil requirements under Directive 2005/36/EC for a right to mutual recognition of professional qualifications (authorisation as a medical doctor without limitations), when the professional experience of the applicant in Norway has unveiled insufficient professional qualifications.

The EFTA Surveillance Authority

56. ESA notes that the system of recognition of professional qualifications aims to facilitate the pursuit of such professions within the entire European Economic Area.[17] Generally, the

[17] Reference is made to recital 1 in the preamble to the Directive.

53. Når det gjelder den tredje betingelse anfører den spanske regjering at det følger av sakens fakta at ordningen er hensiktsmessig for å sikre beskyttelse av offentlig helse, da helsen til pasienter ville være i fare dersom de skulle behandles av uskikkede personer.

54. Til slutt hevder den spanske regjering at tiltaket ikke går ut over det som er nødvendig for å sikre slik beskyttelse. Klageren er ikke hindret i å praktisere medisin. Hun er blitt innvilget en ettårig autorisasjon som tillater henne å arbeide som underordnet lege. Etter regjeringens oppfatning dreier det seg derfor om et begrenset inngrep. Dessuten, dersom klageren skulle forbedre sine kvalifikasjoner i fremtiden, vil hun mest sannsynlig oppnå autorisasjon som lege. Følgelig blir tiltakets forholdsmessighet, ifølge regjeringens syn, bekreftet av inngrepets begrensede karakter og muligheten for omgjøring.

55. Den spanske regjering inviterer høfligst EFTA-domstolen til å besvare det henviste spørsmål som følger:

Artikkel 53 i direktiv 2005/36 skal fortolkes slik at den tillater medlemsstatene å nekte godkjenning av kvalifikasjoner på grunn av mangelfulle språkkunnskaper avdekket i praktisk opplæring. TEUV artikkel 49 skal fortolkes slik at den tillater myndighetene i medlemsstatene å anvende nasjonale regler som gir rett til å nekte en autorisasjon som lege eller til bare å innvilge en begrenset autorisasjon som lege til søkere som oppfyller kravene etter direktiv 2005/36/EF for rett til gjensidig godkjenning av yrkeskvalifikasjoner (autorisasjon som lege uten begrensninger), når det gjennom vedkommendes yrkespraksis i Norge er avdekket utilstrekkelige faglige kvalifikasjoner.

EFTAs overvåkingsorgan (“ESA”)

56. ESA bemerker at systemet for godkjenning av yrkeskvalifikasjoner tar sikte på å lette virksomheten for slike yrker innenfor hele det Europeiske økonomiske samarbeidsområde.[17] Generelt forplikter

[17] Det vises til punkt 1 i fortalen til direktivet.

Directive obliges any EEA State which regulates a profession to recognise qualifications for pursuit of the same profession obtained in other EEA States upon completion of the respective national education, including any practical training requirements.[18]

57. In ESA's view, the Directive provides for a two-stage approach to the automatic recognition of diplomas of medical doctors in accordance with the principle of minimum harmonisation.[19] First, there is an assessment of the qualification granting *access* to the profession and, second, this is subject to application of the rules governing *the pursuit* of that profession.[20]

58. As regards access to the profession, ESA submits that EEA States retain the competence to require applicants to produce the necessary diplomas. In turn, the national authorities of the host State, in which the applicant intends to work, are obliged to recognise certain diplomas awarded in another EEA State ("home State"). In relation to the pursuit of the profession in the host State, the Directive sets out additional rules in Articles 53 to 55 and Annex VII.

59. ESA argues that access to and pursuit of a regulated profession are two distinct and separate steps of equal importance. It is only when the conditions under both steps are fulfilled that a migrant doctor is to be granted the right to take up and pursue the specific medical profession in another EEA State.

60. As regards access to the profession of medical doctor in the host State, ESA submits that Chapter III of Title III of the Directive covers eight professions, including that of medical doctor, which is further subdivided into (i) doctors with basic medical training (only) and (ii) specialised doctors, including general practitioners. ESA notes that the designations of qualifications and training

[18] According to Article 3(1)(a) of the Directive, professions are considered "regulated" where by virtue of national laws, regulations or administrative provisions access or pursuit thereof requires the possession of specific professional qualifications.
[19] Reference is made to Chapter III of Title III of the Directive.
[20] Reference is made to Chapter IV of Title III and to Title IV of the Directive.

direktivet enhver EØS-stat som regulerer et yrke til å godkjenne kvalifikasjoner for å drive virksomhet av samme yrke når kvalifikasjonene er oppnådd i andre EØS-stater gjennom fullføring av den respektive nasjonale utdannelse, inkludert eventuelle krav om praktisk opplæring.[18]

57. Etter ESAs oppfatning fastsetter direktivet en to-trinns tilnærming til den automatiske godkjenning av diplomer for leger i samsvar med prinsippet om minimumsharmonisering.[19] Først foretas en vurdering av kvalifikasjonen som gir *tilgang* til yrket, og for det andre anvendes reglene som styrer *utøvelsen* av dette yrke.[20]

58. Hva angår tilgang til yrket anfører ESA at EØS-statene har i behold sin kompetanse til å kreve at søkere fremlegger de nødvendige diplomer. På sin side er de nasjonale myndigheter i vertsstaten hvor søkeren har til hensikt å arbeide forpliktet til å godkjenne visse diplomer tildelt i en annen EØS-stat ("hjemstaten"). Når det gjelder utøvelsen av yrket i vertsstaten, fastsetter direktivet tilleggsregler i artiklene 53 til 55 og vedlegg VII.

59. ESA fremholder at tilgang til og utøvelsen av et regulert yrke er to adskilte og separate trinn av tilsvarende betydning. Det er bare når betingelsene i henhold til begge trinn er oppfylt at en migrerende lege kan innvilges rett til å etablere seg med aktivitet i det bestemte medisinske yrke i en annen EØS-stat.

60. Hva angår tilgang til yrket som lege i vertsstaten anfører ESA at kapittel III i del III av direktivet dekker åtte profesjoner, inkludert lege, som igjen er oppdelt i (i) leger med (kun) grunnleggende medisinsk opplæring og (ii) spesialistleger, inkludert almenpraktikere. ESA bemerker at de betegnelser for kvalifikasjoner og

[18] I henhold til direktivets artikkel 3 nr.1(a), anses yrker som "lovregulert" når det i kraft av nasjonale lover, forskrifter eller administrative bestemmelser kreves besittelse av særlige yrkeskvalifikasjoner for adgang til og utøvelse av yrket.
[19] Det vises til kapittel III i direktivets del III.
[20] Det vises til kapittel IV i direktivets del III og del IV.

courses relevant to those two categories of medical doctors are listed in Annex V to the Directive in the official language or languages of each EEA State concerned.

61. ESA further points out that national designations of qualifications and training courses relating to doctors with basic medical training are listed under subheading 5.1.1. of Annex V, whereas the national designations of qualifications and training courses relating to specialist doctors are indicated under subheadings 5.1.3. and 5.1.4. of Annex V. As not all States have the same specialisations, only those countries which list an entry for a given specialisation have to recognise that specialisation when obtained elsewhere in the EEA. It observes that the content of Annex V is based, in fact, on notifications by the EEA States of the national provisions under which each State issues those formal qualifications.[21] On that basis, ESA, or, in the case of EU Member States, the European Commission, assesses whether the diplomas notified meet the minimum requirements of the relevant qualifications within the meaning of Articles 24, 25 and 28 of the Directive.

62. ESA notes, moreover, that the lists set out under subheadings 5.1.2. to 5.1.4. to Annex V of the Directive specify the national evidence of professional qualification, the body awarding those qualifications and, where applicable, the accompanying certificates, professional titles and reference dates. In ESA's view, only those formal qualifications and relating documents explicitly mentioned in the list concerned are covered by the system of automatic recognition provided for by the Directive.

63. However, according to ESA, those lists reflect the situation in each profession in light of the most recent notification by the EEA State concerned. In practice, any national changes to the designation of the diploma, the body awarding it or professional titles require the holders of older, different diplomas to produce additional documentation issued by the competent authorities of the home State. ESA observes that, according to Article 23(6)

[21] Reference is made to Article 21(7) of the Directive.

opplæringskurser som er relevante for disse to kategorier av leger er opplistet i vedlegg V til direktivet i det/de offisielle språk i hver enkelt EØS-stat.

61. ESA påpeker videre at nasjonale betegnelser for kvalifikasjoner og opplæringskurs vedrørende leger med grunnleggende medisinsk opplæring er opplistet i underavsnitt 5.1.1. av vedlegg V, mens de nasjonale betegnelser for kvalifikasjoner og opplæringskurs vedrørende spesialistleger er angitt i underavsnittene 5.1.3. og 5.1.4. av vedlegg V. Ettersom ikke alle stater har de samme spesialiseringer, vil det bare være de land som har en listeoppføring for en gitt spesialisering som må godkjenne denne spesialisering når den er oppnådd i en annen EØS-stat. ESA bemerker at innholdet av vedlegg V faktisk er basert på meddelelser fra EØS-statene om de nasjonale bestemmelser som danner grunnlaget for hvert enkelt lands utstedelse av disse formelle kvalifikasjoner.[21] På dette grunnlag vurderer ESA, eller for EUs medlemsstater, Kommisjonen, hvorvidt de meddelte diplomer tilfredsstiller minstekravene for relevante kvalifikasjoner innenfor forståelsen av direktivets artikler 24, 25 og 28.

62. ESA bemerker dessuten at listene som er fastsatt i underavsnittene 5.1.2. til 5.1.4. i vedlegg V i direktivet spesifiserer den nasjonale dokumentasjon for faglig kvalifikasjon, det organ som tildeler disse kvalifikasjoner og eventuelt medfølgende sertifikater, yrkestitler og referansedatoer. Etter ESAs oppfatning er kun de formelle kvalifikasjoner og tilhørende dokumenter som er uttrykkelig nevnt i den aktuelle liste dekket av det system for automatisk godkjenning som direktivet sørger for.

63. Ifølge ESA gjenspeiler imidlertid disse lister situasjonen i hver profesjon i lys av den mest oppdaterte melding fra den aktuelle EØS-stat. I praksis vil enhver nasjonal endring i betegnelse på diplom, på det organ som tildeler det eller av yrkestitler, medføre et krav til innehavere av eldre, forskjellige diplomer om å fremlegge tilleggsdokumentasjon avgitt fra de kompetente myndigheter i hjemlandet. ESA bemerker at i henhold til direktivets artikkel 23

[21] Det vises til direktivets artikkel 21 nr. 7.

of the Directive, all EEA States have to recognise as sufficient proof for EEA nationals, whose evidence of formal qualifications does not correspond to the current entry in Annex V, evidence of that formal qualification when accompanied by a home State document certifying conformity with the minimum requirements under the Directive. According to the same provision, such a certificate must state that the evidence of formal qualifications certifies successful completion of training in accordance with Articles 24, 25 and 28 respectively and is treated by the Member State which issued it in the same way as the qualifications whose titles and diplomas are listed in Annex V.

64. As regards the automatic recognition of diplomas explicitly listed in the Directive, ESA submits that the recognition of medical doctor diplomas is designed to take place automatically and quickly (Article 51) as, in Articles 24, 25 and 28, the Directive harmonises the minimum requirements on education and training to qualify for those professions.

65. In ESA's view, that minimum harmonisation guarantees an agreed level of quality. In addition, the host State neither needs nor is supposed to individually assess qualifications of migrant medical doctors. Thus, according to ESA, if a given diploma is listed in Annex V to the Directive, the minimum requirements under Articles 24, 25 and 28 are deemed to be fulfilled, and the recognition of a professional qualification may not be refused by the host State.

66. On the issue of automatic recognition of diplomas not explicitly listed in the Directive on the basis of acquired rights, ESA argues that, in cases where the minimum requirements under Articles 24, 25 and 28 of the Directive are not met, gaps may be compensated for by evidence of certain professional experience, documented in "certificates of acquired rights" issued by the home State. That procedure allows for the recognition of diplomas which fail to meet the Directive's minimum requirements because, for instance, the training was initiated prior to the harmonisation of EEA minimum standards for education and training.

nr. 6 må alle EØS-stater godkjenne som tilstrekkelig bevis for EØS-borgere hvis kvalifikasjonsbevis ikke tilsvarer gjeldende oppføring i vedlegg V, kvalifikasjonsbevis ledsaget av et dokument fra hjemstaten som bekrefter samsvar med minstekravene etter direktivet. I henhold til samme bestemmelse må en slik bekreftelse erklære at kvalifikasjonsbeviset bevitner at innehaveren har bestått en utdanning i samsvar med henholdsvis artikkel 24, 25 og 28, og blir behandlet av medlemsstaten som utstedte det på samme måte som de kvalifikasjoner hvis titler og diplomer er oppført på listen i vedlegg V.

64. Hva angår den automatiske godkjenning av diplomer som uttrykkelig er opplistet i direktivet anfører ESA at godkjenningen av legediplomer er beregnet å bli gjennomført automatisk og hurtig (artikkel 51), da direktivet i artiklene 24, 25 og 28 harmoniserer minstekravene til utdannelse og opplæring for å kvalifisere seg for disse profesjoner.

65. Etter ESAs oppfatning garanterer denne minimumsharmonisering et omforent kvalitetsnivå. I tillegg hverken trenger eller forventes vertsstaten å foreta individuelle vurderinger av kvalifikasjonene for migrerende leger. Hvis et gitt diplom er oppført i direktivets vedlegg V, skal dermed minstekravene etter artiklene 24, 25 og 28 anses å være oppfylt, og godkjenning av yrkeskvalifikasjoner kan ikke nektes av vertsstaten.

66. Angående spørsmålet om automatisk godkjenning på grunnlag av ervervede rettigheter av diplomer som ikke er uttrykkelig oppført i direktivet, hevder ESA at i de tilfeller hvor minstekravene etter direktivets artikler 24, 25 og 28 ikke er oppfylt, vil det kunne kompenseres for hull gjennom dokumentasjon av yrkeserfaring, dokumentert i form av "sertifikater for ervervede rettigheter" utstedt i hjemstaten. Denne prosedyre gir adgang til godkjenning av diplomer som ikke oppfyller direktivets minstekrav fordi for eksempel praksisopplæringen ble påbegynt forut for harmoniseringen av minstekravene i EØS for utdannelse og praksisopplæring.

67. Furthermore, ESA notes that Article 23(1) of the Directive specifies that in cases where the evidence of formal qualifications as medical doctor giving access to the professional activities of doctor with basic training and specialised doctor does not satisfy all the training requirements referred to in Articles 24 and 25, each Member State shall recognise as sufficient proof evidence of formal qualifications issued by those Member States in so far as such evidence attests successful completion of training which began before the reference dates laid down in Annex V, subheadings 5.1.1. and 5.1.2, and is accompanied by a certificate stating that the holders have been effectively and lawfully engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate. It contends that, again, in this situation, no substantive assessment of individual applications may be carried out by the competent authorities of the host State, only a formal check of authenticity of the documents that have been submitted.

68. As regards pursuit of the profession of medical doctor in the host State, ESA notes that, for the actual pursuit of the profession, the host State may, in addition to recognition of the diploma, call for additional requirements such as proof of good character and financial standing or insurance against financial risk arising from professional liability.[22] In its view, knowledge of the host State language or languages, too, falls under the aspect of pursuit of the profession (see Article 53), unless that proficiency forms part of the qualification itself, as is the case, for example, in relation to speech therapists and language teachers.[23]

69. In addition, ESA notes that once a person has been recognised and authorised to practise in another EEA State he is, of course, subject to the national rules governing the profession, including those on professional conduct or on consumer protection and safety.[24]

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22 Reference is made to Article 50(1) of the Directive in conjunction with Annex VII. In addition, ESA notes that Article 50(4) of the Directive specifies that where a host State requires its doctors to take an oath or solemn declaration it has to ensure that an appropriate and equivalent form of oath or declaration is offered to foreign doctors.

23 Reference is made to point VII of the Code of Conduct, cited above, p. 20.

24 Reference is made to Article 5(3) of the Directive.

67. Videre bemerker ESA at direktivets artikkel 23 nr. 1 spesifiserer at i tilfeller hvor kvalifikasjonsbevis som lege gir adgang til yrkesvirksomhet som lege med grunnutdanning og med spesialistutdanning ikke oppfyller alle de krav til utdanning som det vises til i artikkel 24 og 25, skal alle medlemsstater godkjenne som tilstrekkelig bevis kvalifikasjonsbevis utstedt av disse medlemsstater i den utstrekning slike bevis bevitner bestått fullføring av utdanning som var påbegynt før referansedatoene fastsatt i vedlegg V nr. 5.1.1. og 5.1.2, og dokumentasjonen blir ledsaget av en attest som slår fast at innehaverne har vært faktisk og rettmessig beskjeftiget i de aktuelle virksomheter i minst tre sammenhengende år i løpet av de siste fem år før tildelingen av attesten. Det påberopes igjen at i denne situasjon kan ingen innholdsmessige vurderinger av individuelle søknader utføres av de kompetente myndigheter i vertsstaten, kun en formell kontroll av ektheten av de dokumenter som er innsendt.

68. Når det gjelder utøvelsen av yrket som lege i vertsstaten bemerker ESA at vertsstaten, i tillegg til godkjenning av diplomet, kan fremme tilleggskrav så som bevis for god vandel og økonomisk vederheftighet eller forsikring mot finansiell risiko som kan oppstå på grunnlag av profesjonsansvaret.[22] Etter ESAs oppfatning faller også kjennskap til vertsstatens språk inn under aspektet yrkesutøvelse (se artikkel 53), med mindre denne språkkyndighet utgjør en del av selve kvalifikasjonen, slik for eksempel tilfellet er for taleterapeuter og språklærere.[23]

69. I tillegg bemerker ESA at så snart en person er blitt godkjent og autorisert til å praktisere i en annen EØS-stat, er vedkommende selvsagt underlagt de nasjonale regler som styrer profesjonen, inkludert reglene om yrkesmessig etisk oppførsel eller om forbrukerbeskyttelse og sikkerhet.[24]

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22 Det vises til direktivets artikkel 50 nr. 1 i kombinasjon med vedlegg VII. I tillegg bemerker ESA at direktivets artikkel 50 nr. 4 spesifiserer at når en vertsstat krever av sine leger at de avlegger en ed eller en høytidelig erklæring, må vertsstaten sørge for at en formålstjenlig og tilsvarende form for ed eller erklæring tilbys utenlandske leger.

23 Det vises til punkt VII i retningslinjer for opptreden, som sitert over, s. 20.

24 Det vises til direktivets artikkel 5 nr. 3.

70. As regards the situation described in the request for an advisory opinion, ESA bases its proposed reply to the question of the national tribunal on the facts which relate to the Complainant's application of 15 May 2009 for authorisation as a medical doctor, which defines the scope of the main proceedings. However, due to the limited presentation of the factual background in the request to the Court, it is not entirely clear to ESA whether the Complainant seeks recognition as a psychiatrist or another type of doctor. In that respect, ESA notes that the national tribunal simply indicates that "on 15 May 2009 the Complainant applied anew for a Norwegian authorisation as a medical doctor". However, in light of the fact that the Complainant had specialised and practised as a psychiatrist in Bulgaria, ESA interprets the facts to mean that she has applied for an authorisation to practise as a psychiatrist in Norway.

71. ESA submits also that there is a lack of clarity regarding the certificate issued by the Bulgarian authorities which the Complainant produced before the Norwegian authorities. ESA infers that the document in question is a Bulgarian certificate issued pursuant to Article 23(1) of the Directive, confirming that the migrant has effectively and lawfully been engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate (with the consequence of "automatic recognition").

72. In any case, ESA stresses the importance of clearly distinguishing between the two separate stages of the automatic recognition procedure, that is, first, concerning access to the profession and, second, concerning pursuit of that profession. As regards access to the profession of psychiatrist, ESA submits that the profession of psychiatrist is a regulated profession within the meaning of Article 3(1) of the Directive, as it is mentioned under subheading 5.1.3. of Annex V to the Directive. ESA notes that Bulgaria has a title of a profession listed there, as has Norway, which means that both States acknowledge this specialisation in their respective public health systems. According to Article 25 of the Directive, these specialist titles are contingent upon completion of six years

70. For så vidt gjelder den situasjon som beskrives i anmodningen om rådgivende uttalelse, baserer ESA sitt svarforslag til spørsmålet fra den nasjonale domstol på de fakta som vedrører klagerens søknad av 15. mai 2009 om autorisasjon som lege, en søknad som definerer rammen for hovedsaksanlegget. På grunn av den begrensede presentasjon av den faktiske bakgrunn i anmodningen til EFTA-domstolen, fremstår det imidlertid ikke helt klart for ESA hvorvidt klageren søker godkjennelse som psykiater eller som en annen type lege. I den henseende bemerker ESA at den nasjonale domstol ganske enkelt angir at "den 15. mai 2009 søkte klageren på nytt om norsk autorisasjon som lege". Imidlertid, i lys av det faktum at klageren hadde spesialisert seg og praktisert som psykiater i Bulgaria, tolker ESA fakta slik at hun har søkt om autorisasjon til å praktisere som psykiater i Norge.

71. ESA anfører også at det er manglende klarhet angående sertifikatet avgitt fra bulgarske myndigheter som klageren har fremlagt for norske myndigheter. ESA trekker den slutning at det aktuelle dokument er et bulgarsk sertifikat utstedt i henhold til direktivets artikkel 23 nr. 1, med bekreftelse på at migranten faktisk og rettmessig beskjeftiget i de aktuelle virksomheter i minst tre sammenhengende år i løpet av de siste fem år før tildelingen av attesten (med følger for "automatisk godkjenning").

72. Under enhver omstendighet fremhever ESA viktigheten av klart å skille mellom de to adskilte stadier av den automatiske godkjenningsprosedyre, dvs. for det første det som gjelder tilgang til profesjonen, og for det andre det som dreier seg om utøvelse av yrkesaktiviteten. Når det gjelder tilgangen til yrket som psykiater, anfører ESA at psykiateryrket er en regulert profesjon etter direktivets artikkel 3 nr. 1, da det er nevnt i underavsnitt 5.1.3. i vedlegg V til direktivet. ESA bemerker at Bulgaria har oppført den aktuelle yrkestittel i listen der, noe også Norge har, hvilket betyr at begge stater godkjenner denne spesialisering i sine respektive offentlige helsesystemer. I henhold til direktivets artikkel 25 er disse spesialisttitler betinget av fullføring av seks år med forutgående grunnleggende medisinsk opplæring

of prior basic medical training (as defined in Article 24) and both theoretical and practical specialist training of together no less than four years at a university or teaching hospital.

73. ESA notes that the reference date for training in relation to Norway is 1 January 1994, when the EEA Agreement entered into force, whereas in relation to Bulgaria the reference date is 1 January 2007, the date of its accession to the European Union. According to ESA, education commenced before these dates does not fulfil these minimum requirements of the Directive and, therefore, these diplomas are not covered by Annex V.[25]

74. ESA notes that, in such a situation, an applicant can provide a "certificate of acquired rights" for the purposes of Article 23(1) of the Directive supporting the diploma issued by the home State as proof of the fact that the applicant has worked as a specialised medical doctor for three out of five years prior to his application for recognition. According to the information provided by the national tribunal, such a certificate was indeed issued by the Bulgarian authorities and submitted by the Complainant to the Norwegian authorities in the context of her latest application. Moreover, ESA notes that the Norwegian authorities appear to accept that the Complainant worked in Bulgaria as a psychiatrist for at least three out of the preceding five years before applying for recognition of her diploma as a psychiatrist in Norway.[26]

75. ESA observes that, where an Article 23(1) certificate can be produced, the host State authorities are not allowed to assess the "quality" of the specialist knowledge of the applicant but have to recognise the evidence of formal qualification on a purely formal basis, that is, they may simply check that the diploma and

[25] ESA understands from the request that the education of the Complainant must have started (long) before 1 January 2007, as she first lodged an application for recognition of her qualifications in Norway on 25 January 2007, having, by then, already gathered extensive professional experience as a psychiatrist in Bulgaria.

[26] ESA notes that while this seems to be correct as regards the first application made by the Complainant on 25 January 2007, it appears to be mathematically implausible with regard to her application of 15 May 2009. In light of the description of facts set out in the request, the Complainant appears to have lived (and mostly worked) in Norway at least since February 2007.

(som definert i artikkel 24) og både teoretisk og praktisk spesialistopplæring på til sammen ikke mindre enn fire år ved et universitet eller universitetssykehus.

73. ESA bemerker at referansedatoen for opplæring i relasjon til Norge er 1. januar 1994, tidspunktet EØS-avtalen trådte i kraft, mens den for Bulgaria er 1. januar 2007, datoen for landets inntreden i Den europeiske union. Ifølge ESA vil utdannelse som er påbegynt før disse datoer ikke oppfylle direktivets minstekrav og derfor er disse diplomer ikke dekket av vedlegg V.[25]

74. ESA bemerker at i en slik situasjon kan søkeren fremlegge et "sertifikat for erververde rettigheter" i henhold til direktivets artikkel 23 nr. 1 til understøttelse av diplomet, utstedt av hjemstaten som bevis for det faktum at søkeren har arbeidet som spesialistlege i tre av de siste fem år forut for søknaden om godkjenning. Ifølge den informasjon som er gitt av den nasjonale domstol, ble nettopp et slikt sertifikat utstedt av bulgarske myndigheter og fra klageren innsendt til norske myndigheter i sammenheng med hennes siste søknad. For øvrig merker ESA seg at de norske myndigheter synes å akseptere at klageren har arbeidet i Bulgaria som psykiater i minst tre av de foregående fem år før innlevering av søknaden om godkjennelse av sitt diplom som psykiater i Norge.[26]

75. ESA bemerker at i de tilfeller et sertifikat etter artikkel 23 nr. 1 kan fremlegges, vil vertsstatens myndigheter ikke ha adgang til å etterprøve "kvaliteten" av søkerens spesialistkunnskap, men er nødt til å godkjenne dokumentasjonen for den formelle kvalifikasjon på et rent formelt grunnlag, dvs. at de må begrense

[25] ESA forstår av anmodningen at utdannelsen for klageren må ha startet (lenge) før 1. januar 2007, da hun første gang fremmet søknad om godkjennelse av sine kvalifikasjoner i Norge 25. januar 2007, og at hun allerede på det tidspunkt hadde oppnådd utstrakt faglig erfaring som psykiater i Bulgaria.

[26] ESA bemerker at mens dette synes å være riktig med hensyn til den første søknaden fra klageren av 25. januar 2007, fremstår det som matematisk usannsynlig med hensyn til hennes søknad av 15. mai 2009. I lys av den fakumbeskrivelse som fremlegges i anmodningen, synes det som om klageren har bodd (og hovedsaklig arbeidet) i Norge i det minste siden februar 2007.

"certificate of acquired rights" are authentic (see Article 50(2)). ESA argues that the very purpose of the automatic recognition procedure provided for in Article 23 of the Directive is to preclude any additional substantive or individual assessment by the host State.

76. ESA submits, however, that the host State authorities may examine whether an applicant fulfils all the requirements regarding the pursuit of the profession. As regards the alleged lack of language skills of the Complainant, ESA recalls that Article 53 of the Directive requires persons benefiting from the recognition of professional qualifications to have knowledge of languages necessary for practising the profession in the host State. According to ESA, this provision codified earlier case-law of the ECJ on language skills. For example, the ECJ held that the need for effective communication between a dentist and his patient, the administrative authorities and professional organisations was an imperative reason of general interest such as to justify making the admission as a health service dentist subject to linguistic requirements.[27]

77. Thus, according to ESA, the provision allows EEA States to require from applicants certain language skills in order to be allowed to practise a regulated profession. How this linguistic knowledge is assessed is left to the individual interpretation of the EEA States. Nevertheless, the linguistic requirements cannot go beyond the objectives sought to be attained.[28] In addition, the principle of proportionality implies that EEA States cannot demand systematic language exams.[29]

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27 Reference is made to *Haim II*, cited above, paragraph 60.

28 Reference is made to Case 379/87 *Groener* [1989] ECR 3967, paragraph 21.

29 Reference is made to *Commission* v *Luxembourg*, cited above, paragraph 47. ESA notes also that in *Groener*, cited above, the ECJ held that the principle of non-discrimination precludes any requirement that the linguistic knowledge in question must have been acquired within the national territory, see paragraph 23 of the judgment. Moreover, to require an evidence of an individual's linguistic knowledge exclusively by means of one particular diploma, such as a certificate issued only in one particular province of a Member State, is discriminatory, see Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 45.

seg til å kontrollere at diplomet og "sertifikatet for erververde rettigheter" er autentiske (se artikkel 50 nr. 2). ESA anfører at selve formålet med den automatiske godkjennelsesprosedyre fastlagt i direktivets artikkel 23 er å avskjære vertsstatens adgang til ytterligere innholdsmessig eller individuell vurdering.

76. ESA anfører imidlertid at vertsstatens myndigheter vil kunne undersøke hvorvidt en søker oppfyller alle kravene angående utøvelsen av yrkesaktiviteten. Hva angår de påberopte manglende språkkunnskaper hos klageren, minner ESA om at direktivets artikkel 53 krever at personer som nyter godt av godkjenning av sine yrkeskvalifikasjoner må ha slike språkkunnskaper som er nødvendige for å praktisere yrket i vertsstaten. Ifølge ESA er denne bestemmelse en kodifisering av tidligere rettspraksis fra EU-domstolen om språkferdigheter. For eksempel har EU-domstolen uttalt at behovet for effektiv kommunikasjon mellom en tannlege og hans pasient, administrative myndigheter og faglige organisasjoner var en tvingende grunn av allmen interesse slik at det var berettiget å stille språklige krav som betingelse for å gi adgang til å yte tjenester som tannlege.[27]

77. Ifølge ESA gir således bestemmelsen rom for at EØS-statene kan kreve visse språkferdigheter fra søkerne for å gi adgang til å praktisere et regulert yrke. Hvordan disse språkkunnskaper vurderes, overlates til EØS-statenes individuelle fortolkning. Imidlertid kan ikke språkkravene gå lenger enn de formål de søker å oppnå.[28] I tillegg innebærer prinsippet om forholdsmessighet at EØS-statene ikke kan forlange systematiske språkeksamener.[29]

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27 Det vises til *Haim II*, som sitert over (avsnitt 60).

28 Det vises til sak 379/87 *Groener* Sml. 1989 s. 3967 (avsnitt 21).

29 Det vises til *Kommisjonen* mot *Luxembourg*, som sitert over (avsnitt 47). ESA bemerker også at i *Groener*, som sitert over, kom EU-domstolen til at prinsippet om ikke-diskriminering avskjærer ethvert krav om at de aktuelle språkkunnskaper må ha blitt erververt innenfor det nasjonale territorium, se avsnitt 23 i dommen. Dessuten vil det å kreve dokumentasjon for en persons språkkunnskaper utelukkende på grunnlag av ett bestemt diplom, så som et sertifikat avgitt kun i én bestemt provins av medlemsstaten, være diskriminerende, se sak C-281/98 *Angonese* Sml. 2000 s. I-4139 (avsnitt 45).

78. In any event, according to ESA, the competent authorities of the host State are allowed to assess the language competence of migrants and may refuse the pursuit of the profession on its territory if an applicant's competence is inferior to the standard which, in their opinion, is necessary to practise the profession. Moreover, so it argues, the authorities may point out to applicants that they could be subject to disciplinary sanctions in the event of fault or negligence due to an insufficient grasp of a language. In ESA's view, it follows that Directive 2005/36 lays down provisions which allow a State to refuse the pursuit of a profession, even where the recognition of the qualification itself has to take place automatically.

79. In the event that, following the automatic recognition of professional qualifications, it becomes apparent during pursuit of the profession in the host State that an individual migrant lacks substantive knowledge of the profession, the competent national authorities may, in ESA's view, apply rules of their national legislation, for example, to require additional training, restrict the authorisation or, in case of professional fault, apply disciplinary sanctions, which may ultimately lead to withdrawal of the authorisation to practise. However, in its view, such an issue falls to be dealt with by national legislation alone subject to the requirement that the principle of non-discrimination is respected so as to ensure that all practising medical doctors are supervised in the same way regardless of where they obtained their qualifications and where they completed their training.

80. If the authorities of the host State learn of a lack of competence of an individual applicant prior to automatic recognition, ESA submits that they must still grant recognition. No additional substantive or individual assessment by the host State of documents to be automatically recognised is permitted under the Directive.

81. ESA stresses the importance of not confusing the procedures for automatic recognition of a specific professional qualification and the procedures which apply in the event of possible aptitude deficits. In its view, where individual inaptitude becomes known

78. Under enhver omstendighet vil de kompetente myndigheter i vertsstaten ha adgang til å vurdere språkkompetansen hos migranter og vil kunne nekte adgang til utøvelse av yrket på sitt territorium dersom søkerens kompetanse er for dårlig målt mot den standard som etter deres oppfatning er nødvendig for å utøve yrket. Dessuten vil myndighetene kunne påpeke overfor søkere at de kan bli underlagt disiplinære sanksjoner i tilfelle av skyld eller uaktsomhet som kan tilskrives en mangelfull forståelse av språket. Etter ESAs oppfatning følger det at direktiv 2005/36 fastsetter bestemmelser som gir den enkelte stat adgang til å nekte utøvelsen av et yrke, også i de tilfeller hvor godkjenning av kvalifikasjonen må gjennomføres automatisk.

79. For det tilfellet at det, etter den automatiske godkjenning av yrkeskvalifikasjoner, blir tydelig under utøvelse av yrket i vertsstaten at en migrant mangler vesentlige fagkunnskaper, vil de nasjonale myndigheter etter ESAs oppfatning kunne anvende regler i den nasjonale lovgivning som for eksempel gir hjemmel til å sette krav om tilleggsopplæring, begrense autorisasjonen eller, i tilfelle av yrkesmessig forseelse, anvende disiplinære sanksjoner som i siste omgang vil kunne føre til tilbakekall av autorisasjonen til yrkesutøvelse. Etter ESAs oppfatning hører imidlertid slike spørsmål inn under den nasjonale lovgivning alene, dog underlagt et krav om at prinsippet om ikke-diskriminering blir respektert for å sikre at alle praktiserende leger er gjenstand for tilsyn på samme måte uavhengig av hvor de har oppnådd sine kvalifikasjoner og hvor de har fullført sin opplæring.

80. Dersom myndighetene i vertsstaten får kjennskap til en manglende kompetanse hos en individuell søker forut for den automatiske godkjenning, fremholder ESA at de likevel må innvilge godkjenningen. Direktivet tillater ingen ytterligere innholdsmessig eller individuell vurdering fra vertsstatens side av de dokumenter som er gjenstand for automatisk godkjenning.

81. ESA understreker betydningen av ikke å sammenblande prosedyrene for automatisk godkjenning av en bestemt profesjonell kvalifikasjon og prosedyrene som gjelder i tilfelle av eventuell manglende skikkethet. Etter ESAs oppfatning vil

to the national authorities of the host State after a doctor has been authorised to practise, they may enforce their national rules immediately in relation to migrant doctors in the same way as they can with regard to domestically trained doctors. Thus, according to ESA, it is for national rules to decide how a person is treated once his professional qualifications have been recognised in the host State. Indeed, in the case at hand, Article 57 of the Norwegian Health Personnel Act allows for severe sanctions in cases where the holder of a medical doctor authorisation is unfit to practise his or her profession in a responsible manner for reasons of gross lack of professional insight or lack of due care.

82. In the light of the above, ESA submits that the Court should answer the question referred by the Norwegian Appeal Board for Health Personnel as follows:

As regards access to medical doctor professions, a national authority responsible for the recognition of professional qualifications obtained elsewhere in the EEA must not deny an applicant fulfilling all the criteria required under Directive 2005/36/EC on the automatic recognition of a specific professional qualification his EEA law right to obtain automatic and timely access to the profession in that state.

As regards the pursuit of medical doctor professions in the host State, the national authorities may, on the basis of Article 53 of that Directive, require from applicants that they possess inter alia certain language skills.

Once automatic recognition of professional qualifications has been granted pursuant to Directive 2005/36/EC, that Directive allows the national authorities entrusted with the supervision of medical doctors to take, if necessary immediately, the necessary measures available under national law to address any individual lack of aptitude to properly perform the duties of a medical doctor provided that any such measures are applied in the same way regardless of where the medical doctors obtained their qualifications and where they have completed their training.

vertsstatens nasjonale myndigheter, når manglende skikkethet blir kjent for dem etter at en lege er gitt autorisasjon til å praktisere, ha hjemmel til å håndheve sine nasjonale regler umiddelbart i relasjon til migrerende leger på samme måte som de kan med hensyn til innenlandsk utdannede leger. Dermed er det ifølge ESA en sak for de nasjonale regler å bestemme hvordan en person blir behandlet så snart de faglige kvalifikasjoner er blitt godkjent i vertsstaten. I den foreliggende sak er det nettopp høyst relevant at helsepersonelloven § 57 åpner for alvorlige sanksjoner i tilfeller hvor innehaveren av autorisasjon som lege er uegnet til å utøve sitt yrke forsvarlig på grunn av grov mangel på faglig innsikt eller uforsvarlig virksomhet.

82. I lys av det ovenstående, anfører ESA at EFTA-domstolen bør besvare spørsmålet henvist fra Statens helsepersonellnemnd som følger:

Hva angår tilgang til legeyrkene kan en nasjonal myndighet som er ansvarlig for godkjenning av faglige kvalifikasjoner oppnådd et annet sted i EØS ikke nekte en søker som oppfyller alle de kriterier som kreves etter direktiv 2005/36/EF om automatisk godkjenning av en bestemt faglig kvalifikasjon de rettigheter vedkommende har etter EØS-retten til å oppnå automatisk og rettidig tilgang til yrket i denne staten.

Hva angår utøvelsen av legeyrker i vertsstaten, kan de nasjonale myndigheter på grunnlag av direktivets artikkel 53 kreve av søkerne at de blant annet har visse språklige ferdigheter.

Så snart automatisk godkjenning av faglige kvalifikasjoner er blitt innvilget i henhold til direktiv 2005/36/EF, vil dette direktiv gi rom for at de nasjonale myndigheter som har ansvaret for tilsyn med leger kan gjennomføre, om nødvendig umiddelbart, de nødvendige tiltak som er tilgjengelig etter nasjonal rett for å utelukke enkeltpersoner som viser seg uegnet til en forsvarlig utøvelse av sine plikter som lege, forutsatt at slike tiltak anvendes på samme måte uansett hvor legene har oppnådd sine kvalifikasjoner og hvor de har fullført sin opplæring.

The European Commission

83. The Commission argues that Directive 2005/36 on the recognition of professional qualifications is designed to enable persons who have acquired their qualifications in one Member State to have access to that same profession and pursue it in another Member State with the same rights as nationals.[30] Accordingly, the key principle set down in Article 1 is that the host Member State shall recognise professional qualifications obtained in one or more other States "and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession". The Directive applies to all nationals of a Member State wishing to pursue a regulated profession in a Member State other than the one in which the professional qualifications were obtained (Article 2), including the medical profession (see the definition of "regulated profession" in Article 3(l)(a)), and allows the beneficiary to gain access in the host Member State "to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals" (Article 4(1)).

84. The Commission submits that Chapter III of Title III of the Directive makes provision for recognition on the basis of the coordination of minimum training conditions. In this context, Article 21 lays down the fundamental principle of automatic recognition, which states that each Member State shall recognise evidence of formal qualifications as a doctor giving access to the professional activities of doctor with basic training, and specialised doctor, listed in Annex V, points 5.1.1. and 5.1.2., which states the minimum training conditions referred to in Articles 24 and 25, respectively, and shall, for the purposes of access to and pursuit of the professional activities, give such evidence the same effect on its territory as the evidence of formal qualifications which it itself issues.

[30] Reference is made to the third recital in the preamble to the Directive.

Europakommisjonen

83. Kommisjonen påberoper at direktiv 2005/36 om godkjenning av yrkeskvalifikasjoner har til hensikt å gjøre det mulig for personer som har ervervet sine kvalifikasjoner i ett medlemsland å ha tilgang til det samme yrke og til å utøve yrket i en annen medlemsstat med de samme rettigheter som landets egne statsborgere.[30] I samsvar med dette er det sentrale prinsipp fastsatt i artikkel 1 at vertsstaten skal godkjenne yrkeskvalifikasjoner oppnådd i en eller flere andre stater "og som gjør det mulig for innehaver av nevnte kvalifikasjoner å utøve det samme yrke der, for tilgang til og for utøvelse av yrket". Direktivet gjelder for alle statsborgere av en medlemsstat som ønsker å utøve et regulert yrke i en annen medlemsstat enn den hvor de faglige kvalifikasjoner ble oppnådd (artikkel 2), inkludert den medisinske profesjon (se definisjonen av "lovregulert yrke" i artikkel 3 nr. 1 (a)), og tillater den begustigede å oppnå adgang i vertsstaten "til det samme yrke som det vedkommende er kvalifisert til i hjemstaten og til å utøve yrket i vertsstaten under samme vilkår som medlemsstatens borgere" (artikkel 4 nr. 1).

84. Kommisjonen anfører at kapittel III i del III i direktivet gir bestemmelser om godkjenning på grunnlag av samordningen av minimumsbetingelser for opplæring. I denne sammenheng fastsetter artikkel 21 det grunnleggende prinsipp om automatisk godkjenning, som fastsetter at hver medlemsstat skal godkjenne dokumentasjon for formell kvalifikasjon som lege som gir adgang til yrkesaktivitetet som lege med grunnutdanning og spesialistlege, etter liste i vedlegg V, punktene 5.1.1. og 5.1.2., som fastsetter minimumsbetingelsene for opplæring som det vises til i helholdsvis artikkel 24 og 25, og skal, med hensyn til tilgang til og utøvelse av yrkesaktiviteter, gi slik dokumentasjon den samme virkning på sitt territorium som den dokumentasjon for formelle kvalifikasjoner som staten selv utsteder.

30 Det vises til tredje punkt i direktivets fortale.

85 The Commission observes that Article 21 of the Directive provides further that such evidence of formal qualifications must be issued by the competent bodies in the Member States and accompanied, where appropriate, by the certificates listed in Annex V, points 5.1.1. and 5.1.2. It notes that the third subparagraph of that article specifies that the provisions of the first and second subparagraphs do not affect the acquired rights referred to in Articles 23 and 27. In other words, therefore, in the Commission's view, a qualification as a doctor which is listed in Annex V to the Directive is deemed to satisfy the minimum training conditions and must be automatically recognised by the host Member State. With effect from 1 January 2007, this includes the relevant entries for Bulgaria (inserted by Directive 2006/100).

86. The Commission notes that Article 23 of the Directive goes on to lay down special transitional rules dealing with the issue of acquired rights. In cases where an applicant successfully completed training which had started before the reference dates in Annex V (namely 1 January 2007 for a doctor undertaking training in Bulgaria), a host Member State must automatically recognise such a qualification if "it is accompanied by certificate stating that the holders have been effectively and lawfully engaged in the activities in question for at least three consecutive years during the five years preceding the award of the certificate" (Article 23(1)).

87. Finally, the Commission observes that Article 53 provides that persons benefiting from the recognition of professional qualifications shall have knowledge of languages necessary for practising the profession in the host Member State. It notes also that, in accordance with Article 30 EEA, the EEA States shall, in order to make it easier for persons to take up and pursue activities as workers and self-employed persons, take the necessary measures contained in its Annex VII concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications. Directive 2005/36 was inserted into point 1 of Section A of Annex VII to the EEA by Decision No 142/2007 of the EEA Joint Committee with effect from 1 July

85. Kommisjonen konstaterer at direktivets artikkel 21 videre bestemmer at slik dokumentasjon for formelle kvalifikasjoner må avgis fra kompetente organer i medlemsstaten og i tilfelle være ledsaget av de sertifikater som er opplistet i vedlegg V, punktene 5.1.1. og 5.1.2. Kommisjonen bemerker at tredje ledd i denne artikkel spesifiserer at bestemmelsene i første og annet ledd ikke påvirker de ervervede rettigheter som det vises til i artiklene 23 og 27. Etter Kommisjonens oppfatning skal med andre ord en kvalifikasjon som lege som er oppført i vedlegg V til direktivet derfor anses å tilfredstille minimumsbetingelsene for opplæring og må dermed automatisk godkjennes av vertsstaten. Med virkning fra 1. januar 2007 omfatter dette også de aktuelle oppføringer for Bulgaria (tilføyet ved direktiv 2006/100).

86. Kommisjonen bemerker at direktivets artikkel 23 går videre med å fastsette spesielle overgangsregler som tar for seg spørsmålet om ervervede rettigheter. I tilfeller hvor en søker har fullført en vellykket opplæring som ble startet før referansedatoene i vedlegg V (dvs. 1. januar 2007 for en lege med opplæring fra Bulgaria), må en vertsstat automatisk godkjenne en slik kvalifikasjon dersom "den blir ledsaget av en attest som slår fast at innehaverne har vært faktisk og rettmessig beskjeftiget i de aktuelle virksomheter i minst tre sammenhengende år i løpet av de siste fem år før tildelingen av attesten" (artikkel 23 nr. 1).

87. Til slutt konstaterer Kommisjonen at artikkel 53 fastsetter at personer som som nyter godt av godkjenning av yrkeskvalifikasjoner, skal ha de språkkunnskaper som er nødvendig for å praktisere yrket i vertsstaten. Kommisjonen bemerker også at i henhold til EØS-avtalen artikkel 30 skal EØS-statene – for å gjøre det enklere for personer å etablere seg og utøve aktiviteter som ansatte og selvstendige næringsdrivende – gjennomføre de nødvendige tiltak som nevnes i vedlegg VII angående gjensidig godkjennelse av diplomer, sertifikater og annen dokumentasjon for formelle kvalifikasjoner. Direktiv 2005/36 ble tilføyd til punkt 1 under avsnitt A i vedlegg VII til EØS-avtalen ved EØS-komiteens beslutning nr. 142/2007 med

2009 (i.e. prior to the refusal decision by the Appeal Board of 12 August 2009 concerning the Complainant's most recent application for authorisation, which gave rise to the present request for an advisory opinion).

88. By way of preliminary observation, the Commission notes that, in light of the terms of the request for an advisory opinion, it appears uncontested that Directive 2005/36 applies to the Complainant's case. Although this point is not considered in further detail, the Commission notes that the decision refusing the Complainant authorisation to practise as a doctor in Norway (and which formed the subject of the appeal to the Appeals Board and the present request) was taken on 12 August 2009, a little over a month after the entry into force of Decision No 142/2007 of the EEA Joint Committee which formally inserted Directive 2005/36 into Annex VII to the EEA. In these circumstances, the Commission proposes at this stage of the proceedings to limit its comments to the application and interpretation of Directive 2005/36, although it wishes also to note that the general principles deriving from Directive 2005/36 in relation to doctors were already contained in the predecessor legislation, Directive 93/16/EEC.

89. Second, the Commission observes that it was noted in the refusal decision of August 2009 that the Complainant had "in principle" a right to authorisation on the basis of acquired rights under Article 23 of the Directive. Although this finding is not further explained, it appears clear to the Commission that "the statement" from the Bulgarian authorities referred to on page 3 of the request for an advisory opinion should be understood, therefore, as referring to a certificate of acquired rights within the meaning of Article 23, stating that the Complainant had been "effectively and lawfully engaged" as a doctor "for at least three consecutive years during the five years preceding the award of the certificate".

90. The Commission submits that the key principle set out in Article 21 of the Directive is that of automatic recognition of the qualifications (including those for doctors and specialised

virkning fra 1. juli 2009 (dvs. forut for nektelsesvedtaket fra helsepersonellnemnda av 12. august 2009 angående klagerens seneste søknad om autorisasjon, som har gitt opphav til anmodningen om rådgivende uttalelse).

88. Som en foreløpig konstatering bemerker Kommisjonen at i lys av uttrykksmåten i anmodningen synes det å være ubestridt at direktiv 2005/36 gjelder for klagerens sak. Selv om dette punkt ikke blir drøftet i nærmere detalj, merker Kommisjonen seg at vedtaket om å nekte klageren autorisasjon til å praktisere som lege i Norge (og som dannet saksgrunnlaget for påklagingen til helsepersonellnemnda og den foreliggende anmodning) ble foretatt den 12. august 2009, litt over en måned etter ikrafttredelsen av EØS-komiteens beslutning nr. 142/2007 som formelt tilføyet direktiv 2005/36 til EØS-avtalen vedlegg VII. Under disse omstendigheter foreslår Kommisjonen på dette stadium av saken å begrense sine kommentarer til anvendelsen og fortolkningen av direktiv 2005/36, selv om den også ønsker å bemerke at de allmenne prinsipper som utledes av direktiv 2005/36 i relasjon til leger allerede var omfattet av forløperlovginingen, direktiv 93/16/EØF.

89. For det andre viser Kommisjonen til at det ble nevnt i nektelsesvedtaket av august 2009 at klageren "i prinsippet" hadde en rett til autorisasjon på grunnlag av ervervede rettigheter etter direktivets artikkel 23. Selv om dette ikke forklares nærmere, synes det klart for Kommisjonen at "erklæringen" fra de bulgarske myndigheter som det vises til på side 3 av anmodningen om rådgivende uttalelse, bør forstås slik at den viser til en attest for ervervede rettigheter i henhold til artikkel 23, som erklærer at klageren har vært "faktisk og rettmessig beskjeftiget" som lege "i minst tre sammenhengende år i løpet av de siste fem år forut for tildeling av attesten".

90. Kommisjonen anfører at det sentrale prinsipp som fastsettes i direktivets artikkel 21 er prinsippet om automatisk godkjenning av de kvalifikasjoner (inkludert kvalifikasjonene for leger og

doctors) listed in Annex V. Put simply, a State cannot "look behind" the qualification, and question the nature or quality of the training leading to its award, nor impose additional conditions. If a relevant qualification exists, this must be recognised as permitting full access to that profession.

91. The Commission contends that once a doctor has been recognised by virtue of the operation of Article 21 of the Directive he remains subject to the same rights and obligations as a doctor qualified under the system of the host Member State.[31] In its view, identical principles apply in the situation where an individual has acquired rights within the meaning of Article 23. Thus, a Bulgarian doctor such as the Complainant whose training started before the reference date of 1 January 2007 (the date of Bulgarian accession to the European Union) and who provides a certificate of acquired rights must enjoy automatic recognition as a doctor under the system of the host State, with the corollary that (i) the professional requirements referred to, for example, in Article 48 of the Norwegian Health Personnel Act must be deemed to be fulfilled and (ii) no further training periods or periods of limited access to the profession together with further evaluation can be imposed.

92. The Commission argues that a doctor who has been recognised by the host State is entitled, naturally, to pursue his profession, subject to compliance with the requirements for medical practice in that State. In other words, although the principle of mutual recognition ensures that a doctor qualified in Bulgaria and fulfilling the requirements of Article 21 or 23 of the Directive 2005/36 must automatically be recognised as such in Norway, he remains subject to the same obligations as Norwegian doctors in carrying out that profession. By way of example, it appears that Article 53 of the Norwegian Health Personnel Act envisages that authorisation to practise as a doctor may be revoked in cases of misconduct or "gross lack of professional insight". In addition, the Commission emphasises that the recognition of

[31] Reference is made to Article 4 of the Directive which refers to the pursuit of the profession "under the same conditions" as the nationals of that State.

spesialistleger) som er oppført i vedlegg V. Kort sagt kan en stat ikke "se bakenfor" kvalifikasjonen og betvile arten og kvaliteten av den opplæring som har ført til tildeling av kvalifikasjonen, og kan heller ikke pålegge tilleggsbetingelser. Dersom en relevant kvalifikasjon foreligger, må denne godkjennes som grunnlag for full tilgang til den aktuelle profesjon.

91. Kommisjonen fremholder at så snart en lege er blitt godkjent i kraft av direktivets artikkel 21, vil vedkommende være underlagt de samme rettigheter og forpliktelser som en lege kvalifisert etter vertsstatens eget system.[31] Etter dens oppfatning gjelder identiske prinsipper i en situasjon hvor en enkeltperson har ervervet rettigheter i henhold til artikkel 23. Med andre ord må en bulgarsk lege slik som klageren, med opplæring som startet før referansedatoen 1. januar 2007 (datoen for Bulgarias inntreden i Den europeiske union) og som fremlegger et sertifikat for ervervede rettigheter, oppnå automatisk godkjenning som lege under vertsstatens system, med det resultat at (i) de faglige krav som det for eksempel vises til i helsepersonelloven § 48 må anses å være oppfylt og (ii) ingen ytterligere opplæringsperioder eller perioder med begrenset tilgang til yrket sammen med videre bedømmelser, vil kunne pålegges.

92. Kommisjonen hevder at en lege som er blitt godkjent av vertsstaten naturligvis er berettiget til å utøve sitt yrke, på betingelse av opptreden i samsvar med kravene til medisinsk praksis i den stat. Selv om prinsippet om gjensidig godkjenning sikrer at en lege som er kvalifisert i Bulgaria og som oppfyller kravene i artikkel 21 eller 23 i direktiv 2005/36 automatisk må godkjennes som sådan i Norge, vil vedkommende med andre ord være underlagt de samme forpliktelser som norske leger i utøvelsen av yrket. Som et eksempel fremgår det at helsepersonelloven § 53 ser for seg at autorisasjon til å praktisere som lege vil kunne tilbakekalles i tilfeller av tjenesteforsømmelse eller "grov mangel på faglig innsikt". I tillegg understreker

[31] Det vises til direktivets artikkel 4 som henviser til utøvelse av yrket "på de samme betingelser" som landets egne statsborgere.

medical qualifications does not create a right to be recruited to a particular post.[32]

93. Finally, the Commission notes that Article 53 of Directive 2005/36 envisages that individuals "benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State". In its view, this provision was broadly inspired by the case-law of the ECJ, and in particular by the judgment in *Haim*.[33]

94. The Commission contends that it follows from the express wording of Article 53 of the Directive that a language requirement cannot be applied as a precondition for the recognition of qualifications or for access to the profession in the host Member State. Only in the case of individuals "benefiting" from the recognition of professional qualifications is the knowledge of languages relevant to "practising the profession in the host Member State".

95. Second, any language requirements applied must be necessary and proportionate for the practice of the profession, depending upon the particular circumstances and especially the specific tasks to be carried out.[34] Although this issue was not raised by the Appeals Board in its request for an advisory opinion, for the sake of completeness, the Commission adds that relevant linguistic knowledge could be evidenced by a variety of different means, such as proof of a formal qualification acquired in the language of the host Member State, a specific language qualification obtained, evidence of previous professional experience carried out in the host Member State or, finally, an appropriate interview or test.

96. For the reasons set out above, the Commission considers that the question from the Norwegian Appeals Board for Health Personnel should be answered as follows:

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32 Reference is made, by way of analogy, to *Rubino*, cited above, paragraph 27.
33 Cited above, paragraph 59.
34 Reference is made, by way of analogy, to *Haim II*, cited above, paragraph 60.

Kommisjonen at godkjenning av medisinske kvalifikasjoner ikke skaper en rett til å bli ansatt i noen bestemt stilling.[32]

93. Til slutt bemerker Kommisjonen at artikkel 53 i direktiv 2005/36 ser for seg at personer "som nyter godt av godkjenning av yrkeskvalifikasjoner, skal ha de språkkunnskaper som er nødvendig for å praktisere yrket i vertsstaten". Etter Kommisjonens oppfatning ble denne bestemmelse i store trekk inspirert av rettspraksis fra EU-domstolen, og i særdeleshet av domsavsigelsen i *Haim*.[33]

94. Kommisjonen fremholder at det følger av den uttrykkelige ordlyd i direktivets artikkel 53 at et språkkrav ikke kan pålegges som en forutsetning for godkjenning av kvalifikasjoner eller for tilgang til yrket i vertsstaten. Kun i tilfeller av personer "som nyter godt av" godkjenning av sine yrkeskvalifikasjoner er språkkunnskapene relevante for "å praktisere yrket i vertsstaten".

95. For det andre må ethvert språkkrav være nødvendig og forholdsmessig for utøvelsen av yrket, avhengig av særskilte omstendigheter og spesielt av de bestemte oppgaver som skal utføres.[34] Selv om dette spørsmål ikke ble tatt opp av helsepersonellnemnda i anmodningen om rådgivende uttalelse, vil Kommisjonen for fullstendighetens skyld tilføye at relevante språkkunnskaper vil kunne dokumenteres på et mangfold av ulike måter, så som bevis for en formell kvalifikasjon ervervet på vertsstatens språk, en bestemt oppnådd språklig kvalifikasjon, dokumentasjon av tidligere faglig erfaring utført i vertsstaten eller endelig et hensiktsmessig intervju eller test.

96. Av de grunner som er angitt ovenfor, anser Kommisjonen at spørsmålet fra Statens helsepersonellnemnd bør besvares som følger:

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32 Det vises analogisk til *Rubino*, som sitert over (avsnitt 27).
33 Som sitert over (avsnitt 59).
34 Det vises – etter analogi – til *Haim II*, som sitert over (avsnitt 60).

1. In the situation where an applicant fulfils the conditions for mutual recognition of professional qualifications as a doctor on the basis of either Article 21 or Article 23 of Directive 2005/36/EC, the national authorities of the host State are precluded from denying such recognition and/or otherwise limiting access to that profession.

2. In accordance with Article 53 of Directive 2005/36/EC, proportionate language requirements may be imposed where this is necessary for the exercise of the profession in the host Member State.

Thorgeir Örlygsson

Judge-Rapporteur

1. I en situasjon hvor en søker oppfyller vilkårene for gjensidig godkjenning av yrkeskvalifikasjoner som lege på grunnlag av enten artikkel 21 eller artikkel 23 i direktiv 2005/36/EF, er de nasjonale myndigheter i vertsstaten avskåret fra å nekte slik godkjenning og/eller på annen måte begrense tilgangen til dette yrke.

2. I henhold til artikkel 53 i direktiv 2005/36/EF vil forholdsmessige språkkrav kunne pålegges hvor dette er nødvendig for utøvelsen av yrket i vertsstaten.

Thorgeir Örlygsson

Forberedende dommer


EFTA COURT

II. Administration and Activities of the Court

ADMINISTRATION AND ACTIVITIES OF THE COURT

The Court took up its functions on 4 January 1994 in Geneva with five Judges nominated by Austria, Finland, Iceland, Norway, and Sweden. Due to the accession of Austria, Finland and Sweden to the European Union and the ratification of the EEA Agreement by Liechtenstein, the Court has since mid-1995 consisted of three regular judges and six Ad hoc Judges. The Governments of the EEA/EFTA States decided on 14 December 1994 that the seat of the Court should be moved to Luxembourg. Since 1 September 1996, the Court has had its premises at 1, Rue du Fort Thüngen, Kirchberg, Luxembourg.

Provisions regarding the legal status of the Court are to be found in Protocol 7 to the Surveillance and Court Agreement which is entitled: Legal Capacity, Privileges and Immunities of the EFTA Court. The Court has concluded a Headquarters Agreement with the Grand Duchy of Luxembourg, which was signed on 17 April 1996 and approved by the Luxembourg Parliament on 11 July 1996. This Agreement contains detailed provisions on the rights and obligations of the Court and its judges and staff as well as privileges and immunities of persons appearing before the Court. Excerpts of the Agreement are published in the booklet EFTA Court Texts (latest edition, September 2008), and the full text can be found in the Journal Officiel du Grand-Duché de Luxembourg A-No 60 of 4 September 1996 p. 1871.

Provisions for the internal administration of the Court are laid down in the Staff Regulations and Rules and in the Financial Regulations and Rules, as adopted on the 4th of January 1994, and as later amended.

As provided for in Article 14 of Protocol 5 to the Surveillance and Court Agreement on the Statute of the EFTA Court, the Court remains permanently in session. Its offices are open from Monday to Friday each week, except for official holidays.

The Surveillance and Court Agreement contains provisions on the role of the Governments of the EFTA/EEA States in the administration of the Court. Thus, Article 43 of the Agreement stipulates that the Rules of Procedure shall be approved by the Governments. Article 48 of the

Agreement states that the Governments shall establish the annual budget of the Court, based on a proposal from the Court. A committee of representatives of the participating States was established and is charged with the task of determining the annual budget. This body, the ESA/Court Committee, is composed of the heads of the Icelandic, Liechtenstein and Norwegian Missions to the European Union in Brussels. During the period covered by this Report, the Committee has, inter alia, been dealing with the budget of the Court, the appointment of judges and amendments to the Statute and the Rules of Procedure of the Court.

In 2011, two new Judges, Mr Per Christiansen nominated by Norway, and Mr Páll Hreinsson nominated by Iceland took their oath before the Court.

The Court held regular meetings with the three Courts of the European Union and participated in the official functions of these Courts. It also participated in the official functions of the Grand Duchy of Luxembourg. On the other hand, members of the EU and the Luxembourg judiciary, the diplomatic corps and the Luxembourg civil society took part in the official functions of the Court. Ambassadors from the EFTA States, EU States and other countries visited the Court and attended public hearings. The Court was visited, during the period covered by this Report, inter alia by H.E. René Germanier, President of the National Council of the Swiss Confederation, H.E. Ambassador Henri Gétaz, Head of the Integration Office in the Swiss Administration, H.E. Ambassador Jacques de Watteville, Head of the Mission of the Swiss Confederation to the European Union and the EU/EFTA Delegation of the Swiss Parliament led by its Chairman, the Hon. Dr Ignazio Cassis. It also received numerous ambassadors accredited to the Grand Duchy of Luxembourg. Law professors, assistants, researchers and students from several European universities, as well as trainees from the EFTA institutions in Brussels, Luxembourg and Geneva attended seminars on the Court's jurisdiction and case law. In the framework of the Court's lunch-time talks on European and international issues Professor Niels Fenger from the University of Copenhagen, former Head of the Legal Service of the EFTA Surveillance Authority, spoke on the relevance of the EU Charter of Fundamental Rights for the further development of EU and EEA law.

Judges and the Court's registrar have given speeches on the EEA and the Court and on European integration in general in all the EFTA States,

as well as in a number of EU countries and in the US, Japan, China and Russia. As every year, judges from Norway attended an oral hearing and a seminar at the Court in October. The President of the Court paid visits to the Governments of Norway and of Liechtenstein.

On 17 June 2011 the Court held an international conference at the renovated Cercle Cité in the centre of Luxembourg, the conference featured sixteen renowned speakers and moderators of nine nationalities and was very well attended by members from all branches of the legal profession.

On 14 October 2011, the Court submitted a proposal to the EEA/EFTA States for an amendment of the Surveillance and Court Agreement. In view of the fact that it is frequently faced with novel legal questions, the Court is of the opinion that it should have the possibility of sitting in a five Judges formation in cases of a certain significance (so-called Extended Court consisting of the three regular judges and two ad hoc judges) and that it should have the possibility to call in an Advocate General in complex cases. Furthermore, the qualification of candidates for the posts of judge, ad hoc judge, and (Ad hoc) Advocate General should be assessed by a panel composed in a similar way as the one set up under Article 255 TFEU.

The website of the Court is found via the following Internet address: www.eftacourt.int. It contains general information on the Court, its case law, reports for the hearing and press releases, publications, news, and the main legal texts governing the activities of the Court.

The Court's e-mail address is: eftacourt@eftacourt.int.

III. Judges and Staff

JUDGES AND STAFF

The members of the Court in 2011 were as follows:

Mr Carl BAUDENBACHER (nominated by Liechtenstein)

Mr Thorgeir ÖRLYGSSON (nominated by Iceland – until September 2011)

Mr Henrik BULL (nominated by Norway – until January 2011)

Mr Per CHRISTIANSEN (nominated by Norway – from January 2011)

Mr Páll HREINSSON (nominated by Iceland – from September 2011)

The judges are appointed by common accord of the Governments of the EFTA States.

The Registrar of the Court is Mr Skúli Magnússon.

Ad hoc Judges of the Court are:

Nominated by Iceland:

Ms Áslaug Björgvinsdóttir, héraðsdómari, (District Court Judge)

Mr Benedikt Bogason, dómstjóri (Chief Judge)

Nominated by Liechtenstein:

Ms Nicole Kaiser, Rechtsanwältin (lawyer)

Mr Martin Ospelt, Rechtsanwalt (lawyer)

Nominated by Norway:

Ms Bjørg Ven, advokat (lawyer)

Mr Ola Mestad, professor

In addition to the Judges, the following persons were employed by the Court in 2011:

Mr Moritz AM ENDE, Legal Secretary

Mr Kjartan BJÖRGVINSSON, Legal Secretary

Ms Harriet BRUHN, Senior Financial and Administrative Officer

Ms Mary COX, Information and Communication Coordinator

Ms Hrafnhildur EYJÓLFSDÓTTIR, Personal assistant

Mr Salim GUETTAF, Manager of premises

Mr Skúli MAGNÚSSON, Registrar

Mr Gjermund MATHISEN, Legal Secretary (until May 2011)

Ms Silje NÆSHEIM, Personal assistant

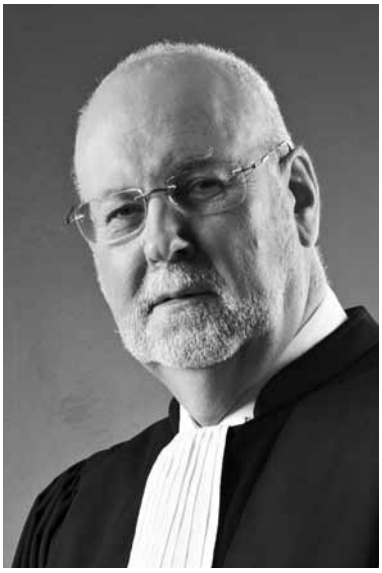
Ms Bryndís PÁLMARSDÓTTIR, Senior Officer

Mr Thomas Christian POULSEN, Legal Secretary (from April 2011)

Ms Kerstin SCHWIESOW, Personal assistant

Ms Sharon WORTELBOER, Administrative Assistant (from March 2011)

CURRICULA VITAE OF THE JUDGES AND THE REGISTRAR



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Carl BAUDENBACHER

Born: 1 September 1947,
in Basel, Switzerland, citizen of Murten.

Studies: University of Bern 1967–1971; Dr. jur. University of Bern 1978, Alexander-von-Humboldt-scholar, Max Planck Institute of Intellectual Property Law Munich 1979–1981,Habilitation/Privatdozent University of Zurich 1983.

Professional career: Universities of Berne and Zurich, Assistant, 1972–1978; Legal Secretary, Bulach District Court, 1982–1984; Visiting Professor, Universities of Bochum, Berlin, Tübingen, Marburg, Saarbrücken, 1984–1986; Professor of Private Law, University of Kaiserslautern, 1987; Chair of Private, Commercial and Economic Law, University of St. Gallen since 1987; Managing Director of the University of St. Gallen Institute of European Law 1991; Visiting Professor, University of Geneva, 1991; Visiting Professor University of Texas School of Law from 1993 to 2004; Chairman of the St. Gallen International Competition Law Forum since 1993; Member of the Supreme Court of the Principality of Liechtenstein, 1994–1995; Expert advisor of the Governments of the Principality of Liechtenstein, Israel, the Russian Federation and the Swiss Confederation as well as of both chambers of the Parliament of the Swiss Confederation; Judge of the EFTA Court since 6 September 1995; President of the EFTA Court since 15 January 2003.

Publications: 40 books and over 200 articles on European and International law, law of obligations, labour law, law of unfair competition, antitrust law, company law, intellectual property law, comparative law and the law of international courts.

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Per CHRISTIANSEN

Born in 1949 in Larvik, Norway.

Studies: Cand jur (University of Oslo), 1976; studies at the University of Glasgow, 1978-1979; Dr Juris (University of Oslo),1988; Fulbright Scholar (George Washington University, Washington DC), 2005-2006.

Professional career: Legal Counsellor, Norges Bank, 1976-1982; Head of Division and Deputy Director in the Economic Policy Department, Ministry of Finance, 1982-1985; Head of Office and Secretary to the Board of Governors, Norges Bank, 1985-1986; Assistant Director General of the Economic Policy Department, Ministry of Finance, 1986-1988; Counsellor, Norwegian Mission to the European Communities (Brussels), 1988-1994; Director General in the Economic Policy Department, Ministry of Finance, 1994; Director General of the Financial Markets Department, Ministry of Finance, 1994-1995; Registrar at the EFTA Court, 1995-1988; Advocate at Advokatfirmaet Pricewaterhouse Coopers DA, 1998-2002; Professor of Law at the University of Tromsø, Norway since 2001; Judge at the EFTA Court since 2011.

Publications: various publications in the field of international law, EU and EEA law and financial law.

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Páll HREINSSON

Born 20 February 1963, in Reykjavík, Iceland

Studies: Cand. Juris 1988 from the University of Iceland. Visitor student in Administrative Law and Public Administration at the University of Copenhagen 1990-1991. Doctor Juris 2005 from the University of Iceland.

Professional career: Assistant Judge, City Court of Reykjavik, 1988-1991; Special Assistant, The Althing Ombudsman (The Parliamentary Ombudsman's Office), 1991-1998; Member of the committees of specialists which wrote the legislative bills on the Administrative Act from 1993 and the Freedom of Information Act from 1996; Associate Professor, Faculty of Law, University of Iceland, 1998-1999; Professor of Law, University of Iceland, 1999-2007; Vice-Dean, Faculty of Law, University of Iceland, 2002-2005; Dean, Faculty of Law, University of Iceland, 2005 – 2007; Chairman of the Commission for access to administrative documentation from the 1st of January 2005 to the 1st of September 2007. Justice at Supreme Court of Iceland, 2007-2011. Chairman of the Special Investigation Commission, established with Act no. 142/2008 on an Investigation of the Events Leading To, and the Causes Of, the Downfall of the Icelandic Banks in 2008, and Related Events, from the 1st of January 2009 to the 1st of September 2010. Chairman of the Board of the Data Protection Authority 1999-2011.

Publications: 12 books and 35 articles on Administrative law, constitutional law, Data Protection and Information Privacy and law of obligations.

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Skúli MAGNÚSSON

Born: 14 October 1969, in Reykjavik, Iceland.

Studies: University of Iceland, Cand. Jur. 1995; University of Oxford (Univ. College), Mag. Jur. 1998.

Professional career: Deputy at the District Court of Reykjanes (1995-1997); Examination to the Icelandic Bar of Advocates (1996); Part Time Lecturer at the University of Iceland, Faculty of Law (1998-2000); Law Clerk at the Supreme Court of Iceland (199-2000); Registrar for the Complaint Committee of Public Procurement (part-time, 1999-2002); Lecturer and Docent at the University of Iceland, Faculty of Law (full time 2000-2004 and part time from there onwards); District Judge in Reykjavik (2004-2007); Appointed Registrar of the EFTA Court in April 2007. Appointed in 2010, Ad-hoc Judge at the European Court of Human Rights on behalf of Iceland.

Has taken part in several governmental commissions and working committees entrusted with submitting proposals for new legislation in Iceland.

Publications: various publications in the field Legal Theory, Constitutional Law, Public Procurement and Procedural Law.

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List of Court Decisions published in the EFTA Court Reports

CASES 1994 - 2011

	Case	Parties	Type of Case	EFTA Court Report
1	*E-1/94*	*Ravintoloitsijain Liiton Kustannus Oy Restamark*	Request for an Advisory Opinion from Tullilautakunta, Finland *Admissibility – Free movement of goods – State monopolies of a commercial character – Import monopoly – Articles 11, 13 and 16 of the EEA Agreement – Unconditional and sufficiently precise*	*[1994-1995] p. 15*
2	*E-2/94*	*Scottish Salmon Growers Association Ltd v EFTA Surveillance Authority*	**Direct Action** *Decision of the EFTA Surveillance Authority – Constituent Elements – Judicial Review – Statement of Reasons – Admissibility – Locus standi – Direct and Individual Concern*	*[1994-1995] p. 59*
3	*E-3/94*	*Alexander Flandorfer Friedmann and Others v Republic of Austria*	*Jurisdiction – Procedure – Admissibility – Legal aid*	*[1994-1995] p. 83*
4	*E-4/94*	*Konsument-ombudsmannen v De Agostini (Svenska) Förlag AB*	*Request for an Advisory Opinion from Marknadsdomstolen, Sweden* *Withdrawn*	*[1994-1995] p. 89*
5	*E-5/94*	*Konsumentombuds-mannen v TV-shop i Sverige AB*	Request for an Advisory Opinion from Marknadsdomstolen, Sweden *Withdrawn*	*[1994-1995] p. 93*
6	*E-6/94*	*Reinhard Helmers v EFTA Surveillance Authority and Kingdom of Sweden*	**Direct Action** *Procedure – Admissibility – Application for revision*	*[1994-1995] p. 97 and 103*
7	*E-7/94*	*Data Delecta Aktiebolag and Ronnie Forsberg v MSL Dynamics Ltd*	Request for an Advisory Opinion from Högsta domstolen, Sweden *Withdrawn*	*[1994-1995] p. 109*
8	*Joined Cases E-8/94 and E-9/94*	*Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S*	Request for an Advisory Opinion from Markedsrådet, Norway *Admissibility – Free movement of services – Council Directive 89/552/EEC – Transmitting State principle – Televised advertising targeting children – Broadcasters/ Advertisers – Circumvention – Directed advertising – Council Directive 84/450/ EEC*	*[1994-1995] p. 113*

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9	*E-1/95*	*Ulf Samuelsson v Svenska staten*	Request for an Advisory Opinion from Varbergs tingsrätt, Sweden *Admissibility – Council Directive 80/987/EEC – National measures to counter abuse – Proportionality*	*[1994-1995] p. 145*
10	*E-2/95*	*Eilert Eidesund v Stavanger Catering A/S*	Request for an Advisory Opinion from Gulating lagmannsrett, Norway *Council Directive 77/187/EEC – Transfer of part of a business – Transfer of rights to pension benefits*	*[1995-1996] p. 1*
11	*E-3/95*	*Torgeir Langeland v Norske Fabricom A/S*	*Request for an Advisory Opinion from Stavanger byrett, Norway* *Council Directive 77/187/EEC – Transfer of rights to pension benefits*	*[1995-1996] p. 36*
12	*E-1/96*	*EFTA Surveillance Authority v Republic of Iceland*	*Discontinuance of proceedings*	*[1995-1996] p. 63*
13	*E-2/96*	*Jørn Ulstein and Per Otto Røiseng v Asbjørn Møller*	*Request for an Advisory Opinion from Inderøy herredsrett, Norway* *Council Directive 77/187/EEC – Transfer of rights to pension benefits*	*[1995-1996] p. 65*
14	*E-3/96*	*Tor Angeir Ask and Others v ABB Offshore Technology AS and Aker Offshore Partner AS*	Request for an Advisory Opinion from Gulating lagmannsrett, Norway *Council Directive 77/187/EEC – Transfer of part of a business*	*[1997] p. 1*
15	*E-4/96*	*Fridtjof Frank Gundersen v Oslo kommune*	Request for an Advisory Opinion from Oslo byrett, Norway *Withdrawn*	*[1997] p. 28*
16	*E-5/96*	*Ullensaker kommune and Others v Nille AS*	Request for an Advisory Opinion from Borgarting lagmannsrett, Norway *Admissibility – Free movement of goods – Licensing scheme*	*[1997] p. 30*
17	*E-6/96*	*Tore Wilhelmsen AS v Oslo kommune*	Request for an Advisory Opinion from Oslo byrett, Norway *Alcohol sales – State monopolies of a commercial character – Free movement of goods*	*[1997] p. 53*
18	*E-7/96*	*Paul Inge Hansen v EFTA Surveillance Authority*	**Direct Action** *Action for failure to act – Admissibility*	*[1997] p. 100*

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19	*E-1/97*	*Fridtjof Frank Gundersen v Oslo kommune, supported by Norway*	Request for an Advisory Opinion from Oslo byrett, Norway *Alcohol sales – State monopolies of a commercial character – Free movement of goods*	*[1997] p. 108*
20	*E-2/97*	*Mag Instrument Inc v California Trading Company Norway, Ulsteen*	Request for an Advisory Opinion from Fredrikstad byrett, Norway *Exhaustion of trade mark rights*	*[1997] p. 127*
21	*E-3/97*	*Jan and Kristian Jæger AS, supported by Norwegian Association of Motor Car Dealers and Service Organisations v Opel Norge AS*	Request for an Advisory Opinion from Nedre Romerike herredsrett, Norway *Competition – Motor vehicle distribution system – Compatibility with Article 53(1) EEA – Admission to the system – Nullity*	*[1998] p. 1*
22	*E-4/97*	*The Norwegian Bankers' Association v EFTA Surveillance Authority, supported by Kingdom of Norway*	**Direct Action** *State Aid – Action for annulment of a decision of the EFTA Surveillance Authority – Admissibility – Exceptions under Article 59(2) EEA – Procedures*	*[1998] p. 38 and [1999] p. 1*
23	*E-5/97*	*European Navigation Inc v Star Forsikring AS, under offentlig administrasjon (under public administration)*	Request for an Advisory Opinion from Høysteretts kjæremålsutvalg, Norway *Withdrawn*	*[1998] p. 59*
24	*E-7/97*	*EFTA Surveillance Authority v Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – Safety and health protection of workers in surface and underground mineral – extracting industries – Council Directive 92/104/EEC*	*[1998] p. 62*
25	*E-8/97*	*TV 1000 Sverige AB v Norwegian Government*	Request for an Advisory Opinion from Oslo byrett, Norway *Council Directive 89/552/EEC – Transfrontier television broadcasting – Pornography*	*[1998] p. 68*

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26	*E-9/97*	*Erla María Sveinbjörnsdóttir v Government of Iceland*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland *Council Directive 80/987/EEC – Incorrect implementation of a directive – Liability of an EFTA State*	*[1998] p. 95*
27	*E-10/97*	*EFTA Surveillance Authority v Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfill its obligations – Health protection for workers exposed to vinyl chloride monomer – Council Directive 78/610/EEC*	*[1998] p. 134*
28	*E-1/98*	*Norwegian Government v Astra Norge AS*	Request for an Advisory Opinion from Borgarting lagmannsrett, Norway *Free movement of goods – Copyright – Disguised restriction on trade*	*[1998] p. 140*
29	*E-2/98*	*Federation of Icelandic Trade (Samtök verslunarinnar – Félag íslenskra stórkaupmanna, FIS) v Government of Iceland and the Pharmaceutical Pricing Committee (Lyfjaverðsnefnd)*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland *Pricing of pharmaceutical products – General price decrease – Price control system*	*[1998] p. 172*
30	*E-3/98*	*Herbert Rainford-Towning*	Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein *Right of establishment – Residence requirement for managing director of a company*	*[1998] p. 205*
31	*E-4/98*	*Blyth Software Ltd v AlphaBit AS*	Request for an Advisory Opinion from Oslo byrett, Norway *Withdrawn*	*[1998] p. 239*
32	*E-5/98*	*Fagtún ehf v Byggingarnefnd Borgarholtsskóla, Government of Iceland, City of Reykjavík and Municipality of Mosfellsbær*	Request for an Advisory Opinion from Hæstiréttur Íslands, Iceland *General prohibition on discrimination – Free movement of goods – Post-tender negotiations in public procurement proceedings*	*[1999] p. 51*

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33	*E-6/98 R & E-6/98*	*Government of Norway v EFTA Surveillance Authority*	**Direct Action** *State aid – Suspension of operation of a measure – Action for annulment of a decision of the EFTA Surveillance Authority – General measures – Effect on trade – Aid schemes*	*[1998] p. 242 and [1999] p. 74*
34	*E-1/99*	*Storebrand Skadeforsikring AS v Veronika Finanger*	Request for an Advisory Opinion from Norges Høyesterett, Norway *Motor Vehicle Insurance Directives – Driving under the influence of alcohol – Compensation for passengers*	*[1999] p. 119*
35	*E-2/99*	*EFTA Surveillance Authority v Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations - Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC*	*[2000-2001] p. 1*
36	*E-1/00*	*State Debt Management Agency v Íslandsbanki-FBA hf.*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland *Free movement of capital – State guarantees issued on financial loans – Different guarantee fees for foreign and domestic loans*	*[2000-2001] p. 8*
37	*E-2/00*	*Allied Colloids and Others v Norwegian State*	Request for an Advisory Opinion from Oslo byrett, Norway *Free movement of goods – Directives on dangerous substances and preparations – Joint Statements of the EEA Joint Committee*	*[2000-2001] p. 35*
38	*E-3/00*	*EFTA Surveillance Authority v Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – Fortification of foodstuffs with iron and vitamins – Protection of public health – Precautionary principle*	*[2000-2001] p. 73*
39	*E-4/00*	*Dr Johann Brändle*	Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein *Right of establishment – Single practice rule – Justification by overriding reasons of general interest*	*[2000-2001] p. 123*
40	*E-5/00*	*Dr Josef Mangold*	Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein *Right of establishment – Single practice rule – Justification by overriding reasons of general interest*	*[2000-2001] p. 163*

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41	*E-6/00*	*Dr Jürgen Tschannet*	Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein *Right of establishment – Single practice rule – Justification by overriding reasons of general interest*	*[2000-2001] p. 203*
42	*E-7/00*	*Halla Helgadóttir v Daníel Hjaltason and Iceland Insurance Company Ltd*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland *Motor Vehicle Insurance Directives – Standardised compensation system – Compensation for victims*	*[2000-2001] p. 246*
43	*E-8/00*	*Landsorganisa-sjonen i Norge v Kommunenes Sentralforbund and Others*	Request for an Advisory Opinion from Arbeidsretten, Norway *Competition rules – Collective agreements – Transfer of occupational pension scheme*	*[2002] p. 114*
44	*E-9/00*	*EFTA Surveillance Authority v Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – State retail alcohol monopoly – licensed serving of alcohol beverages – discrimination*	*[2002] p. 72*
45	*E-1/01*	*Hörður Einarsson v The Icelandic State*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland *Differentiated value-added tax on books – Article 14 EEA – Competing products – Indirect protection of domestic products*	*[2002] p. 1*
46	*E-2/01*	*Dr Franz Martin Pucher*	Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein *Right of establishment – Residence requirement for at least one board member of a domiciliary company*	*[2002] p. 44*
47	*E-3/01*	*Alda Viggósdóttir v Íslandspóstur hf.*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland *Council Directive 77/187/EEC – Transfer of a State administrative entity to a State owned limited liability company*	*[2002] p. 202*
48	*E-4/01*	*Karl K. Karlsson hf. v The Icelandic State*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland *State alcohol monopoly – incompatibility with Article 16 EEA – State liability in the event of a breach of EEA law – Conditions of liability*	*[2002] p. 240*

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49	*E-5/01*	*EFTA Surveillance Authority v Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations - Council Directive 87/344/EEC on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance*	*[2000-2001] p. 287*
50	*E-6/01*	*CIBA and Others v The Norwegian State*	Request for an Advisory Opinion from Oslo byrett, Norway *Rules of procedure – Admissibility – Jurisdiction of the Court – Competence of the EEA Joint Committee*	*[2002] p. 281*
51	*E-7/01*	*Hegelstad and Others v Hydro Texaco AS*	Request for an Advisory Opinion from Gulating lagmannsrett, Norway *Competition – Exclusive purchasing agreement – Service-station agreement – Article 53 EEA – Regulation 1984/83 – Nullity*	*[2002] p. 310*
52	*E-8/01*	*Gunnar Amundsen AS and Others v Vectura AS*	Request for an Advisory Opinion from Borgarting lagmannsrett, Norway *Withdrawn*	*[2002] p. 236*
53	*E-1/02*	*EFTA Surveillance Authority v Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – Equal Rights Directive - Reservation of academic positions for women*	*[2003] p. 1*
54	*E-2/02*	*Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance* *Authority-State aid-Admissibility-Locus standi*	*[2003] p. 52*
55	*E-3/02*	*Paranova AS v Merck & Co., Inc. and Others*	Request for an Advisory Opinion from Norges Høyesterett, Norway *Parallel imports – Article 7(2) of Directive 89/104/EEC – Use of coloured stripes on the parallel importer's repackaging design – Legitimate reasons*	*[2003] p. 101*
56	*E-1/03*	*EFTA Surveillance Authority v Iceland*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – free movement of services -higher tax on intra-EEA flights than on domestic flights*	*[2003] p. 143*

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57	*E-2/03*	*Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*	Request for an Advisory Opinion from Héraðsdómur Reykjaness, Iceland *Jurisdiction – Admissibility – Fish products – Protocol 9 to the EEA Agreement – rules of origin – Protocol 4 to the EEA Agreement – Free Trade Agreement EEC-Iceland*	*[2003] p. 185*
58	*E-3/03*	*Transportbedriftenes Landsforening and Nor-Way Bussekspress AS v EFTA Surveillance Authority*	**Direct Action** *Withdrawal of an application*	*[2004] p. 1*
59	*E-4/03*	*EFTA Surveillance Authority v Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – Article 8 of Directive 98/34/EC*	*[2004] p. 3*
60	*E-1/04*	*Fokus Bank ASA v* *The Norwegian State, represented by Skattedirektoratet (the Directorate of Taxes)*	Request for an Advisory Opinion from Frostating lagmannsrett, Norway *Free movement of capital – taxation of dividends – tax credit granted exclusively to shareholders resident in a Contracting Party – denial of procedural rights to shareholders resident in other Contracting Parties*	*[2004] p. 11*
61	*E-2/04*	*Reidar Rasmussen, Jan Rossavik, and Johan Käldman, v Total E&P Norge AS, v/styrets formann*	Request for an Advisory Opinion from Gulating lagmannsrett, Norway *Transfer of undertakings - Council Directive 77/187/EEC – time of transfer – objection to transfer of employment relationship*	*[2004] p. 57*
62	*E-3/04*	*Tsomakas Athanasios and Others with Odfjell ASA as an accessory intervener v The Norwegian State, represented by Rikstrygdeverket*	Request for an Advisory Opinion from Gulating lagmannsrett, Norway *Freedom of movement for workers - social security for migrant workers - Title II of Regulation 1408/71 - form E 101 - Article 3 EEA*	*[2004] p. 95*

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63	*E-4/04*	*Pedicel AS v Sosial- og helsedirektoratet (Directorate for Health and Social Affairs*	Request for an Advisory Opinion from Markedsrådet, Norway *Free movement of goods and services - prohibition against alcohol advertisement - trade in wine – Articles 8(3) and 18 EEA - "other technical barriers to trade"- advertisement of wine – restriction – protection of public health – principle of proportionality – applicability of the precautionary principle*	*[2005] p. 1*
64	*Joined Cases E-5/04 E-6/04 and E-7/04*	*Fesil and Finnfjord, PIL and others and The Kingdom of Norway v EFTA Surveillance Authority*	**Direct Action** *State aid – Exemptions from energy tax for the manufacturing and mining industries – Admissibility – Selectivity – Effect on trade and distortion of competition – Existing aid and new aid – Recovery – Legal certainty – Legitimate expectations – Proportionality*	*[2005] p. 117*
65	*E-8/04*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Right of establishment – Residence requirement for one member of management board and one member of executive management in banks*	*[2005] p. 46*
66	*E-9/04*	***The Bankers' and Securities' Dealers Association of Iceland*** *v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – State guarantee for a publicly owned institution – State aid – Services of General Economic Interest – Decision not to raise objections – Initiation of the formal investigation procedure – Admissibility*	*[2006] p. 42*
67	*E-9/04 COSTS*	***The Bankers' and Securities' Dealers Association of Iceland*** *v EFTA Surveillance Authority*	**Direct Action** *Taxation of costs*	*[2007] p. 74*
68	*E-9/04 COSTS II*	*Bankers´and Securities´Dealers Association of Iceland v EFTA Surveillance Authority*	**Direct Action** *Taxation of costs*	*[2007] p. 220*

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69	*E-10/04*	*Paolo Piazza v Paul Schurte AG*	Request for an Advisory Opinion from Fürstliches Landgericht (Princely Court of Justice), Liechtenstein ***Admissibility –security for costs before national courts – free movement of capital – freedom to provide services***	*[2005] p. 76*
70	*E-1/05*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – life assurance services – freedom to provide services and right of establishment – Article 33 of Directive 2002/83/EC – justification of restriction based on general good – proportionality*	*[2005] p. 234*
71	*E-2/05*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *State aid - Failure of a Contracting Party to fulfil its obligations – Second subparagraph of Article 1(2) of Part I of Protocol 3 SCA – Validity of a decision by the EFTA Surveillance Authority – Termination of tax measures and recovery of aid - Absolute impossibility to implement a decision of the EFTA Surveillance Authority*	*[2005] p. 202*
72	*E-3/05*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – free movement of workers – social security for migrant workers with family members residing in an EEA State other than the State of employment – regional residence requirement for family benefits – Article 73 of Regulation EEC 1408/71 – Article 7(2) of Regulation EEC 1612/68 – discrimination – justification on grounds of promoting sustainable settlement*	*[2006] p. 102*
73	*E-4/05*	*HOB-vín v The Icelandic State and Áfengis- og tóbaksverslun ríkisins (the State Alcohol and Tobacco Company of Iceland)*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland *Free movement of goods – State monopolies of a commercial character – requirements to supply goods on pallets and to include the pallet price in the price of the goods – discrimination against importers of alcoholic beverages – abuse of a dominant position*	*[2006] p. 4*

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74	*Joined Cases E-5/05 E-6/05 E-7/05 E-8/05 and E-9/05*	***EFTA Surveillance Authority v The Principality of Liechtenstein***	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services – Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) – Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) – Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) – Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)*	*[2006] p. 142*
75	*E-1/06*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *National legislation transferring the operation of gaming machines to a State-owned monopoly – restriction of freedom of establishment and freedom to provide services – justification – legitimate aims – consistency of national legislation – necessity of national legislation*	*[2007] p. 8*
76	*E-2/06*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Conditions for concession for acquisition of hydropower resources – scope of the EEA Agreement – free movement of capital – right of establishment – indirect discrimination – public ownership – security of energy supply – environmental protection – proportionality*	*[2007] p. 164*
77	*E-3/06*	*Ladbrokes Ltd. v Staten v/Kultur- og kirkedepartementet and Staten v/ Landbruks- og matdepartementet*	Request for an Advisory Opinion from Oslo tingrett (Oslo District Court), Norway *Right of establishment – freedom to provide services – national restrictions on gambling and betting – legitimate aims – suitability/consistency – necessity – provision and marketing of gaming services from abroad*	*[2007] p. 86*

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78	*E-4/06*	*KLM Royal Dutch Airlines v Staten v/ Finansdepartementet (The Norwegian State, represented by the Ministry of Finance)*	Request for an Advisory Opinion from Borgarting lagmanssrett (Borgarting Court of Appeal), Norway *Withdrawn*	*[2007] p. 4*
79	*E-5/06*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *(Failure by a Contracting Party to fulfil its obligations – Article 4(1) and (2a) of Regulation EEC 1408/71 – social security benefits and special non-contributory benefits – legal effect of Annex IIa to Regulation EEC 1408/71 listing special non-contributory benefits – Decision 1/95 of the EEA Council on the entry into force of the EEA Agreement for Liechtenstein)*	*[2007] p. 296*
80	*E-6/06*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise*	*[2007] p. 238*
81	*E-1/07*	*Criminal proceedings against A*	Request for an Advisory Opinion from Fürstliches Landgericht (Princely Court of Justice), Liechtenstein *Lawyers' freedom to provide services – Council Directive 77/249/EEC – Article 7 EEA – Protocol 35 EEA – principles of primacy and direct effect – conforming interpretation*	*[2007] p. 246*
82	*E-2/07*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Widow's and widower's pension rights – Equal treatment of women and men – Article 69 EEA – Directive 79/7/EEC – Directive 86/378/EEC*	*[2007] p. 280*
83	*E-3/07*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2002/88/EC of the European Parliament and of the Council of 9 December 2002 amending Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery*	*[2007] p. 356*

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84	*E-4/07*	*Jón Gunnar Þorkelsson* *v Gildi-lífeyrissjóður*	Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland ***Invalidity pension rights – free movement of workers – Regulation (EEC) No 1408/71 – Regulation (EEC) No 574/72***	*[2008] p. 3*
85	*E-5/07*	*Private Barnehagers Landsforbund v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – Municipal kindergartens – State aid – Notion of undertaking – Decision not to raise objections – Initiation of the formal investigation procedure – Admissibility*	*[2008] p. 62*
86	*E-6/07*	***HOB vín ehf.*** v ***Faxaflóahafnir sf.***	Request for an Advisory Opinion from Hæstiréttur Íslands (the Supreme Court of Iceland), Iceland ***Port charges – charges having equivalent effect to customs duties – internal taxation – free movement of goods***	*[2008] p. 128*
87	*E-7/07*	*Seabrokers AS v The Norwegian State, represented by Skattedirektoratet (the Directorate of Taxes)*	Request for an Advisory Opinion from Stavanger tingrett (Stavanger District Court), Norway ***Freedom of establishment – double taxation agreement – calculation of maximum credit allowance for tax paid in another EEA State – debt interest and group contributions***	*[2008] p. 172*
88	*E-8/07*	*Celina Nguyen v The Norwegian State, represented by Justis- og politidepartementet (the Ministry of Justice and the Police)*	Request for an Advisory Opinion from Oslo tingrett (Oslo District Court), Norway ***Compulsory insurance for civil liability in respect of motor vehicles – Directives 72/166/EEC, 84/5/EEC and 90/232/EEC – compensation for non-economic injury – conditions for State liability – sufficiently serious breach***	*[2008] p. 224*
89	*Joined Cases E-9/07 and E-10/07*	*L'Oréal Norge AS (Case E-9/07 and Case E-10/07); L'Oréal SA (Case E-10/07) v Per Aarskog AS (Case E-9/07); Nille AS (Case E-9/07); Smart Club AS (Case E-10/07)*	Request for an Advisory Opinion from Follo tingrett (Follo District Court) and Oslo tingrett (Oslo District Court), Norway ***Exhaustion of trade mark rights***	*[2008] p. 259*

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90	*Joined Cases E-11/07 and E-1/08*	*Olga Rindal (Case E-11/07); Therese Slinning, represented by legal guardian Olav Slinning (Case E-1/08) v The Norwegian State, represented by the Board of Exemptions and Appeals for Treatment Abroad*	Request for an Advisory Opinion from Borgarting lagmannsrett (Borgarting Court of Appeal) and Oslo tingrett (Oslo District Court), Norway *Social security – Freedom to provide services – National health insurance systems – Hospital treatment costs incurred in another EEA State – Experimental and test treatment*	*[2008] p. 320*
91	*E-2/08*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2004/26/EC relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery*	*[2008] p. 301*
92	*E-3/08*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Regulation (EC) No 648/2004 on detergents*	*[2008] p. 308*
93	*E-4/08*	***Claudia Sebjanic v Christian Peters***	Request for an Advisory Opinion from Fürstliches Landgericht (Princely Court of Justice), *Liechtenstein* *Withdrawn*	*[2008] p. 299*
94	*E-5/08*	*Yannike Bergling v EFTA Surveillance Authority*	**Direct Action** *Inadmissable*	*[2008] p. 316*
95	*E-6/08*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2002/91/EC on the energy performance of buildings*	*[2009-2010] p. 4*
96	*E-1/09*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Freedom of establishment – Residence requirements*	*[2009-2010] p. 46*

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97	E-2/09	EFTA Surveillance Authority v The Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Commission Regulation (EC) No 593/2007 on the fees and charges levied by the European Aviation Safety Agency – judgment by default	[2009-2010] p. 12
98	E-3/09	EFTA Surveillance Authority v The Principality of Liechtenstein	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC	[2009-2010] p. 20
99	E-4/09	Inconsult v the Financial Market Authority (Finanz-marktaufsicht)	Request for an Advisory Opinion from the Appeals Commission of the Financial Market Authority (Beschwerdekommission der Finanzmarktaufsicht), Liechtenstein, Admissibility – Directive 2002/92/EC on insurance mediation – Concept of a "durable medium	[2009-2010] p. 86
100	E-5/09	EFTA Surveillance Authority v The Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC	[2009-2010] p. 30
101	E-6/09	Magasin- og Uke-presseforeningen v EFTA Surveillance Authority	**Direct Action** Action for failure to act – State aid – Existing aid – Admissibility	[2009-2010] p. 144
102	E-7/09	EFTA Surveillance Authority v The Principality of Liechtenstein	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies	[2009-2010] p. 38

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103	E-8/09	EFTA Surveillance Authority v Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts – Judgment by default	[2009-2010] p. 180
104	E-1/10	Periscopus AS v Oslo Børs ASA and Erik Must AS	Request for an Advisory Opinion from Oslo District Court (Oslo tingrett) Directive 2004/25/EC – Acquisition of control – Mandatory bid – Adjustment of the bid price – Clearly determined circumstances and criteria – Reference to market price	[2009-2010] p. 198
105	E-2/10	Thor Kolbeinsson v The Icelandic State	**Direct Action** Safety and health of workers – Directives 89/391/EEC and 92/57/EEC – Article 3 EEA – Employers' and employees' liability for work accidents – State liability	[2009-2010] p. 234
106	E-3/10	EFTA Surveillance Authority v The Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate	[2009-2010] p. 188
107	E-5/10	Dr. Joachim Kottke v Präsidial Anstalt and Sweetyle Stiftung	Request for an Advisory Opinion from Fürstliches Obergericht (Princely Court of Appeal) Security for costs before national courts – Discrimination – Article 4 EEA – Justification	[2009-2010] p. 320
108	E-4,6,7/10	The Prinicipality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v EFTA Surveillance Authority	**Direct Action** Action for annulment of ESA decision 97/10/COL regarding the taxation of captive insurance companies under the Liechtenstein Tax Act	[2011] p. 16

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109	E-8/10	EFTA Surveillance Authority v The Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2005/36/EC on the recognition of professional qualifications	[2009-2010] p. 296
110	E-9/10	EFTA Surveillance Authority v The Principality of Liechtenstein	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2005/36/EC on the recognition of professional qualifications	[2009-2010] p. 304
111	E-10/10	EFTA Surveillance Authority v The Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2005/36/EC on the recognition of professional qualifications	[2009-2010] p. 312
112	E-11/10	EFTA Surveillance Authority v The Principality of Liechtenstein	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2006/54/EC on implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation	[2009-2010] p. 368
113	E-12/10	EFTA Surveillance Authority v The Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 96/71/EC concerning the posting of workers in the framework of provision of services	[2011] p.117
114	E-13/10	Aleris Ungplan AS v Surveillance Authority	**Direct Action** Refusal by ESA to commence proceedings for alleged failure of an EEA State to fulfil its obligations in the field of procurement	[2011] p. 3
115	E-14/10	Konkurrenten.no AS v EFTA Surveillance Authority	**Direct Action** Application for the annulment of ESA decision 254/10/COL of 21 June 2010, to close case without opening formal investigation procedure	[2011] p. 266

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116	E-16/10	*Philip Morris Norway AS v Staten v/Helse- og omsorgsdepartementet*	Request for an Advisory Opinion from Oslo District Court (Oslo tingrett) ***Free movement of goods – Prohibition on the visual display of tobacco products – Articles 11 and 13 EEA – Measures having equivalent effect to quantitative restrictions –Selling arrangements – Protection of public health – Proportionality***	*[2011] p. 330*
117	E-18/10	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Non-compliance with a judgment of the Court establishing a failure to fulfil obligations - Article 33 SCA - Measures necessary to comply with the judgment of the Court*	*[2011] p. 202*
118	E-1/11	*Norwegian Appeal Board for Health Personnel - appeal from A*	Request for an Advisory Opinion from Appeal Board for Health Personnel (Statens helsepersonellnemnd) ***Free movement of persons – Directive 2005/36/EC – Recognition of professional qualifications – Protection of public health – Non-discrimination - Proportionality***	*[2011] p. 484*
119	E-3/11	*Pálmi Sigmarsson v the Central Bank of Iceland*	Request for an Advisory Opinion from Reykjavik District Court (Héraðsdómur Reykjavíkur) *Free movement of capital – Article 43 EEA – National restrictions on capital movements – Jurisdiction – Proportionality – Legal certainty*	*[2011] p. 430*
120	E-4/11	*Arnulf Clauder*	Request for an Advisory Opinion from *Verwaltungsgerichtshof des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein)* *Directive 2004/38/EC – Family reunification – Right of residence for family members of EEA nationals holding a right of permanent residence – Condition to have sufficient resources*	*[2011] p. 216*

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121	E-5/11	EFTA Surveillance Authority v The Kingdom of Norway	**Direct Action** Non-compliance with a judgment of the Court establishing a failure to fulfil obligations - Article 33 SCA - Failure by a Contracting Party to fulfil its obligations – Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency – Regulation (EC) No 1891/2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No 1406/2002	[2011] p. 418
122	E-8/11	EFTA Surveillance Authority v The Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2002/49/EC on the assessment and management of environmental noise	[2011] p. 467

The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. The EEA Agreement entered into force on 1 January 1994. The EFTA Court is composed of three judges. The EFTA States which are parties to the EEA Agreement are Iceland, Liechtenstein and Norway.

This report contains information on the EFTA Court and the administration of the Court for the period from 1 January 2011 to 31 December 2011. In addition, it has a short section on the Judges and the staff and the Court's activities in 2011.

The report includes the full texts of the decisions of the EFTA Court as well as the reports for the hearing prepared by the Judge-Rapporteurs during this period. This Report also contains an index of decisions printed in prior editions of the EFTA Court Report.


EFTA COURT