REPORT OF THE EFTA COURT 2016

Book 1

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Book 1

REPORT OF THE EFTA COURT 2016

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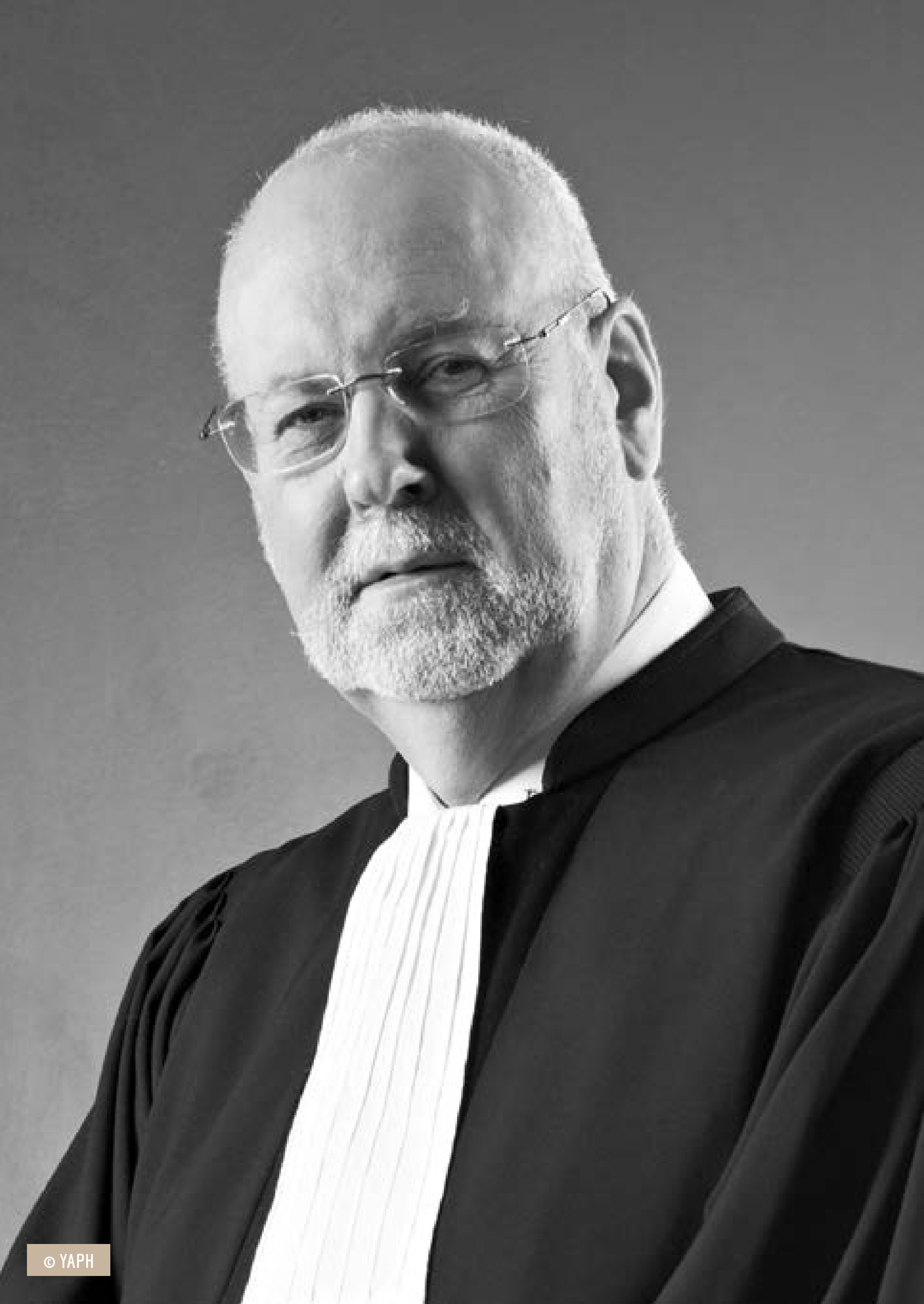
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Foreword

The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. This treaty was concluded between, on the one hand, the European Communities and their then twelve Member States and on the other hand the then seven EFTA States Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. The agreement entered into force on 1 January 1994, except for Liechtenstein and Switzerland. After a negative referendum on 6 December 1992, Switzerland refrained from ratifying it. 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. The Court's seat was Geneva. Austria, Finland and Sweden joined the European Union on 1 January 1995 and have since then been EEA Member States on the EU side. On the EFTA side, Liechtenstein became a member of the EEA on 1 May 1995. The Court continued its work in its original composition of five judges until 30 June 1995 under a Transitional Arrangements Agreement. Since September 1995, the Court has been composed of three judges appointed by common accord of the Governments of Iceland, Liechtenstein and Norway. On 1 September 1996, the Court's seat was moved to Luxembourg.

The EEA Agreement aims at extending the EU single market to the participating EFTA States with the exception of most common policies. It is based on a two- pillar structure, the EU forming one pillar and the EFTA States the other. Currently, the EEA consists of the EU and its 28 Member States 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 2016*. It contains the judgments and orders rendered during that period as well as an overview of the Court's extrajudicial activities.

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 are rendered in English and in the language of the requesting national court. Both language versions are authentic and published in the Court Reports although the non-English version is only a translation. The different language versions are published with corresponding page numbers to facilitate reference.

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

1

Decisions of the Court

Case

E-17/15

Ferskar kjötvörur ehf.

The Icelandic State

(Jurisdiction – Article 8 EEA – Import of raw meat – Directive 89/662/EEC – Harmonisation of the regulatory regime for veterinary checks)

Mál

E-17/15

Ferskar kjötvörur ehf.

gegn

íslenska ríkinu

(Lögsaga – 8. gr. EES-samningsins – Innflutningur á hráum kjötvörum – Tilskipun 89/622/EBE – Samræming reglukerfis um dýraheilbrigðiseftirlit)

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Summary of the Judgment

1 Raw meat products fall outside the scope of the rules on the free movement on goods as defined in Article 8 EEA, unless otherwise provided for in the Agreement. Certain legal acts dealing with aspects of trade in agricultural and fish products have been incorporated in the EEA Agreement. For example, Directive 89/662/EEC has been included in Annex I.

2 Following the adoption of EEA Joint Committee Decision No 133/2007, the acts included in Chapter I of Annex I apply to Iceland unless an adaption text states otherwise. In relation to the Directive no adaptation text has been agreed. As a result, the Directive fully applies to Iceland.

3 The Directive seeks to ensure that veterinary checks are carried out at the place of dispatch only, and the objective of the Directive is to safeguard public and animal health. Under Article 5 of the Directive, veterinary checks in the State of destination are only allowed as veterinary spot-checks or, in the event of a serious presumption of irregularity, while the goods are in transit. The import requirements at issue in the present case go beyond these limits, since they are regular and systematic. They are therefore incompatible with the Directive.

4 Iceland's argument that its geographical isolation and the immunological vulnerability of its animal population should be taken into account when interpreting the Directive must be rejected. As opposed to the import of live animals, no adaptation for import of raw meet has been made.

Samantekt

1 Hráar kjötvörur falla utan gildissviðs frjálsra vöruflutninga eins og það hugtak er skilgreint í 8. gr. EES-samningsins, nema annað sé tekið fram í samningnum. Ákveðnar lagagerðir sem varða tiltekin atriði viðskipta með landbúnaðar- og sjávarafurðir hafa verið teknar upp í EES-samninginn. Til dæmis var tilskipun 89/662/EES hluti af I. viðauka.

2 Í kjölfar ákvörðunar sameiginlegu EES-nefndarinnar nr. 133/2007, ná þær gerðir sem koma fram í I. kafla I. viðauka til Íslands nema annað sé sérstaklega tekið fram í aðlögunartextanum. Ekki hefur verið samið um neinar aðlaganir fyrir tilskipunina. Hún tekur því að öllu leyti til Íslands.

3 Með tilskipuninni er lögð áhersla á að tryggja að dýraheilbrigðiseftirlit fari einungis fram á sendingarstað, og markmið tilskipunarinnar er að samhæfa grundvallarkröfur um verndun heilbrigðis manna og dýra. Samkvæmt 5. gr. tilskipunarinnar, má einungis sinna dýraheilbrigðiseftirliti á viðtökustað, í formi dýraheilbrigðisskyndikannana, eða, ef uppi er rökstuddur grunur um brot, við flutning varanna á yfirráðasvæði ríkis. Þær innflutningskröfur sem gerðar eru í umræddu máli ganga lengra en þessi takmörk, þar sem þær eru reglulegar og kerfisbundnar. Þær eru því ósamrýmanlegar tilskipuninni.

4 Hafna verður röksemdum Íslands um að taka beri tillit til einangraðar landfræðilegar legu landsins og ónæmisfræðilegs varnarleysis dýraflóru landsins og hugsanlegra afleiðinga á líf og heilsu manna, við skýringu tilskipunarinnar. Ólíkt innflutningi á lifandi dýrum, hefur samningurinn engin aðlögunarákvæði að geyma vegna innflunings hrárra kjötvara.

5 Therefore, it is not compatible with the Directive that an EEA State require an importer of raw meat products to apply for a special import permit before the products are imported, including the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance.

5 Þess vegna, samrýmist það ekki ákvæðum tilskipunarinnar að EES ríki, setji reglu, þar sem þess er krafist, að innflytjandi hrárrar kjötvöru sæki um sérstakt leyfi áður en varan er flutt inn, og áskilji að lagt sé fram vottorð um að kjötið hafi verið geymt frosið í tiltekinn tíma fyrir tollafgreiðslu.

Judgment of the Court

1 February 2016[1]

(Jurisdiction – Article 8 EEA – Import of raw meat – Directive 89/662/EEC – Harmonisation of the regulatory regime for veterinary checks)

In Case E-17/15,

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 Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in the case between

Ferskar kjötvörur ehf.

and

The Icelandic State,

concerning the applicability of the provisions of the Agreement on the European Economic Area to the import to Iceland of raw meat products,

1 Language of the request: Icelandic

Dómur Dómstólsins

1. febrúar 2016[1]

(Lögsaga – 8. gr. EES-samningsins –Innflutningur á hráum kjötvörum – Tilskipun 89/662/EBE – Samræming reglukerfis um dýraheilbrigðiseftirlit)

Mál E-17/15,

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

Ferskar kjötvörur ehf.

gegn

íslenska ríkinu

um gildissvið ákvæða samningsins um Evrópska efnahagssvæðið um innflutning á hráum kjötvörum.

1 Beiðni um ráðgefandi álit á íslensku.

The Court

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

– Ferskar kjötvörur ehf. ("the plaintiff"), represented by Arnar Þór Stefánsson, Supreme Court Attorney, acting as Counsel;

– The Icelandic State ("the defendant"), represented by Kristján Andri Stefánsson, Director General, Ministry of Foreign Affairs, and Einar Karl Hallvarðsson, State Attorney General and Supreme Court Attorney, acting as Agents, and Jóhannes Karl Sveinsson and Gizur Bergsteinsson, Supreme Court Attorneys, acting as Counsel;

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

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Director, Maria Moustakali, Officer, and Írís Ísberg, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Daniele Bianchi, member of its Legal Service, and Kathleen Skelly, a national civil servant on secondment to the Legal Service, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of the plaintiff, represented by Arnar Þór Stefánsson; the defendant, represented by Kristján Andri Stefánsson and

Dómstóllinn

Skipaður dómurunum Carl Baudenbacher, forseta, Per Christiansen, framsögumanni, og Páli Hreinssyni,

dómritari: Gunnar Selvik,

hefur, með tilliti til skriflegra greinargerða frá:

– Stefnanda, Ferskum kjötvörum ehf., í fyrirsvari er Arnar Þór Stefánsson, hrl.;

– Stefnda, íslenska ríkinu, í fyrirsvari eru Kristján Andri Stefánsson, skrifstofustjóri hjá utanríkisráðuneytinu, og Einar Karl Hallvarðsson, ríkislögmaður og hrl., sem umboðsmenn, auk Jóhannesar Karls Sveinssonar, hrl., og Gizurar Bergsteinssonar, hrl., sem málflutningsmenn;

– Ríkisstjórn Noregs, í fyrirsvari sem umboðsmenn eru Janne Tysnes Kaasin, lögfræðingur á lagasviði utanríkisráðuneytisins og Torje Sunde, lögmaður hjá skrifstofu ríkislögmanns.

– Eftirlitsstofnun EFTA (ESA), í fyrirsvari sem umboðsmenn eru Carsten Zatschler, framkvæmdastjóri lögfræði- og framkvæmdasviðs, Maria Moustakali og Íris Ísberg, lögfræðingar á lögfræði- og framkvæmdasviði.

– Framkvæmdastjórn Evrópusambandsins (framkvæmdastjórnin), í fyrirsvari sem umboðsmenn eru Daniele Bianchi og Kathleen Skelly, frá lagaskrifstofu framkvæmdastjórnarinnar, en sú síðarnefnda er opinber starfsmaður aðildarríkis sem starfar tímabundið á lagaskrifstofunni.

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings lögmanns stefnanda, Arnars Þórs Stefánssonar, lögmanna stefnda, Kristjáns Andra Stefánssonar og

Jóhannes Karl Sveinsson; the Government of Norway, represented by Janne Tysnes Kaasin; ESA, represented by Maria Moustakali and Íris Ísberg; and the Commission, represented by Daniele Bianchi and Kathleen Skelly, at the hearing on 2 December 2015,

gives the following

Judgment

I INTRODUCTION

1 The plaintiff imported 83 kg of raw beef fillets from the Netherlands via Denmark to Iceland in February 2014. The import permit was granted, *inter alia*, on the condition that the meat was stored at a temperature of at least -18°C for one month before customs clearance. The plaintiff objected to that condition, but this was to no avail. As a consequence, the meat was discarded. In the case before the national court, the plaintiff seeks compensation from the defendant for the expenses incurred. In the context of those proceedings, the national court has decided to refer several questions concerning the compatibility of the system for import permits with the Agreement on the European Economic Area ("the EEA Agreement" or "EEA").

II LEGAL BACKGROUND

EEA LAW

2 The fourth recital of the preamble to the EEA Agreement reads:

CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and

Jóhannesar Karls Sveinssonar, umboðsmanns ríkisstjórnar Noregs, Janne Tysnes Kaasin, fulltrúa ESA, Maríu Moustakali og Írisar Ísberg, og fulltrúa framkvæmdastjórnar Evrópusambandsins, Daniele Bianchi og Kathleen Skelly, sem fram fór 2. desember 2015,

kveðið upp svofelldan

Dóm

I INNGANGUR

1 Í febrúar 2014 flutti stefnandi 83 kg af ferskum nautalundum frá Hollandi til Íslands, með viðkomu í Danmörku. Innflutningsleyfið var veitt, meðal annars með því skilyrði að kjötið yrði geymt við að minnsta kosti -18°C í einn mánuð fyrir tollafgreiðslu. Stefnandi mótmælti þessu skilyrði, án árangurs. Kjötinu var því fargað. Í málinu sem rekið er fyrir Héraðsdómi krefst stefnandi þess að stefnda verði gert að endurgreiða honum útgjöldin. Í tengslum við þann málarekstur ákvað héraðsdómur að beina nokkrum spurningum til EFTA-dómstólsins varðandi það hvort veiting innflutningsleyfa samkvæmt framangreindu kerfi fái samrýmst samningnum um Evrópska efnahagssvæðið (EES-samningnum).

II LÖGGJÖF

EES-RÉTTUR

2 Í 4. lið formálsorða EES-samningsins segir:

HAFA Í HUGA það markmið að mynda öflugt og einsleitt Evrópskt efnahagssvæði er grundvallist á sameiginlegum reglum og sömu

equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;

3 Article 1(1) EEA reads:

The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

4 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

5 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:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

(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.

samkeppnisskilyrðum, tryggri framkvæmd, meðal annars fyrir dómstólum, og jafnrétti, gagnkvæmni og heildarjafnvægi hagsbóta, réttinda og skyldna samningsaðila;

3 Í 1. mgr. 1. gr. EES-samningsins segir:

Markmið þessa samstarfssamnings er að stuðla að stöðugri og jafnri eflingu viðskipta- og efnahagstengsla samningsaðila við sömu samkeppnisskilyrði og eftir sömu reglum með það fyrir augum að mynda einsleitt Evrópskt efnahagssvæði sem nefnist hér á eftir EES.

4 Í 3. gr. EES-samningsins segir:

Samningsaðilar skulu gera allar viðeigandi almennar eða sérstakar ráðstafanir til að tryggja að staðið verði við þær skuldbindingar sem af samningi þessum leiðir.

Þeir skulu varast ráðstafanir sem teflt geta því í tvísýnu að markmiðum samnings þessa verði náð.

Þeir skulu enn fremur auðvelda samvinnu innan ramma samnings þessa.

5 Í 7. gr. EES-samningsins segir:

Gerðir sem vísað er til eða er að finna í viðaukum við samning þennan, eða ákvörðunum sameiginlegu EES-nefndarinnar, binda samningsaðila og eru þær eða verða teknar upp í landsrétt sem hér segir:

(a) gerð sem samsvarar reglugerð EBE skal sem slík tekin upp í landsrétt samningsaðila;

(b) gerð sem samsvarar tilskipun EBE skal veita yfirvöldum samningsaðila val um form og aðferð við framkvæmdina.

6 Article 8 EEA reads:

1. *Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*

2. *Unless otherwise specified, Articles 10 to 15, 19, 20 and 25 to 27 shall apply only to products originating in the Contracting Parties.*

3. *Unless otherwise specified, the provisions of this Agreement shall apply only to:*

   (a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;

   (b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.

7 Article 13 EEA reads:

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.

8 Article 17 EEA reads:

Annex I contains specific provisions and arrangements concerning veterinary and phytosanitary matters.

6 Í 8. gr. EES-samningsins segir:

1. *Koma skal á frjálsum vöruflutningum milli samningsaðila í samræmi við ákvæði samnings þessa.*

2. *Ákvæði 10.–15., 19., 20. og 25.–27. gr. taka einungis til framleiðsluvara sem upprunnar eru í ríkjum samningsaðila nema annað sé tekið fram.*

3. *Ef annað er ekki tekið fram taka ákvæði samningsins einungis til:*

   (a) *framleiðsluvara sem falla undir 25.–97. kafla í samræmdu vörulýsingar- og vörunúmeraskránni, að frátöldum þeim framleiðsluvörum sem skráðar eru í bókun 2;*

   (b) *framleiðsluvara sem tilgreindar eru í bókun 3 í samræmi við það sérstaka fyrirkomulag sem þar er greint frá.*

7 Í 13. gr. EES-samningsins segir:

Ákvæði 11. og 12. gr. koma ekki í veg fyrir að leggja megi á innflutning, útflutning eða umflutning vara bönn eða höft sem réttlætast af almennu siðferði, allsherjarreglu, almannaöryggi, vernd lífs og heilsu manna eða dýra eða gróðurvernd, vernd þjóðarverðmæta, er hafa listrænt, sögulegt eða fornfræðilegt gildi, eða vernd eignarréttinda á sviði iðnaðar og viðskipta. Slík bönn eða höft mega þó ekki leiða til gerræðislegrar mismununar eða til þess að duldar hömlur séu lagðar á viðskipti milli samningsaðila.

8 Í 17. gr. EES-samningsins segir:

Í I. viðauka eru sérstök ákvæði og fyrirkomulag varðandi heilbrigði dýra og plantna.

9 Article 18 EEA reads:

Without prejudice to the specific arrangements governing trade in agricultural products, the Contracting Parties shall ensure that the arrangements provided for in Articles 17 and 23(a) and (b), as they apply to products other than those covered by Article 8(3), are not compromised by other technical barriers to trade. Article 13 shall apply.

10 Article 19(2) EEA reads:

The Contracting Parties undertake to continue their efforts with a view to achieving progressive liberalization of agricultural trade.

11 Article 23 EEA reads:

Specific provisions and arrangements are laid down in:

(a) Protocol 12 and Annex II in relation to technical regulations, standards, testing and certification;

(b) …

(c) …

They shall apply to all products unless otherwise specified.

12 Chapter I of Annex I to the EEA Agreement contains provisions on veterinary issues. Following the adoption of EEA Joint Committee Decision No 69/98 of 17 July 1998 (OJ 1999 L 158, p. 1, and EEA Supplement 1999 No 27, p. 1), the first paragraph of point 2 of the introductory part made clear that the acts referred to in the Chapter should apply to Iceland where it was so stated in relation to a specific act. By EEA Joint Committee Decision No 133/2007 of 26 October 2007 (OJ 2008 L 100, p. 27, and EEA Supplement 2008 No 19, p. 34), the Contracting Parties reviewed the situation and several changes were made to Annex I with regard to Iceland. The first paragraph of point 2 of the introductory part of Chapter I was replaced by the following two paragraphs:

9 Í 18. gr. EES-samningsins segir:

Með fyrirvara um sérstakt fyrirkomulag varðandi viðskipti með landbúnaðarafurðir skulu samningsaðilar tryggja að fyrirkomulaginu, sem kveðið er á um í 17. gr. og a- og b-lið 23. gr. varðandi aðrar vörur en þær er heyra undir 3. mgr. 8. gr., verði ekki stofnað í hættu vegna annarra tæknilegra viðskiptahindrana. Ákvæði 13. gr. skulu gilda.

10 Í 2. mgr. 19. gr. EES-samningsins segir:

Samningsaðilar skuldbinda sig til að halda áfram viðleitni sinni til að auka smám saman frjálsræði í viðskiptum með landbúnaðarafurðir.

11 Í 23. gr. EES-samningsins segir:

Sérstök ákvæði og fyrirkomulag er að finna í:

(a) bókun 12 og II. viðauka varðandi tæknilegar reglugerðir, staðla, prófanir og vottanir;

(b) …

(c) …

Þau skulu taka til allra framleiðsluvara nema annað sé tekið fram.

12 I. kafli I. viðauka EES-samningsins inniheldur ákvæði um heilbrigði dýra. Í kjölfar ákvörðunar sameiginlegu EES-nefndarinnar nr. 69/98 frá 17. júlí 1998 (Stjtíð. ESB 1999 L 158, bls. 1, og EES-viðbætir 1999 nr. 27, bls. 1), var kveðið á um það í 1. mgr. 2.-liðar inngangshlutans að þær gerðir sem vísað væri til í kaflanum skyldu taka til Íslands þegar það væri tekið fram í tengslum við tiltekna gerð. Með ákvörðun sameiginlegu EES-nefndarinnar nr. 133/2007 frá 26. október 2007 (Stjtíð. ESB 2008 L 100, bls. 27, og EES-viðbætir 2008 nr. 19, bls. 34), var sú staða endurskoðuð af samningsaðilum og ýmsar breytingar gerðar á I. viðauka hvað Ísland varðaði. Eftirfarandi málsgreinar komu í stað 1. mgr. 2. liðar inngangsorða I. kafla.

The provisions contained in this Chapter shall apply to Iceland, except for the provisions concerning live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen. When an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act.

Iceland shall implement the provisions contained in this Chapter, in the areas which did not apply to Iceland prior to the review of this Chapter by Decision of the EEA Joint Committee No 133/2007, no later than 18 months after the entry into force of this Decision.

13 Under heading 1.1 in Chapter I, which sets out the basic texts concerning control matters, point 1 refers to Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13) ("the Directive"), and to subsequent amendments to that directive. That point does not provide for any special arrangements concerning Iceland.

14 The preamble to the Directive includes the following recitals:

[3] Whereas in the veterinary field frontiers are currently being used for carrying out checks aimed at safeguarding public health and animal health;

[4] Whereas the ultimate aim is to ensure that veterinary checks are carried out at the place of dispatch only; whereas the attainment of this objective implies the harmonization of the basic requirements relating to the safeguarding of public health and animal health;

[5] Whereas with a view to the completion of the internal market, pending the attainment of this objective, the emphasis should be placed on the checks to be carried out at the place of dispatch and in organizing those that could be carried out at the place of destination; whereas such a solution would entail the suspension of veterinary checks at the Community's internal frontiers;

Ákvæði þessa kafla skulu taka til Íslands, að frátöldum ákvæðum um lifandi dýr, önnur en fisk og eldisdýr, og dýraafurðir á borð við egg, fósturvísa og sæði. Ef tiltekin gerð á ekki að taka til Íslands eða aðeins að hluta til skal það tekið fram í tengslum við þá gerð.

Þau ákvæði þessa kafla, sem lúta að sviðum sem vörðuðu ekki Ísland áður en kaflinn var endurskoðaður samkvæmt ákvörðun sameiginlegu EES-nefndarinnar nr. 133/2007, skulu koma til framkvæmda á Íslandi eigi síðar en 18 mánuðum eftir að sú ákvörðun öðlast gildi.

13 Í undirkafla 1.1. í I. kafla I. viðauka EES-samningsins, þar sem útlistaðir eru grundvallartextar um eftirlitsmál, er í 1. undirlið vísað til tilskipunar ráðsins 89/662/EBE frá 11. desember 1989 um dýraheilbrigðiseftirlit í viðskiptum innan bandalagsins til að stuðla að því að hinum innri markaði verði komið á (Stjtíð. ESB 1989 L 395, bls. 13) (tilskipunin) og eftirfarandi breytinga á henni. Ekki er mælt fyrir um nokkurt sérstakt fyrirkomulag varðandi Ísland í þeim lið.

14 Í formálsorðum tilskipunarinnar er að finna eftirfarandi liði:

[3] Á sviði dýraheilbrigðis eru landamærastöðvar notaðar um þessar mundir til að annast eftirlit sem hefur það að markmiði að vernda heilbrigði manna og dýra.

[4] Endanlegt markmið er að tryggja að dýraheilbrigðiseftirlit fari einungis fram á sendingarstað. Náist þetta markmið felur það í sér samhæfingu grundvallarkrafna um verndun heilbrigðis manna og dýra.

[5] Til að stuðla að því að hinum innri markaði verði komið á ætti, þar til markmiðinu er endanlega náð, að leggja áherslu á að eftirlit fari fram á sendingarstað og að skipuleggja það eftirlit sem gæti farið fram á viðtökustað. Slík lausn felur í sér að dýraheilbrigðiseftirlit á innri landamærum bandalagsins fellur niður.

…

[7] Whereas in the State of destination spot veterinary checks could be carried out at the place of destination; whereas, however, in the event of a serious presumption of irregularity, the veterinary check could be carried out while the goods are in transit;

15 Article 1 of the Directive reads:

Member States shall ensure that the veterinary checks to be carried out on products of animal origin covered by the acts referred to in Annex A or by Article 14 and which are intended for trade are no longer carried out … at frontiers but are carried out in accordance with this Directive.

16 Article 2(1) of the Directive contains the following definition:

'Veterinary check' means any physical check and/or administrative formality which applies to the products referred to in Article 1 and which is intended for the protection, direct or otherwise, of public or animal health;

17 Chapter I of the Directive is concerned with checks at origin and consists of Articles 3 and 4. The first subparagraph of Article 3(1) reads:

Member States shall ensure that the only products intended for trade are those referred to in Article 1 which have been obtained, checked, marked and labelled in accordance with Community rules for the destination in question and which are accompanied to the final consignee mentioned therein by a health certificate, animal-health certificate or by any other document provided for by Community veterinary rules.

18 The first sentence of Article 4(1) reads:

Member States of dispatch shall take the necessary measures to ensure that operators comply with veterinary requirements at all stages of the production, storage, marketing and transport of the products referred to in Article 1.

…

[7] Skyndikannanir vegna dýraheilbrigðiseftirlits geta farið fram í viðtökuríkinu. Leiki sterkur grunur á að um vanrækslu sé að ræða getur dýraheilbrigðiseftirlitið farið fram meðan á umflutningi vörunnar stendur.

15 Í 1. gr. tilskipunarinnar segir:

Aðildarríkin skulu tryggja að dýraheilbrigðiseftirlitið með afurðum úr dýraríkinu, sem falla undir tilskipanirnar sem eru taldar upp í viðauka A eða 14. gr. og hafa á viðskipti með, fari ekki lengur fram, … við landamærastöðvar heldur samkvæmt þessari tilskipun.

16 Í 1. mgr. 2. gr. tilskipunarinnar er að finna eftirfarandi skilgreiningu:

„dýraheilbrigðiseftirlit“: eftirlit með ástandi og/eða formsatriðum á sviði stjórnsýslu sem tekur til afurðanna sem um getur í 1. gr. og er ætlað að vernda, beint eða óbeint, heilbrigði manna eða dýra;

17 1. kafli tilskipunarinnar varðar „eftirlit á upprunastað“ og samanstendur af 3. og 4. gr. Í fyrstu undirgrein 1. mgr. 3. gr. segir:

Aðildarríkin skulu tryggja að einu afurðirnar sem viðskipti eru höfð með séu þær sem um getur í 1. gr. og hafa verið fengnar, skoðaðar og merktar í samræmi við reglur bandalagsins, sem gilda um viðtökustaðinn, og þarf heilbrigðisvottorð að fylgja til endanlegs móttakanda sem þar er getið, dýraheilbrigðisvottorð eða eitthvert annað skjal sem kveðið er á um í dýraheilbrigðisreglum bandalagsins.

18 Fyrsta setning 1. mgr. 4.gr. tilskipunarinnar er svohljóðandi:

Sendingaraðildarríkin skulu gera nauðsynlegar ráðstafanir til að tryggja að stjórnendur fullnægi dýraheilbrigðiskröfum á öllum stigum framleiðslunnar, geymslu, markaðssetningar og flutninga afurðanna sem um getur í 1. gr.

19 Chapter II of the Directive contains rules on checks on arrival at the destination. Article 5(1)(a) requires EEA States to implement the following measure:

The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport.

20 Articles 7 and 8 of the Directive lay down the measures to be taken if the competent authority of the EEA State of destination establishes the presence of agents responsible for a disease named in Directive 82/894/EEC, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans. In such a case, protective measures provided for in Article 9 may be applied.

NATIONAL LAW

21 Article 10 of Act No 25/1993 on Animal Diseases and Preventive Measures against them (*lög* nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim) ("the Icelandic Act") reads:

To prevent animal diseases from reaching the country it is prohibited to import the following types of goods:

a. Raw and lightly salted slaughter products, both processed and non-processed …

19 II. kafli tilskipunarinnar varðar „eftirlit á viðtökustað“: Í a-lið 1. mgr. 5. gr. er lögð sú skylda á EES-ríki að þau komi eftirfarandi ráðstöfunum til framkvæmda:

Lögbært yfirvald getur, á viðtökustað varanna, kannað með óhlutdrægum dýraheilbrigðisskyndikönnunum hvort kröfum 3. gr. hefur verið fullnægt; það getur einnig tekið sýni í þessu sambandi.

Jafnframt getur lögbært yfirvald umflutningsaðildarríkisins eða viðtökuaðildarríkisins, hafi það rökstuddan grun um brot, einnig látið fara fram eftirlit við flutning varanna á yfirráðasvæði sínu, þar með talið eftirlit með að flutningatækin fullnægi gildandi reglum;

20 Í 7. og 8. gr. tilskipunarinnar er kveðið á um þær ráðstafanir sem grípa beri til verði lögbær yfirvöld aðildarríkis vör við sjúkdómsvalda sem orsaka sjúkdóm sem nefndur er í tilskipun 82/894/EBE, dýrasjúkdóm sem getur einnig lagst á menn, eða eitthvert það ástand sem getur stofnað dýrum eða mönnum í hættu. Í slíkum tilvikum má grípa til þeirra verndarráðstafana sem mælt er fyrir um í 9. gr.

LANDSRÉTTUR

21 Í 10. gr. *laga nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim* (íslensku lögin) segir:

Til að hindra að dýrasjúkdómar berist til landsins er óheimilt að flytja til landsins eftirtaldar vörutegundir:

a. hráar og lítt saltaðar sláturafurðir, bæði unnar og óunnar [...]

Despite the provisions of paragraph 1 the Minister [of Fisheries and Agriculture] is authorized to allow the import of products mentioned in items a-e, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause animal diseases. The Minister can decide by regulation that paragraph 1 shall not apply to certain categories of those mentioned if the product is disinfected in production or a special disinfection is performed before importation and the product is accompanied with a satisfactory certificate of origin, production and disinfection. The Minister is authorized to prohibit by notice the import of products which carry the risk of transmitting contamination agents that could cause danger to the health of animals.

…

22 Regulation No 448/2012 on Measures to prevent the Introduction of Animal Diseases and Contaminated Products (*reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins*) ("the Icelandic Regulation") sets out detailed provisions on the implementation of Article 10 of the Act. Article 3 of the Icelandic Regulation reads:

The importation to Iceland of the following animal products and products that may carry infectious agents which cause diseases in animals and humans is not permitted; cf. however, further details in Chapter III:

a. Raw meat, processed or unprocessed, chilled or frozen, as well as offal and slaughter wastes, which have not been treated by heating, so that the core temperature has reached 72°C for 15 seconds, or other comparable treatment in the assessment of the Food and Veterinary Authority.

…

Þrátt fyrir ákvæði 1. mgr. er [sjávarútvegs – og landbúnaðar-] ráðherra heimilt að leyfa innflutning á vörum þeim sem eru taldar upp í a–e-lið enda þyki sannað að ekki berist smitefni með þeim er valda dýrasjúkdómum. 4 Ráðherra er heimilt að ákveða með reglugerð að ákvæði 1. mgr. skuli ekki gilda fyrir einstakar vörutegundir sem þar eru taldar upp ef varan sótthreinsast við tilbúning eða sérstök sótthreinsun er framkvæmd fyrir innflutning og vörunni fylgir fullnægjandi vottorð um uppruna, vinnslu og sótthreinsun Ráðherra er heimilt að banna með reglugerð innflutning á vörum, óháð uppruna, sem hætta telst á að smitefni geti borist með og hætta telst geta stafað af varðandi heilbrigði dýra.

...

22 Reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins (íslenska reglugerðin) kveður ítarlega á um beitingu 10. gr. laganna. Í 3. gr. reglugerðarinnar segir:

Eftirtaldar afurðir dýra og vörur sem geta borið með sér smitefni er valda sjúkdómum í dýrum og mönnum er óheimilt að flytja til landsins samanber þó nánari útlistun í III. kafla:

a. Hrátt kjöt, unnið sem óunnið, kælt sem frosið, svo og innmat og sláturúrgang, sem ekki hefur hlotið hitameðferð, þannig að kjarnhiti hafi náð 72°C í 15 sekúndur eða aðra sambærilega meðferð að mati Matvælastofnunar.

...

23 Article 4 of the Icelandic Regulation reads:

The Minister of Fisheries and Agriculture is authorized to allow the import of products mentioned in Article 3, cf. Article 10 of [the Act] and subsequent amendments, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause diseases in animals and humans, and the conditions imposed for the import have been fulfilled, see however Article 7.

When an application is submitted for the first time to import a raw or unsterilized product as referred to in the first paragraph, an importer must provide the Ministry of Fisheries and Agriculture with the necessary information on the product for consideration and approval before the product is dispatched from the country of export.

An importer of raw products shall in all cases apply for a permit to the Minister of Fisheries and Agriculture and submit, for the consideration of the Food and Veterinary Authority, an import declaration, information on the country of origin and production, the type of product and producer, and the required certificates, as provided for in Article 5.

24 Article 5 of the Icelandic Regulation reads:

Imported foods which are listed under [Combined Nomenclature Codes] 0202 … which the Minister has authorised for import to the country as referred to in Article 4 and which have not received satisfactory heat treatment must be accompanied by the following certificates:

a. …

b. …

c. *a certificate confirming that the products have been stored at a temperature of at least -18°C for a month prior to customs clearance;*

d. …

23 Í 4. gr. íslensku reglugerðarinnar segir:

Sjávarútvegs- og landbúnaðarráðherra er heimilt, að fengnum meðmælum Matvælastofnunar, að leyfa innflutning á vörum, sem taldar eru upp í 3. gr., sbr. 10. gr. laga nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim, ásamt síðari breytingum, enda þyki sannað að ekki berist smitefni með þeim er valda sjúkdómum í dýrum og mönnum og þau skilyrði sem sett hafa verið fyrir innflutningnum séu uppfyllt, sjá þó 7. gr.

Þegar sótt er um innflutning á hrárri eða ósótthreinsaðri vöru skv. 1. mgr. í fyrsta sinn skal innflytjandi láta sjávarútvegs- og landbúnaðarráðuneytinu í té nauðsynlegar upplýsingar um vöruna til athugunar og samþykkis áður en varan er send frá útflutningslandi.

Innflytjandi hrárrar vöru skal alltaf sækja um leyfi til sjávarútvegs- og landbúnaðarráðherra og leggja fram, til umsagnar Matvælastofnunar, aðflutningsskýrslu, upplýsingar um uppruna- og framleiðsluland vörunnar, tegund vöru og framleiðanda auk tilskilinna vottorða skv. 5. gr.

24 Í 5. gr. íslensku reglugerðarinnar segir:

Innfluttum matvælum sem flokkast undir vöruliði 0202 [númer skv. sameinuðu tollnafnaskránni] [...] sem ráðherra hefur veitt heimild til að flytja til landsins sbr. 4. gr. og hafa ekki hlotið fullnægjandi hitameðferð skulu fylgja þau vottorð sem hér greinir:

a. …

b. …

c. *Vottorð sem staðfestir að vörurnar hafi verið geymdar við a.m.k. -18°C í einn mánuð fyrir tollafgreiðslu.*

d. ...

e. *an official certificate confirming that the products are free of salmonella bacteria;*

f. *animal meat products and by-products, dairy products and eggs shall conform to the appropriate provisions of the current regulation on food contaminants;*

g. *the product shall be labelled in conformity with current rules on labelling, advertising and promotion of foodstuffs.*

The Combined Nomenclature is established on the basis of the Harmonized System.

25 In relation to this legislation, ESA submitted a reasoned opinion on 8 October 2014 in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). In that opinion, ESA alleged that Iceland had failed to fulfil its obligations under the Directive, in particular Article 5, by maintaining in force the authorisation system for fresh meat and meat products provided for in Article 10 of the Icelandic Act and Articles 3 to 5 of the Icelandic Regulation. Alternatively, ESA considered the authorisation system to be in breach of Article 18 EEA. It appears from its written observations to the Court that ESA has decided to postpone further handling of the infringement case until the Court has given its Advisory Opinion in the present case.

III FACTS AND PROCEDURE

26 The plaintiff ordered 83 kg of beef fillets from a Dutch company for EUR 1 909. On 26 February 2014, the plaintiff applied to the Icelandic Minister of Fisheries and Agriculture for permission to import the meat to Iceland. The day after, the meat was transported by air from Denmark to Iceland. The freight costs amounted to ISK 80 606. The

e. *Opinbert vottorð sem staðfestir að afurðirnar séu lausar við salmonellusýkla.*

f. *Slátur- og mjólkurafurðir og egg skulu uppfylla ákvæði gildandi reglugerðar um aðskotaefni í matvælum.*

g. *Varan skal merkt í samræmi við gildandi reglur um merkingu, auglýsingu og kynningu matvæla.*

Sameinuðu tollnafnaskránni er komið á fót á grundvelli hinnar samræmdu vörulýsingar- og vörunúmeraskrár.

25 Hinn 8. október 2014 lét ESA uppi rökstutt álit i tengslum við þessa löggjöf, sbr. 31. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls (SED). ESA komst þar að þeirri niðurstöðu að Ísland hefði ekki uppfyllt skyldur sínar samkvæmt tilskipuninni, sérstaklega 5. gr., með því að halda við lýði leyfisveitingakerfi fyrir hrátt kjöt og kjötafurðir, sem mælt er fyrir um í 10. gr. laganna og 3. til 5. gr. íslensku reglugerðarinnar. ESA taldi leyfisveitingakerfið einnig vera brot á 18. gr. EES-samningsins. Ráða má af skriflegum greinargerðum stofnunarinnar til dómstólsins, að hún hafi ákveðið að fresta frekari aðgerðum í tengslum við málsmeðferðina vegna brots Íslands þar til dómstóllinn hafi veitt ráðgefandi álit í máli þessu.

III MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

26 Stefnandi pantaði 83 kíló af nautalundum frá hollensku fyrirtæki fyrir 1.909 evrur. Stefnandi sótti þann 26. febrúar 2014 um innflutningsleyfi fyrir kjötið hjá sjávarútvegs- og landbúnaðarráðuneytinu. Daginn eftir voru vörurnar fluttar með flugi frá Danmörku til Íslands. Flutningskostnaður nam 80.606

meat was stored at the customs office in Keflavík pending an import permit.

27 On 6 March 2014, acting on behalf of the Minister of Fisheries and Agriculture, the Minister of Industries and Innovation authorised the import, provided that the conditions in Article 5(c), (e) and (g) of the Icelandic Regulation were met.

28 On 11 March 2014, the plaintiff requested the Food and Veterinary Authority to process a request to allow the import and to permit customs clearance of the fresh meat without requiring it to be frozen. The plaintiff stated that the purpose of the import was to offer consumers in Iceland fresh meat that had not been frozen.

29 On 14 March 2014, the Food and Veterinary Authority replied that it was not in a position to grant the request and that the conditions imposed were in accordance with the Icelandic Regulation. Following this, the Directorate of Customs stopped clearance of the meat, and the meat was discarded at the request of the plaintiff.

30 In April 2014, the plaintiff brought a case before Reykjavík District Court, claiming compensation for the costs of the meat and its transport. The plaintiff claims that the defendant’s refusal to grant permission to import fresh meat violates Icelandic law and EEA law, in particular Article 18 EEA, the Directive and Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law.

31 By order of 24 February 2015, Reykjavík District Court, upon the request of the plaintiff, decided to refer certain questions to the Court. Following an appeal from the defendant, the Supreme Court of Iceland (*Hæstirettur Íslands*) rephrased and amended the questions by judgment of 27 April 2015. Accordingly, by letter of 22 May 2015,

krónum. Kjötið var geymt á starfsstöð tollstjórans í Keflavík á meðan beðið var ákvörðunar varðandi innflutningsleyfið.

27 Þann 6. mars 2014 veitti atvinnuvega- og nýsköpunarráðherra innflutningsleyfið, fyrir hönd sjávarútvegs- og landbúnaðarráðherra, með þeim fyrirvara að skilyrði c-, e- og g- liðar 5. gr. íslensku reglugerðarinnar væru uppfyllt.

28 Hinn 11. mars 2014 fór stefnandi þess á leit við Matvælastofnun, að hún heimilaði innflutning hins ferska kjöts og tollafgreiðslu þess án þess að gerð væri krafa um frystingu. Í beiðni stefnanda kom fram að innflutningur hans miðaði að því að bjóða neytendum upp á ferska kjötvöru sem ekki hefði verið fryst.

29 Í svari Matvælastofnunar, frá 14. mars 2014, kom fram að stofnunin hefði ekki heimild til að verða við beiðninni og að skilyrðin væru í samræmi við íslensku reglugerðina. Í kjölfar þessara bréfaskipta hafnaði tollstjóri tollafgreiðslu kjötsins og var því fargað að beiðni stefnanda.

30 Þann 14. apríl 2014 höfðaði stefnandi mál þetta fyrir Héraðsdómi Reykjavíkur og fór fram á bætur sem nema kaupverði vörunnar auk flutningskostnaðar. Stefnandi telur að höfnun stefnda á umsókn um leyfi til innflutnings á fersku kjöti brjóti í bága við íslensk lög og EES-rétt, sérstaklega 18. gr. EES-samningsins, tilskipunina og reglugerð Evrópuþingsins og ráðsins nr. 178/2002/EB frá 28. janúar 2002 um almennar meginreglur og kröfur samkvæmt lögum um matvæli, um stofnun Matvælaöryggisstofnunar Evrópu og um málsmeðferð vegna öryggis matvæla.

31 Með úrskurði 24. febrúar 2015 féllst Héraðsdómur Reykjavíkur á beiðni stefnanda um að beina tilteknum spurningum til EFTA-dómstólsins. Í kjölfar kæru stefnda á úrskurðinum kvað Hæstiréttur upp dóm 27. apríl 2015 þar sem spurningarnar voru endurorðaðar og framsetningu þeirra breytt. Í samræmi við þetta beindi Héraðsdómur Reykjavíkur eftirfarandi spurningum til dómstólsins með bréfi

registered at the Court on 16 June 2015, the District Court referred the following questions to the Court:

1. *Does the field of application of the EEA Agreement, as defined in Article 8 thereof, entail that a Member State of the Agreement has discretion regarding the setting of rules on the importation of raw meat products and is, in this respect, not bound by the provisions of the Agreement and the acts based thereon?*

2. *If the answer to the first question is in the negative, then the question arises whether it is compatible with the provisions of [the Directive] that a Member State of the EEA Agreement should set rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and require the submission, for this purpose, of an import declaration, information on the country of origin and production, the type of product and the producer, and the required certificates, including a certificate confirming that the products have been stored frozen for a certain period prior to customs clearance.*

3. *The national court requests the opinion of the Court whether the provisions of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law are relevant in answering the second question.*

4. *Following on from the second and third questions, an answer is requested to the question of whether it constitutes a technical barrier to trade in the sense of Article 18 EEA if an EEA State sets rules under which the importation to that State of raw meat products is not permitted.*

5. *An opinion is requested on whether it affects the answer to the fourth question, if it is permitted, under the rules of the EEA State of destination, to grant exceptions from the general prohibition referred to in that question.*

dagsettu 22. maí 2015, sem skráð var í málaskrá dómstólsins 16. júní sama ár:

1. *Leiðir gildissvið EES-samningsins, eins og það er markað í 8. gr. hans, til þess að ríki, sem aðild á að samningnum, hafi frjálsar hendur um setningu reglna um innflutning hrárrar kjötvöru og sé í þeim efnum óbundið af ákvæðum samningsins og þeim gerðum, sem á honum byggja?*

2. *Ef svarið við fyrstu spurningunni er neikvætt, er í öðru lagi spurt, hvort það samrýmist ákvæðum tilskipunar ráðsins 89/662/EBE, að ríki, sem aðild á að EES-samningnum, setji reglur, þar sem þess er krafist, að innflytjandi hrárrar kjötvöru sæki um sérstakt leyfi áður en varan er flutt inn, og áskilji að lagðar séu fram í þeim tilgangi aðflutningsskýrslur, upplýsingar um uppruna- og framleiðsluland vörunnar, tegund vöru og framleiðanda auk tilskilinna vottorða, þar á meðal um að kjötið hafi verið fryst í tiltekinn tíma fyrir tollafgreiðslu.*

3. *Í tengslum við aðra spurninguna er óskað álits á því, hvort ákvæði reglugerðar Evrópuþingsins og ráðsins (EB) nr. 178/2002 hafi sérstaka þýðingu, þegar spurningunni er svarað.*

4. *Í framhaldi af annarri og þriðju spurningunni er óskað svara við því, hvort það feli í sér tæknilega hindrun í skilningi 18. gr. EES-samningsins, að ríki, sem á aðild að samningnum, setji reglur þess efnis, að óheimilt sé að flytja til landsins hráa kjötvöru.*

5. *Í tengslum við fjórðu spurninguna er óskað álits á því, hvort það hafi þýðingu þegar henni er svarað, ef heimilt er samkvæmt reglum innflutningslandsins að veita undanþágu frá slíku almennu banni, sem um getur í fjórðu spurningunni.*

6. *If the answer to the fourth and/or fifth question is in the affirmative, an answer is then requested to the question of in which cases such a prohibition on the importation of raw meat products taking into account, as appropriate, the circumstances described in the fifth question, could be considered justifiable with reference to Article 13 EEA. Also, an answer is requested to the question of what requirements should be made regarding proof in this connection, particularly in the light of the precautionary principle of EEA law.*

32 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 only insofar as is necessary for the reasoning of the Court.

IV ANSWERS OF THE COURT

THE FIRST QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

33 The plaintiff, ESA and the Commission submit that agricultural products and foodstuffs are subject to the provisions of Chapters 2 and 4 of Part II of the EEA Agreement. Article 17 EEA refers to Annex I, which contains specific provisions and arrangements regarding veterinary and phytosanitary matters. This includes the Directive as well as other foodstuffs legislation and relevant animal health and welfare rules applicable in the EEA. These legal acts harmonise the conditions under which products of animal origin are produced, placed on the market and circulated in the EEA. Furthermore, Article 23(a) EEA refers to Annex II on technical regulations, standards, testing and certification, which contains a specific chapter related to foodstuffs. These provisions limit the discretion of the EEA States when enacting rules on the import of raw meat products.

6. *Ef svarið við fjórðu og/eða fimmtu spurningunni er jákvætt, þá er óskað svara við því, í hvaða tilvikum slíkt bann við innflutningi hrárrar kjötvöru, eftir atvikum að teknu tilliti til aðstæðna sem lýst er í fimmtu spurningunni, geti talist réttlætanlegt með vísan til 13. gr. EES-samningsins. Jafnframt er óskað svara við því, hvaða kröfur beri að gera til sönnunar í því sambandi, einkum í ljósi varúðarreglu EES-réttar.*

32 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika, meðferðar málsins og skriflegra greinargerða sem dómstólnum bárust. Verða þau ekki rakin frekar nema að því leyti sem forsendur dómsins krefjast.

IV SVÖR DÓMSINS

FYRSTA SPURNINGIN

ATHUGASEMDIR SEM LAGÐAR VORU FYRIR DÓMSTÓLINN

33 Stefnandi, ESA og framkvæmdastjórnin telja að landbúnaðarafurðir og matvæli falli undir ákvæði 2. og 4. kafla II. hluta EES-samningsins. 17. gr. vísi til I. viðauka, sem hafi að geyma sérstök ákvæði og tilhaganir varðandi heilbrigði dýra og plantna. Til þeirra teljist tilskipunin, ásamt annarri matvælalöggjöf auk tengdra reglna um dýraheilbrigði og –velferð innan EES. Þessi lagaákvæði samræmi skilyrðin fyrir framleiðslu, markaðssetningu og dreifingu dýraafurða innan EES. A-liður 23. gr. vísi þar að auki til II. viðauka um tæknilegar reglugerðir, staðla, prófanir og vottun, sem innihaldi sérstakan kafla um matvæli. Þessi ákvæði takmarki svigrúm EES-ríkja til lagasetningar um innflutning hrárra kjötvara.

34 ESA and the Commission contend that the inclusion of Chapters 2 and 4 and of the legal acts referred to in Annexes I and II would be devoid of any meaning and effectiveness if EEA States were free not to apply those provisions. Pursuant to Article 7 EEA, Iceland is bound to ensure the full implementation of the relevant acts. Thus, any national measure related to veterinary checks on raw meat has to be compatible with the Directive and related legislation on animal products.

35 The plaintiff and the Commission further argue that Article 18 EEA prohibits any technical barriers to trade other than those included in Annexes I and II. National rules concerning import of fresh meat and meat products must thus be assessed under Article 18 EEA.

36 The defendant submits that it follows from Article 8 EEA that EEA States have discretion to regulate the import of raw meat, unless otherwise specified in the Agreement. The Directive has different legal effects in the EU and in Iceland. Iceland is not part of the EU Common Agricultural Policy, and is thus unable to adjust to the EU rules to the same extent as would be the case within the EU. For this reason, unrestricted trade in agricultural products cannot be required of Iceland. This was to a large extent the reason for the negotiation of the EEA Agreement, and in particular Article 17. Furthermore, the application and the objective of the Directive are completely different in the EU in comparison with the situation in the EEA. The Directive aims at the completion of the internal market for agricultural products, yet no such market exists in the EEA context.

37 The defendant continues that, by agreeing to the Directive, Iceland merely contributed to ensuring that certain procedures and formalities in terms of health standards would apply to facilitate trade in agricultural products. However, the agricultural system falls in its entirety outside the scope of the EEA Agreement. Iceland can

34 ESA og framkvæmdastjórnin telja að ákvæði 2. og 4. kafla, auk þeirra ákvæða sem vísað sé til í I. og II. viðauka væru þýðingarlaus og án allrar virkni ef EES-ríkjum væri frjálst að fara ekki eftir þeim. Samkvæmt 7. gr. EES-samningsins beri Íslandi að tryggja innleiðingu viðeigandi lagagerða að fullu. Allar ráðstafanir að landsrétti aðildarríkja um dýraheilbrigðiseftirlit verði því að samrýmast tilskipuninni og tengdri löggjöf um dýraafurðir.

35 Stefnandi og framkvæmdastjórnin halda því enn fremur fram að 18. gr. EES-samningsins leggi bann við hvers konar tæknilegum viðskiptahindrunum, öðrum en þeim sem teknar eru upp í I. og II. viðauka. Því verði að leggja mat á reglur landsréttar um innflutning á hráu kjöti og kjötvörum samkvæmt 18. gr. EES-samningsins.

36 Stefndi telur það leiða af 8. gr. EES-samningsins að EES-ríki hafi frjálsar hendur um setningu reglna um innflutning hrárrar kjötvöru, nema annað sé sérstaklega tekið fram í samningnum. Tilskipunin hafi önnur réttaráhrif á Íslandi en innan Evrópusambandsins. Sameiginleg landbúnaðarstefna ESB eigi ekki við um Ísland og því geti Ísland ekki lagað sig að reglum ESB með þeim hætti sem ætlast sé til innan þess. Óheft viðskipti með landbúnaðarvörur geti því ekki átt við gagnvart Íslandi. Þetta atriði hafi verið ein helsta ástæðan að baki viðræðum um EES-samninginn, sérstaklega í tengslum við 17. gr. Beiting og markmið tilskipunarinnar séu jafnframt allt önnur innan ESB en EES. Tilskipunin stefni að því að koma á innri markaði fyrir landbúnaðarafurðir, en innri markaður fyrir slíkar vörur sé ekki til staðar innan EES.

37 Stefndi heldur því einnig fram að með því að samþykkja tilskipunina hafi Ísland einungis lagt sitt af mörkum til að tryggja tiltekið verklag og tiltekin formsatriði myndu gilda í tengslum við heilsustaðla til að auðvelda viðskipti með landbúnaðarafurðir. Landbúnaðarkerfið falli þó algjörlega utan gildissviðs EES-samningsins. Ísland geti því

therefore adopt the required safety measures concerning the protection of livestock and public health.

38 The Government of Norway observes that the EEA States have agreed to the common regulation of some aspects of trade in agricultural and fishery products. This is shown, in particular, in Article 17 EEA with its reference to Annex I on veterinary and phytosanitary matters. Annex I largely reflects the unique expansion of the EEA Agreement that took place from 1999, with the inclusion of the veterinary rules in accordance with EEA Joint Committee Decision No 69/98. The legal acts in Annex I therefore apply both to agricultural and fishery products. Article 18 EEA is intended to ensure that the effects of the harmonised legal acts in Annex I are not counteracted by technical barriers to trade not foreseen in those acts. It is clear from its wording that this provision is not meant to bring agricultural products within the general scope of the EEA Agreement.

39 The Government of Norway argues that EEA law and EU law are not fully harmonised as regards agricultural products. Thus, a difference in the interpretation of the two agreements cannot be excluded. Accordingly, it must be assessed on a case-by-case basis to what extent the EEA regulatory framework leaves discretion for the EEA States to enact specific national regulations.

FINDINGS OF THE COURT

40 By its first question, the national court essentially asks if raw meat products fall outside the scope of the EEA Agreement, as defined in Article 8, such that an EEA State has discretion when setting the rules for importation of raw meat, since it is not bound by the provisions of the Agreement or acts incorporated therein.

innleitt nauðsynlegar öryggisráðstafanir um verndun búfénaðar og lýðheilsu.

38 Ríkisstjórn Noregs bendir á að EES-ríki hafi samþykkt sameiginlegt regluverk í tengslum við ákveðin atriði í viðskiptum með landbúnaðar- og sjávarútvegsafurðir. Þessa sjái sérstaklega stað í 17. gr. EES-samningsins þar sem vísað er til I. viðauka um heilbrigði dýra og plantna. I. viðauki endurspegli að miklu leyti þá sérstöku viðbót við EES-samninginn sem átti sér stað árið 1999, með ákvörðun sameiginlegu EES-nefndarinnar nr. 69/98 um dýraheilbrigði. Reglur I. viðauka eigi því bæði við um landbúnaðar- og sjávarútvegsafurðir. 18. gr. EES-samningsins sé ætlað að tryggja að ekki sé unnið gegn áhrifum samræmdra lagagerða í I. viðauka með tæknilegum viðskiptahindrunum sem ekki voru fyrirséðar við samningu þeirra. Ljóst sé af orðalagi 18. gr. að henni sé ekki ætlað að færa landbúnaðarafurðir undir almennt gildissvið EES-samningsins.

39 Ríkisstjórn Noregs telur reglur EES- og ESB-réttar ekki hafa verið samræmdar að fullu, hvað landbúnaðarafurðir varðar. Ekki sé því hægt að útiloka mismunandi túlkun á samningunum tveimur. Þar af leiðandi verði að meta í hverju tilviki fyrir sig að hvaða marki regluverk EES veiti EES-ríkjum svigrúm til að setja sérstaka löggjöf í landsrétt.

ÁLIT DÓMSTÓLSINS

40 Fyrsta spurning landsdómstólsins leitar aðallega svars við því hvort hráar kjötvörur falli utan gildissviðs EES-samningsins, eins og það er markað í 8. gr. hans, og þá hvort aðildarríki hafi frjálsar hendur um setningu reglna um innflutning hrárrar kjötvöru og sé í þeim efnum óbundið af ákvæðum samningsins og þeim gerðum, sem á honum byggja.

41 The Court notes that the EEA Agreement has established a homogeneous and dynamic European Economic Area for the benefit of businesses, workers and consumers. The aim of the Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties, achieved in particular on the basis of equality and reciprocity concerning rights and obligations. The EEA shall provide for the fullest possible realisation of the free movement of goods. At the same time, it aims at guaranteeing a high level of health protection and at promoting the interests of consumers. These goals are reflected in the preamble to the Agreement and laid down in various provisions.

42 The defendant has argued that Iceland is not part of the EU Agricultural Policy. That is true. However, the Agreement does contain specific arrangements concerning agricultural products.

43 Article 8(1) EEA provides that free movement of goods between the Contracting Parties shall be established in conformity with the provisions of the Agreement. Article 8(3)(a) limits free movement to products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System ("Harmonized System"), unless otherwise provided for in the EEA Agreement. As raw bovine meat does not fall within the said chapters of the Harmonized System, it falls outside the scope of the EEA Agreement, unless otherwise provided for in the Agreement.

44 The Court notes that certain legal acts dealing with specific aspects of trade in agricultural and fish products have been incorporated in the EEA Agreement. This extension of the scope of the EEA is intended to further a continuous and balanced strengthening of trade and economic relations between the Contracting Parties in a homogeneous and dynamic EEA.

45 According to Article 17 EEA, provisions and arrangements concerning veterinary and phytosanitary matters are to be

41 Dómurinn bendir á að EES-samningurinn kom á einsleitu og öflugu evrópsku efnahagssvæði, fyrirtækjum, launþegum og neytendum til hagsbóta. Markmið samningsins er að stuðla að stöðugri og jafnri eflingu viðskipta- og efnahagstengsla samningsaðila. Til grundvallar því markmiði liggur jafnrétti og gagnkvæmni varðandi réttindi og skyldur. EES skal stuðla að svo víðtækum frjálsum vöruflutningum sem frekast er unnt. Jafnframt er miðað að því að viðhalda háu stigi heilsuverndar og að styrkja neytendavernd. Þessi markmið birtast í formálsorðum samningsins og í ýmsum ákvæðum hans.

42 Stefndi hefur réttilega haldið því fram að Ísland standi utan landbúnaðarstefnu ESB. Samningurinn mælir hins vegar fyrir um tilteknar ráðstafanir varðandi landbúnaðarafurðir.

43 Í 1. mgr. 8. gr. EES-samningsins er kveðið á um koma skuli á frjálsum vöruflutningum milli samningsaðila í samræmi við ákvæði hans. Í a-lið 3. mgr. 8. gr. eru frjálsir vöruflutningar takmarkaðir við þær vörur sem falla undir 25.–97. kafla í samræmdu vörulýsingar- og vörunúmeraskránni, nema annað sé tekið fram í samningnum. Þar sem hrátt nautakjöt fellur utan tilvitnaðra kafla samræmdu vörulýsingar- og vörunúmeraskrárinnar fellur það einnig utan gildissviðs EES-samningsins, nema annað sé tekið fram.

44 Dómurinn bendir á að ákveðnar lagagerðir sem varða tiltekin atriði viðskipta með landbúnaðar- og sjávarafurðir hafa verið teknar upp í EES-samninginn. Þeirri rýmkun á gildissviði EES-samningsins er ætlað að stuðla að stöðugri og jafnri eflingu viðskipta- og efnahagstengsla samningsaðila á einsleitu og öflugu evrópsku efnahagssvæði.

45 Í 17. gr. EES-samningsins kemur fram að sérstök ákvæði og fyrirkomulag varðandi heilbrigði dýra og plantna skuli felld inn í I.

incorporated in Annex I. The Directive has been included in Annex I. Similarly, Article 23 incorporates specific provisions and arrangements that apply to all products, unless otherwise specified. Moreover, the Contracting Parties have undertaken to make efforts to achieve progressive liberalisation of agricultural trade (see Article 19(2) EEA). These provisions provide for the regulation of agricultural matters in the EEA context.

46 As regards the regulation of veterinary and phytosanitary matters, EEA law is not fully homogeneous with EU law. For example, Annex I only applied to Iceland with regard to aquaculture animals and fisheries products until EEA Joint Committee Decision No 133/2007 was adopted. In that decision, the Contracting Parties reviewed the situation and declared that "Iceland will take over the acts referred to in Chapter I of Annex I, except for the provisions that concern live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen" and that "[w]hen an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act". The points are included in Chapter I of Annex I to the Agreement.

47 The acts included in Chapter I of Annex I therefore apply to Iceland, unless an adaptation text states otherwise (for a similar situation regarding acts included in Annex II compare Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 46). In relation to the Directive no adaptation has been agreed. As a result, the Directive fully applies to Iceland.

48 According to Article 7 EEA, a Contracting Party is bound by and must ensure full implementation of acts included in the Annexes. Moreover, the EEA/EFTA States are obliged under Article 3 EEA to take all appropriate measures to ensure fulfilment of the obligations arising from the Agreement and they must abstain from measures that could jeopardise the attainment of its objectives.

viðauka hans. Tilskipunin hefur verið tekin upp í I. viðauka. Sérstök ákvæði og fyrirkomulag sem eiga við um allar framleiðsluvörur, nema annað sé tekið fram, er einnig að finna í 23. gr. Samningsaðilar skuldbinda sig, enn fremur, til að halda áfram viðleitni sinni til að auka með stigvaxandi hætti frjálsræði í viðskiptum með landbúnaðarafurðir (sjá 2. mgr. 19. gr. EES-samningsins). Þessi ákvæði mæla fyrir um reglusetningu innan EES á sviði landbúnaðar.

46 EES-réttur er ekki að öllu leyti eins og Evrópuréttur, hvað heilbrigði dýra og plantna varðar. I. viðauki tók til að mynda aðeins til Íslands í tilviki lagareldisdýra og fiskafurða, þar til ákvörðun sameiginlegu EES-nefndarinnar nr. 133/2007 tók gildi. Samkvæmt þeirri ákvörðun endurskoðuðu samningsaðilar stöðuna og lýstu því yfir að ákvæði I. kafla I. viðauka skyldu taka til Íslands „að frátöldum ákvæðum um lifandi dýr, önnur en fisk og eldisdýr, og dýraafurðir á borð við egg, fósturvísa og sæði.“ Áfram sagði, að ef tiltekin gerð ætti ekki að taka til Íslands eða aðeins að hluta til skyldi það tekið fram í tengslum við hana. Liðirnir koma fram í I. kafla I. viðauka við samninginn.

47 Gerðirnar sem teknar hafa verið upp í I. kafla I. viðauka eiga því við um Ísland, nema annað sé tekið fram í aðlögunartextanum (til samanburðar má benda á svipað mál er varðaði gerðir sem teknar hafa verið upp í II. viðauka, mál E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, 46. mgr.). Ekki hefur verið samið um neinar aðlaganir fyrir tilskipunina. Hún tekur því að öllu leyti til Íslands.

48 Samkvæmt 7. gr. EES-samningsins verður samningsaðili bundinn af þeim gerðum sem teknar hafa verið upp í viðaukum og ber að tryggja fulla innleiðingu þeirra. Samkvæmt 3. gr. EES-samningsins ber EES/EFTA-ríkjum jafnframt skylda til að gera allar viðeigandi ráðstafanir til að tryggja að staðið verði við þær skuldbindingar sem af samningnum leiðir. Þau skulu og varast ráðstafanir sem teflt geta því í tvísýnu að markmiðum samningsins verði náð.

49 It follows that in so far as the Contracting Parties have agreed to extend the scope of the Agreement such an extension may limit, as in this case, an EEA/EFTA State's discretion in setting rules on trade in goods.

50 The answer to the first question must thus be that the field of application of the EEA Agreement, as defined in Article 8 EEA, does not entail that an EEA State has discretion to set rules on the importation of raw meat products unbound by relevant provisions incorporated into the Annexes to the EEA Agreement.

THE SECOND QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

51 The plaintiff, ESA and the Commission argue that the Directive has introduced a detailed and harmonised system of veterinary inspections of fresh meat to replace existing inspection systems within the country of destination. In the context of such a harmonised system, the scope for an EEA State to impose additional controls or requirements with respect to products being imported into its territory is strictly limited. The Commission adds that any such discretion to impose additional rules or requirements would be contrary to the aim of the Directive, expressed in the fourth recital of its preamble.

52 The plaintiff, ESA and the Commission submit that the checks that may be carried out at the place of destination are described in Article 5 of the Directive. EEA States cannot impose more rigorous measures, save for protective measures which are temporary in nature and required for the control of an outbreak of a zoonosis or disease or a cause likely to constitute a serious health hazard to animals or humans. Furthermore, as the Directive has exhaustively harmonised the regulatory regime for veterinary checks for animal

49 Af framansögðu leiðir, að hafi samningsaðilar komið sér saman um að rýmka gildissvið samningsins, getur slík rýmkun takmarkað heimild EES/EFTA-ríkis til reglusetningar um viðskipti með vörur.

50 Fyrstu spurningunni verður því að svara þannig að gildissvið EES-samningsins, eins og það er markað í 8. gr. hans, leiðir ekki til þess að EES-ríki hafi frjálsar hendur um setningu reglna um innflutning hrárrar kjötvöru og sé óbundið af viðeigandi ákvæðum sem tekin hafa verið upp í viðauka EES-samningsins.

ÖNNUR SPURNINGIN

ATHUGASEMDIR SEM LAGÐAR VORU FYRIR DÓMSTÓLINN

51 Að mati stefnanda, ESA og framkvæmdastjórnarinnar kveður tilskipunin á um nákvæmt og samræmt kerfi dýraheilbrigðiseftirlits með fersku kjöti sem komi í stað þáverandi eftirlitskerfa innflutningslandsins. Innan þessa samræmda kerfis sé heimild EES-ríkis til að beita auknu eftirliti eða gera aðrar kröfur vegna þeirra vara sem fluttar eru inn á yfirráðasvæði þess verulega takmarkaðar. Framkvæmdastjórnin segir jafnframt að slík heimild til að setja viðbótarreglur eða –skilyrði gengi gegn markmiði tilskipunarinnar, eins og það sé orðað í 4. lið formálsorða hennar.

52 Stefnandi, ESA og framkvæmdastjórnin telja að því eftirliti sem heimilt sé að framkvæma á áfangastað sé lýst í 5. gr. tilskipunarinnar. EES-ríkjum sé ekkert svigrúm veitt til að beita strangari reglum, ef frá eru taldar verndarráðstafanir, sem séu tímabundnar í eðli sínu og miði að því að hemja útbreiðslu dýrasjúkdóms sem geti einnig lagst á menn eða eitthvert það ástand sem geti stofnað dýrum eða mönnum í hættu. Tilskipunin hafi enn fremur samræmt reglukerfi um dýraheilbrigðiseftirlit vegna

products, the imposition of additional requirements or rules by the EEA State of destination cannot be justified under Article 13 EEA.

53 In the view of the plaintiff, ESA and the Commission, the administrative requirements referred to in the question from the national court constitute veterinary checks within the meaning of Article 2 of the Directive. They do not appear to fall within the type of checks permitted by Article 5 of the Directive. Insofar as the requirements are systematic, they cannot be described as spot-checks, and as such go beyond what is permissible pursuant to Article 5. In particular, the so-called freezing requirement is beyond what is permitted under the Directive or any act to which it refers.

54 The plaintiff, ESA and the Commission contend that a prior notification system is not in line with the requirements of the Directive. Thus, it must be all the more clear that a prior authorisation system, such as the one at issue, is incompatible with the Directive.

55 The plaintiff and ESA submit further that the Icelandic administrative formalities require importers to fulfil certain substantive conditions. That is not permitted under Article 5 of the Directive. Veterinary checks in the State of destination can only aim at verifying, by means of non-discriminatory examination, that the requirements of Article 3 of the Directive have been complied with. This means whether the product has been obtained, checked, marked and labelled in accordance with EEA rules. EEA States thus cannot impose checks that do not find their basis in EEA rules. In the plaintiff's view, this applies to the requirement of the Icelandic Regulation to demonstrate that products have been stored frozen for a certain period of time prior to customs clearance.

56 ESA goes on to challenge Article 5(e), (f) and (g) of the Icelandic Regulation. As to the salmonella certificate required under its Article

dýraafurða með tæmandi hætti. Verði því setning annarra reglna eða skilyrða af hálfu innflutningslandsins ekki réttlætt með skírskotun til 13. gr. EES-samningsins.

53 Að mati stefnanda, ESA og framkvæmdastjórnarinnar falla þær stjórnsýslukröfur, sem minnst sé á í annarri spurningunni, undir dýraheilbrigðiseftirlit í skilningi 2. gr. tilskipunarinnar. Þær falli ekki undir það eftirlit sem heimilað sé í 5. gr. tilskipunarinnar. Að því marki sem kröfurnar séu kerfisbundnar verði þeim ekki lýst sem skyndikönnunum og gangi því lengra en heimilt sé samkvæmt 5. gr. Sérstaklega falli skilyrðið um frystingu utan við þær kröfur sem tilskipunin geri, eða nokkur lagagerð sem hún vísar til.

54 Stefnandi, ESA og framkvæmdastjórnin halda því fram að kerfi sem feli í sér fyrirfram tilkynningarskyldu standist ekki kröfur tilskipunarinnar. Því sé ljóst að kerfi, líkt og það sem til skoðunar sé í þessu máli, samrýmist ekki tilskipuninni.

55 Stefnandi og ESA telja jafnframt að formsatriði á sviði íslenskrar stjórnsýslu leggi þá skyldu á innflutningsaðila að þeir uppfylli tiltekin efnisleg skilyrði. Slíkt sé óheimilt samkvæmt 5. gr. tilskipunarinnar. Dýraheilbrigðiseftirlit í innflutningslandinu megi aðeins miða að því að kannað sé með hlutlausum athugunum hvort kröfum 3. gr. hafi verið fullnægt. Það er hvort vörurnar hafi verið skoðaðar, skráðar og merktar í samræmi við EES-reglur. EES-ríki geti því ekki gert kröfur sem eigi sér enga stoð í EES-rétti. Að mati stefnanda eigi þetta við um þá kröfu, að sýna verði fram á að vörurnar hafi verið frystar í tiltekinn tíma fyrir tollafgreiðslu.

56 ESA gagnrýnir einnig e-, f- og g-lið íslensku reglugerðarinnar. Varðandi salmonelluvottorðið, sem krafist er samkvæmt e-lið 5. gr.

5(e), ESA contends that such additional guarantees, which are provided for under Regulation (EC) No 853/2004, may not be applied when the EEA State in question does not have an approved control programme.

57 As regards the requirement in Article 5(f) of the Icelandic Regulation, that the products conform to the regulation on food contaminants, ESA observes that the EEA legislation on contaminants in food sets out maximum levels for certain contaminants (Regulation (EEC) No 315/93 and Regulation (EC) No 1881/2006). That legislation does not contain any provisions giving EEA States a legal basis to impose on importers the completion of a systematic procedure to demonstrate that food products are in conformity with the current legislation on food contaminants.

58 ESA understands Article 5(g) of the Icelandic Regulation to entail a systematic obligation for the importer to present to the Food and Veterinary Authority photographs/pdf documents illustrating the packaging. ESA notes that the EEA legislation on the labelling of foodstuffs (Regulation (EU) No 1169/2011) does not provide a legal basis for EEA States to impose on importers the completion of a systematic procedure to demonstrate that food products are in conformity with legislation on labelling.

59 In ESA's view, the existence of customs controls on agricultural goods by EFTA States cannot justify the existence of additional veterinary checks, as argued by Iceland. Customs controls and veterinary checks serve different purposes and operate in different spheres of the EEA Agreement.

60 The defendant submits that the Directive was enacted with a view to completing the internal market and pursuing the common agricultural policy. In the EEA there is no internal market for the

hennar, bendir ESA á ekki megi krefjast slíkra viðbótarskilyrða samkvæmt reglugerð 853/2004, nema viðkomandi EES-ríki sé með viðurkennt eftirlitskerfi.

57 Varðandi skilyrði f-liðar 5. gr. íslensku reglugerðarinnar um að þær vörur sem þar er minnst á uppfylli skilyrði reglugerðarinnar um aðskotaefni í matvælum, bendir ESA á að EES-löggjöfin um aðskotaefni í matvælum kveði á um hámarksgildi tiltekinna aðskotaefna (reglugerð 315/93/EBE og reglugerð 1881/2006/EB). Engin ákvæði þeirra laga veiti EES-ríkjum lagalega heimild til að leggja þá skyldu á innflutningsaðila, að þeir undirgangist kerfisbundið ferli til að sýna fram á að matvæli standist gildandi reglur um aðskotaefni í matvælum.

58 Skilningur ESA á g-lið 5. gr. íslensku reglugerðarinnar er sá að hún feli í sér kerfisbundna skyldu innflutningsaðila til að leggja fyrir Matvælastofnun ljósmyndir/pdf-skjöl sem sýna umbúðir. ESA bendir á að EES-löggjöf um merkingu matvæla (reglugerð nr. 1169/2011/EB) veiti EES-ríkjum ekki heimild til að leggja þá skyldu á innflutningsaðila, að þeir undirgangist kerfisbundið ferli til að sýna fram á að matvæli standist gildandi lög um merkingu matvæla.

59 Að mati ESA getur tilvist tolleftirlits með landbúnaðarvörum hjá EFTA-ríkjunum ekki réttlætt viðbótar-dýraheilbrigðiseftirlit, líkt og Ísland heldur fram. Tolleftirlit og dýraheilbrigðiseftirlit þjóni ólíkum tilgangi og heyri undir ólík svið EES-samningsins.

60 Stefndi telur að markmiðið með tilskipuninni hafi verið að ljúka við að koma á hinum innri markaði og að fylgja eftir sameiginlegu landbúnaðarstefnunni. Innan EES sé hvorki innri markaður fyrir vörurnar sem mál þetta fjallar um, né sameiginleg

products at issue and there is no common agricultural policy. The isolated geographical location of Iceland and the immunological vulnerability of the country's animal population are reflected by the numerous acts in Annex I to the EEA Agreement not applicable to Iceland. Thus, the specific EEA context of the Directive and the special circumstances of Iceland must be taken into account when interpreting the Directive.

61 The defendant observes that the matter in dispute in the main proceedings concerns the freezing certificate. In its view, it is not clear from the District Court's question why all the Icelandic rules concerning the import of raw meat should be reviewed in the light of the Directive in the present proceedings.

62 The defendant submits that the freezing certificate does not discourage imports of raw meat, as can be seen from the increasing volume of imported meat over the last ten years. Moreover, the certificate does not seek to double check compliance with requirements that have been controlled in the State of dispatch. Iceland has full trust in the veterinary checks that are conducted in other EEA States by virtue of the common EEA rules. The certificate only seeks to respond to the special situation of Iceland. That objective lies beyond the EEA rules. Consequently, the freezing certificate does not come within the scope of the Directive.

FINDINGS OF THE COURT

63 By its second question, the referring court asks whether the Icelandic rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and require the submission, for this purpose, of an import declaration, information on the country of origin and production, the type of product and the producer, and the required certificates, including a certificate confirming that the products have been stored frozen for a certain period, prior to customs clearance, are compatible with the Directive.

landbúnaðarstefna. Einangruð landfræðileg lega Íslands og ónæmisfræðilegt varnarleysi dýraflóru landsins endurspeglist einnig í þeim fjölmörgu ákvæðum I. viðauka EES-samningsins sem gilda ekki um Ísland. Því verði við túlkun tilskipunarinnar að taka mið af hinu tiltekna EES-samhengi hennar og hinum sérstöku aðstæðum Íslands.

61 Stefndi bendir á að málið sem rekið sé fyrir héraðsdómi varði „frystingarvottorðið". Ekki sé þó ljóst af spurningu héraðsdóms hvers vegna skýra eigi allar íslenskar reglur um innflutning á hráu kjöti með hliðsjón af tilskipuninni í þessu máli.

62 Stefndi telur að „frystingarvottorðið" hafi ekki letjandi áhrif á innflutning á hráu kjöti, líkt og ráða megi af auknu magni innflutts kjöts á síðastliðnum áratug. Kröfunni um vottorðið sé þar að auki ekki ætlað að endurtaka yfirferð á því hvort upprunaríkið hafi gengið úr skugga um að öll skilyrði séu uppfyllt. Ísland beri fullt traust til dýraheilbrigðiseftirlits sem fram fer í öðrum aðildarríkjum í samræmi við sameiginlegar EES-reglur. Vottorðinu sé einungis ætlað að fást við sérstakar aðstæður Íslands. Það markmið standi utan við EES-rétt. Af framansögðu leiði að skilyrðið um frystingarvottorð falli ekki undir gildissvið tilskipunarinnar.

ÁLIT DÓMSTÓLSINS

63 Með annarri spurningunni spyr landsdómstóllinn hvort íslensku reglurnar sem krefjast þess að innflytjandi hrárrar kjötvöru sæki um sérstakt leyfi áður en varan er flutt inn, og áskilji að lagðar séu fram í þeim tilgangi aðflutningsskýrslur, upplýsingar um uppruna- og framleiðsluland vörunnar, tegund vöru og framleiðanda auk tilskilinna vottorða, þar á meðal um að kjötið hafi verið fryst í tiltekinn tíma fyrir tollafgreiðslu, samrýmist tilskipuninni.

64 As expressed in its preamble, the emphasis of the Directive is to ensure that veterinary checks are carried out at the place of dispatch only. This is an emanation of the country of origin principle. Article 1 of the Directive provides that veterinary checks for products of animal origin may no longer be carried out at the frontiers, but shall be carried out in accordance with the Directive. In particular, Article 3 of the Directive as adapted to the EEA Agreement requires that an EEA/EFTA State shall ensure that products of animal origin have been obtained, checked, marked and labelled in accordance with the relevant EEA rules for the destination in question and that the products are accompanied by a health certificate, animal-health certificate or any other document provided for by EEA veterinary rules. According to Article 5, veterinary checks may be carried out in the State of destination at the place of destination as veterinary spot-checks or, in the event of a serious presumption of irregularity, while the goods are in transit.

65 The objective of the Directive leads to the harmonisation of the basic requirements of veterinary control to safeguard public and animal health. The harmonised system of veterinary checks is based on full inspection of the goods in the EEA State of dispatch. The system is intended to replace, as a rule, inspection in the EEA State of destination. Considerations related to the need to protect public or animal health cannot justify additional specific constraints imposed by an EEA State when the frontier is crossed (see, for comparison, judgment in *Commission* v *Sweden,* C-111/03, EU:C:2005:619, paragraph 51).

66 The objective of the Directive could not be realised, nor its effectiveness achieved, if the EEA States were free to go beyond its requirements. Maintaining or adopting national measures other than those expressly provided for in the Directive must therefore be regarded as incompatible with the Directive’s purpose (compare *Commission* v *Sweden*, cited above, paragraph 63).

64 Eins og fram kemur í formálsorðunum er með tilskipuninni lögð áhersla á að tryggja að dýraheilbrigðiseftirlit fari einungis fram á sendingarstað. Þetta er birtingarmynd meginreglunnar um upprunaland. 1. gr. tilskipunarinnar kveður á um að dýraheilbrigðiseftirlitið með dýraafurðum skuli ekki lengur fara fram við landamæri, heldur samkvæmt tilskipuninni. Þess er sérstaklega krafist af EES/EFTA-ríkjum skv. 3. gr. tilskipunarinnar, eins og hún hefur verið löguð að EES-samningnum, að þau tryggi að dýraafurðir hafi verið fengnar, skoðaðar og merktar í samræmi við reglur EES-réttar, sem gilda um viðtökustaðinn, og að heilbrigðisvottorð, dýraheilbrigðisvottorð eða eitthvert annað skjal sem kveðið er á um í dýraheilbrigðisreglum EES fylgi þeim. Samkvæmt 5. gr. má einnig sinna dýraheilbrigðiseftirliti á viðtökustað, í formi dýraheilbrigðisskyndikannana, eða, ef uppi er rökstuddur grun um brot, við flutning varanna á yfirráðasvæði ríkis.

65 Tilskipunin miðar að samhæfingu grundvallarkrafna um verndun heilbrigðis manna og dýra. Samræmt dýraheilbrigðiseftirlit byggist á ítarlegri skoðun varanna í sendingarríkinu. Kerfinu er ætlað að koma í stað reglulegs eftirlits á viðtökustað. Ekki er unnt að réttlæta sérstakar viðbótartakmarkanir EES-ríkis, þegar farið er yfir landamæri, með vísan til lýðheilsusjónarmiða eða dýraheilbrigðis (sjá, til samanburðar, mál *Framkvæmdastjórnarinnar* gegn *Svíþjóð*, C-111/03, EU:C:2005:619, 51. mgr.)

66 Markmiði tilskipunarinnar og virkni væri ekki unnt að ná ef EES-ríkjum væri frjálst að ganga lengra en þar er krafist. Það verður því að teljast ósamrýmanlegt tilgangi tilskipunarinnar að gripið sé til viðbótarráðstafana eða þeim viðhaldið, umfram þær sem sérstaklega er kveðið á um í henni (sjá, til samanburðar, áður tilvitnað mál *Framkvæmdastj*órnarinnar gegn *Svíþjóð,* 63. mgr.)

67 To ensure that the requirements of Article 3 of the Directive have been complied with, Article 5 permits the State of destination to carry out veterinary spot-checks. However, the defendant has not argued that the requirements in question constitute spot-checks. On the contrary, it is undisputed that they are regular and systematic. They are thus incompatible with the Directive. The same goes for the exercise of veterinary checks by customs clearance at the frontier since checks must be made at the place of destination, unless a serious presumption of irregularity exists. Such a presumption has not been alleged.

68 The defendant has argued that the national rules do not discourage imports of raw meat, since the volume of imported meat to Iceland over the last ten years has increased. A distinction should be made between administrative formalities and substantive requirements. According to the defendant, the Directive contains requirements regarding administrative formalities, whereas the Icelandic legislation on importation of raw meat and, in particular, the freezing requirement is of a substantive nature.

69 However, the reference to import volumes cannot include raw meat, as illustrated by the present case. In any event, the existence of adverse effects on trade is not a requirement to establish a breach of an obligation under the EEA Agreement (see for comparison *Commission* v *Sweden*, cited above, paragraph 67).

70 Moreover, a distinction between administrative formalities and substantive requirements cannot be made in this case. The administrative formalities under the Directive serve to verify that substantive checks have been carried out to protect public and animal health.

71 A duty of prior notification imposed by national law on importers of products of animal origin from other Member States is incompatible

67 Til að tryggja að kröfum 3. gr. tilskipunarinnar hafi verið fullnægt, heimilar 5. gr. viðtökuaðildarríkinu að framkvæma dýraheilbrigðisskyndikannanir. Stefndi hefur þó ekki haldið því fram að hinar umdeildu skyldur sem lagðar eru á innflutningsaðila séu skyndikannanir. Þvert á móti, er óumdeilt að þær séu reglulegar og kerfisbundnar. Þær eru því ósamrýmanlegar tilskipuninni. Hið sama á við um dýraheilbrigðiseftirlit við tollafgreiðslu á landamærum, þar sem eftirlit verður að fara fram á viðtökustað, nema uppi séu alvarlegar grunsemdir um misfellur. Engar staðhæfingar um slíkar grunsemdir liggja fyrir í máli þessu.

68 Stefndi hefur haldið því fram að reglur landsréttar letji ekki innflutningi á hráu kjöti, enda hafi magn innflutts kjöts aukist á síðastliðnum áratug. Hér verði að gera greinarmun á formsatriðum á sviði stjórnsýslu og efnislegum kröfum. Stefndi telur tilskipunina geyma kröfur um formsatriði á sviði stjórnsýslu, en íslenska löggjöfin um innflutning hrárra kjötvara, og þá sérstaklega skilyrðið um frystingu, séu efnislegs eðlis.

69 Tilvísun til innflutts magns getur hins vegar ekki tekið til hrárra kjötvara, eins og fram er komið í máli þessu. Neikvæð áhrif á viðskipti eru í öllu falli ekki skilyrði fyrir því að brot á EES-samningnum teljist liggja fyrir (sjá, til samanburðar, áður tilvitnað mál *Framkvæmdastjórnarinnar* gegn *Svíþjóð,* 67. mgr.)

70 Ekki er heldur hægt að gera greinarmun á formsatriðum á sviði stjórnsýslu og efnislegum kröfum í máli þessu. Samkvæmt tilskipuninni þjóna formsatriðin á sviði stjórnsýslu þeim tilgangi að sannreyna hvort efnislegt eftirlit hafi farið fram til að vernda heilsu manna og dýra.

71 Fyrirfram tilkynningaskylda samkvæmt reglum landsréttar á innflutningsaðila dýraafurða frá öðrum aðildarríkjum er ósamrýmanleg tilskipuninni (sjá, til samanburðar, áður tilvitnað mál

with the Directive (compare *Commission* v *Sweden*, cited above). An import permit requirement such as the one at issue is even more restrictive than a mere notification system.

72 Furthermore, the Directive makes no provisions for the freezing of meat as a legitimate trade rule for veterinary purposes between EEA States and does not allow for any such requirement to be made under national law. As a consequence, national law may not require a certificate to verify the freezing of meat.

73 The defendant's argument that Iceland's geographical isolation and the immunological vulnerability of Iceland's animal population and the potential consequences for the life and health of humans should be taken into account when interpreting the Directive must be rejected. Iceland averred that it has full trust in the veterinary checks that are conducted in other EEA States by virtue of the common EEA rules. The EEA Agreement recognises an adaptation for Iceland when live animals, other than fish and aquaculture animals, are concerned. However, the Agreement has no adaptation for import to Iceland of raw meat.

74 The present procedures have focused on the requirement of the freezing certificate. The observations submitted to the Court and the pleadings at the oral hearing do not provide a firm basis to examine the other conditions for obtaining an import permit mentioned in the second question from the national court.

75 ESA has stated that certificates concerning salmonella, food contaminants and labelling, as required under Article 5(e), (f) and (g) of the Icelandic Regulation, are dealt with in separate regulations under EEA law. The Court observes that in relation to the Directive such certificates must, in principle, be considered in the same manner as a freezing certificate.

Framkvæmdastjórnarinnar gegn *Svíþjóð*). Krafa um innflutningsleyfi, eins og það sem um ræðir í málinu, er takmarkandi ráðstöfun sem gengur enn lengra en einfalt tilkynningarkerfi.

72 Enn fremur er í tilskipuninni ekki gert ráð fyrir frystingu kjötvöru í því skyni að vernda dýraheilbrigði, sem lögmætri reglu í viðskiptum milli EES-ríkja. Hún hefur heldur enga heimild að geyma fyrir setningu slíks skilyrðis samkvæmt landsrétti. Þar af leiðandi er óheimilt að vottorðs um að kjötið hafi verið fryst sé krafist að landsrétti.

73 Hafna verður röksemdum stefnda um að taka beri tillit til einangraðar landfræðilegrar legu Íslands og ónæmisfræðilegs varnarleysis dýraflóru landsins og hugsanlegra afleiðinga á líf og heilsu manna, við skýringu tilskipunarinnar. Ísland fullyrti að það beri fullt traust til dýraheilbrigðiseftirlits sem fram fer í öðrum aðildarríkjum í samræmi við sameiginlegar EES-reglur. Samkvæmt EES-samningnum er í gildi aðlögun fyrir Ísland, sem tekur til lifandi dýra, annarra en fiska og lagareldisdýra. Samningurinn hefur þó engin aðlögunarákvæði að geyma vegna innflutnings hrárra kjötvara til Íslands.

74 Við rekstur málsins hefur krafan um vottorð fyrir frystingu verið í forgrunni. Skriflegar athugasemdir og munnlegur málflutningur fyrir dómstólnum veita ekki nægilega traustan grundvöll til að unnt sé að leggja mat á hin skilyrðin fyrir úthlutun innflutningsleyfis, sem minnst er á í annarri spurningu landsdómstólsins.

75 ESA hefur haldið því fram að vandinn að baki kröfum um vottorð vegna salmonellu, aðskotaefna í matvælum og merkinga, sem mælt er fyrir um í e-, f- og g-lið íslensku reglugerðarinnar sé leystur með öðrum reglum EES-réttar. Í meginatriðum telur dómurinn að leggja beri mat á slík vottorð með sama hætti og lagt hefur verið mat á vottorðið um frystingu.

76 The aim to protect human and animal health in EEA trade mentioned in Article 13 EEA cannot be invoked to justify measures banning or restricting imports when a Directive provides for the harmonization of the measures necessary to guarantee the protection of animal and human health and when they establish procedures to check that they are observed (see, for comparison, judgment in *Commission* v *Portugal*, C-52/92, EU:C:1993:216, paragraph 17).

77 The answer to the second question must therefore be that it is not compatible with the provisions of the Directive for an EEA State to enact rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and requiring the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance.

THIRD TO SIXTH QUESTIONS

78 In light of the answer given to the second question, there is no need to address the remaining questions referred by the national court.

V COSTS

79 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

76 Ekki er hægt að vísa til markmiðsins um vernd lífs og heilsu manna og dýra í viðskiptum innan EES, eins og það birtist í 13. gr. EES-samningsins, í tilvikum þar sem tilskipun kveður á um samræmingu nauðsynlegra aðgerða til að tryggja vernd heilsu dýra og manna, og um eftirlitsferli með framkvæmd þess markmiðs (sjá, til samanburðar, mál *Framkvæmdastjórnarinnar* gegn *Portúgal*, C-52/92, EU:C:1993:216, 17. mgr.).

77 Því verður að svara annarri spurningunni með þeim hætti að það samrýmist ekki ákvæðum tilskipunarinnar, að ríki, sem aðild á að EES-samningnum, setji reglur, þar sem þess er krafist, að innflytjandi hrárrar kjötvöru sæki um sérstakt leyfi áður en varan er flutt inn, og áskilji að lagt sé fram vottorð um að kjötið hafi verið geymt frosið í tiltekinn tíma fyrir tollafgreiðslu.

ÞRIÐJA TIL SJÖTTA SPURNING

78 Í ljósi þess hvernig annarri spurningunni var svarað gerist ekki þörf á að tekin sé afstaða til þeirra spurninga landsdómstólsins sem eftir standa.

V MÁLSKOSTNAÐUR

79 Ríkisstjórn Noregs, 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.

On those grounds,

The Court

In answer to the questions referred to it by *Reykjavík District Court* hereby gives the following Advisory Opinion:

1. **The field of application of the EEA Agreement as defined in Article 8 EEA does not entail that an EEA State has discretion to set rules on the importation of raw meat products, since that discretion may be limited by provisions incorporated into an Annex to the EEA Agreement.**

2. **It is not compatible with the provisions of Directive 89/662/EEC for an EEA State to enact rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and requiring the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Delivered in open court in Luxembourg on
1 February 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Með vísan til framangreindra forsendna lætur,

Dómstóllinn

uppi svohljóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjavíkur beindi til dómstólsins:

1. **Gildissvið EES-samningsins, eins og það er markað í 8. gr. hans, leiðir ekki til þess að EES-ríki hafi frjálsar hendur um setningu reglna um innflutning hrárrar kjötvöru, þar sem svigrúm þess getur takmarkast af ákvæðum sem tekin hafa verið upp í viðauka EES-samningsins.**

2. **Það samrýmist ekki ákvæðum tilskipunar 89/662/EBE að ríki, sem aðild á að EES-samningnum, setji reglur, þar sem þess er krafist, að innflytjandi hrárrar kjötvöru sæki um sérstakt leyfi áður en varan er flutt inn, og áskilji að lagt sé fram vottorð um að kjötið hafi verið geymt frosið í tiltekinn tíma fyrir tollafgreiðslu.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Kveðið upp i heyranda hljóði í Lúxemborg
***1. febrúar 2016*.**

Gunnar Selvik
Dómritari

Carl Baudenbacher
Forseti

Report for the Hearing

in Case E-17/15

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 Reykjavík District Court (*Héraðsdómur Reykjavíkur)* in the case between

Ferskar kjötvörur ehf.

and

The Icelandic State

concerning the applicability of the provisions of the Agreement on the European Economic Area to the import of raw meat products.

I INTRODUCTION

1 In 2014, the Icelandic meat distribution company Ferskar kjötvörur ehf. ("the plaintiff") applied to the Icelandic Minister of Fisheries and Agriculture for permission to import 83 kg of raw beef fillets from the Netherlands via Denmark to Iceland. The permission was granted *inter alia* on the condition that the meat was stored at a temperature of at least -18°C for one month before customs clearance. The plaintiff objected to this, stating that the purpose of the import was to offer fresh meat to Icelandic consumers. The condition was nevertheless maintained. In the meantime, the meat had already been transported to Iceland and was being stored at the customs office. It was subsequently discarded.

Skýrsla Framsögumanns

í máli E-17/15

BEIÐNI samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls um ráðgefandi álit EFTA-dómstólsins, frá Héraðsdómi Reykjavíkur, í máli

Ferskar kjötvörur ehf.

gegn

íslenska ríkinu

varðandi gildissvið ákvæða samningsins um Evrópska efnahagssvæðið um innflutning á hráum kjötvörum.

I INNGANGUR

1 Árið 2014 sótti íslenska fyrirtækið Ferskar kjötvörur ehf. (stefnandi) um leyfi Sjávarútvegs- og landbúnaðarráðuneytisins til innflutnings á 83 kg af ferskum nautalundum frá Hollandi til Íslands, með viðkomu í Danmörku. Leyfið var veitt, meðal annars með því skilyrði að kjötið yrði geymt við að minnsta kosti -18°C í einn mánuð fyrir tollafgreiðslu. Stefnandi mótmælti þessu, á grundvelli þess að tilgangur innflutningsins væri að bjóða íslenskum neytendum upp á ferska kjötvöru. Ekki var þó vikið frá þessu skilyrði. Meðan á þessum samskiptum stóð var búið að flytja kjötið til Íslands og var það sett í geymslu hjá tollstjóra. Kjötinu var síðar fargað.

2 In the case before Reykjavík District Court, the plaintiff claims payment from the Icelandic State ("the defendant") of EUR 1 909 and ISK 80 606, which correspond to the price of the meat and its transport. In the context of those proceedings, the District Court has decided to refer to the Court several questions concerning the compatibility of the abovementioned condition with the Agreement on the European Economic Area ("the EEA Agreement" or "EEA").

II LEGAL BACKGROUND

EEA LAW

3 In Part II of the EEA Agreement ("Free Movement of Goods") Chapter 1 is headed "Basic Principles". The first provision of that chapter, Article 8, reads:

> *1. Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*
>
> *2. …*
>
> *3. Unless otherwise specified, the provisions of this Agreement shall apply only to:*
>
> *(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
>
> *(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

2 Í málinu sem rekið er fyrir Héraðsdómi krefst stefnandi þess að íslenska ríkinu (stefnda) verði gert að greiða sér fjárhæðina 1.909 evrur og 80.606 krónur, sem svarar til verðs kjötsins og útlagðs flutningskostnaðar. Í tengslum við þann málarekstur ákvað héraðsdómur að beina nokkrum spurningum til EFTA-dómstólsins varðandi það hvort framangreint skilyrði fái samrýmst samningnum um Evrópska efnahagssvæðið (EES-samningnum).

II LÖGGJÖF

EES-RÉTTUR

3 1. kafli II. hluta EES-samningsins („Frjálsir vöruflutningar) ber yfirskriftina „Grundvallarreglur". Í fyrsta ákvæði kaflans, sem er 8. gr., segir:

1. Koma skal á frjálsum vöruflutningum milli samningsaðila í samræmi við ákvæði samnings þessa.

2. …

3. Ef annað er ekki tekið fram taka ákvæði samningsins einungis til:

(a) framleiðsluvara sem falla undir 25.–97. kafla í samræmdu vörulýsingar- og vörunúmeraskránni, að frátöldum þeim framleiðsluvörum sem skráðar eru í bókun 2;

(b) framleiðsluvara sem tilgreindar eru í bókun 3 í samræmi við það sérstaka fyrirkomulag sem þar er greint frá.

4 Agricultural products and foodstuffs fall outside Chapters 25 to 97 of the Harmonized Commodity Description and Coding System. Furthermore, raw meat is not among the products specified in Protocol 3. The goods at issue in the main proceedings are therefore outside the scope of the EEA Agreement unless otherwise specified.

5 Article 18 EEA reads:

Without prejudice to the specific arrangements governing trade in agricultural products, the Contracting Parties shall ensure that the arrangements provided for in Articles 17 and 23(a) and (b), as they apply to products other than those covered by Article 8(3), are not compromised by other technical barriers to trade. Article 13 shall apply.

6 Article 17 EEA, which is included in Chapter 2 on "Agricultural and Fishery Products", refers to Annex I concerning specific provisions and arrangements concerning veterinary and phytosanitary matters. Article 23(a) EEA, in Chapter 4 on "Other Rules relating to the Free Movement of Goods", refers to specific provisions and arrangements laid down in Protocol 12 and Annex II in relation to technical regulations, standards, testing and certification. Article 23(b) EEA is not relevant for the present case. Article 13 EEA, which is referred to in the last sentence of Article 18 EEA, reads:

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.

4 Landbúnaðarafurðir og matvæli falla ekki undir 25. til 97. kafla samræmdu vörulýsingar- og vörunúmeraskrárinnar. Hrátt kjöt er auk þess ekki meðal þeirra vara sem tilgreindar eru í bókun 3. Þær vörur sem málið fyrir landsdómstólnum varðar falla því utan gildissviðs EES-samningsins nema annað sé sérstaklega tekið fram.

5 Í 18. gr. EES-samningsins segir:

Með fyrirvara um sérstakt fyrirkomulag varðandi viðskipti með landbúnaðarafurðir skulu samningsaðilar tryggja að fyrirkomulaginu, sem kveðið er á um í 17. gr. og a- og b-lið 23. gr. varðandi aðrar vörur en þær er heyra undir 3. mgr. 8. gr., verði ekki stofnað í hættu vegna annarra tæknilegra viðskiptahindrana. Ákvæði 13. gr. skulu gilda

6 17. gr. EES-samningsins sem tekin var upp í 2. kafla um „landbúnaðar- og sjávarafurðir“ vísar til I. viðauka sem hefur að geyma sérstök ákvæði og fyrirkomulag varðandi heilbrigði dýra og plantna. Í a-lið 23. gr., sem er hluti 4. kafla um „aðrar reglur um frjálsa vöruflutninga“ er vísað til sérstakra ákvæða og fyrirkomulags sem er að finna í bókun 12 og II. viðauka varðandi tæknilegar reglugerðir, staðla, prófanir og vottanir. B-liður 23. gr. hefur enga þýðingu fyrir mál þetta. Í 13. gr. EES-samningsins, sem vísað er til í lokamálslið 18. gr. segir:

Ákvæði 11. og 12. gr. koma ekki í veg fyrir að leggja megi á innflutning, útflutning eða umflutning vara bönn eða höft sem réttlætast af almennu siðferði, allsherjarreglu, almannaöryggi, vernd lífs og heilsu manna eða dýra eða gróðurvernd, vernd þjóðarverðmæta, er hafa listrænt, sögulegt eða fornfræðilegt gildi, eða vernd eignarréttinda á sviði iðnaðar og viðskipta. Slík bönn eða höft mega þó ekki leiða til gerræðislegrar mismununar eða til þess að duldar hömlur séu lagðar á viðskipti milli samningsaðila.

7 Chapter I of Annex I to the EEA Agreement contains provisions on veterinary issues. The first paragraph of point 2 of the introductory part reads:

The provisions contained in this Chapter shall apply to Iceland, except for the provisions concerning live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen. When an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act.

8 In Chapter I of Annex I to the EEA Agreement under heading 1.1, which sets out the basic texts concerning control matters, point 1 refers to Council Directive 89/662/EC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market[1] ("the Directive"), and to subsequent amendments to that directive.

9 The preamble to the Directive includes the following recitals:

[3] Whereas in the veterinary field frontiers are currently being used for carrying out checks aimed at safeguarding public health and animal health;

[4] Whereas the ultimate aim is to ensure that veterinary checks are carried out at the place of dispatch only; whereas the attainment of this objective implies the harmonization of the basic requirements relating to the safeguarding of public health and animal health;

[5] Whereas with a view to the completion of the internal market, pending the attainment of this objective, the emphasis should be placed on the checks to be carried out at the place of dispatch and in organizing those that could be carried out at the place of destination; whereas such a solution would entail the suspension of veterinary checks at the Community's internal frontiers;

1 OJ 1989 L 395, p. 13.

7 I. kafli I. viðauka EES-samningsins inniheldur ákvæði um heilbrigði dýra. Í 1. mgr. 2.-liðar inngangsorða kaflans segir:

Ákvæðin í þessum kafla skulu taka til Íslands, að undanskildum ákvæðum um lifandi dýr, önnur en fisk og lagareldisdýr, og dýraafurða eins og hrogn, egg og sæði. Þegar gerð á ekki að taka til Íslands, eða aðeins að hluta, skal taka það fram í tengslum við hana.

8 Í undirkafla 1.1. í I. kafla I. viðauka EES-samningsins, þar sem útlistaðir eru grundvallartextar um eftirlitsmál, er í 1. undirlið vísað til tilskipunar ráðsins 89/662/EBE frá 11. desember 1989 um dýraheilbrigðiseftirlit í viðskiptum innan bandalagsins til að stuðla að því að hinum innri markaði verði komið á[1] (tilskipunin) og eftirfarandi breytinga á henni.

9 Í formálsorðum tilskipunarinnar er að finna eftirfarandi liði:

[3] Á sviði dýraheilbrigðis eru landamærastöðvar notaðar um þessar mundir til að annast eftirlit sem hefur það að markmiði að vernda heilbrigði manna og dýra.

[4] Endanlegt markmið er að tryggja að dýraheilbrigðiseftirlit fari einungis fram á sendingarstað. Náist þetta markmið felur það í sér samhæfingu grundvallarkrafna um verndun heilbrigðis manna og dýra.

[5] Til að stuðla að því að hinum innri markaði verði komið á ætti, þar til markmiðinu er endanlega náð, að leggja áherslu á að eftirlit fari fram á sendingarstað og að skipuleggja það eftirlit sem gæti farið fram á viðtökustað. Slík lausn felur í sér að dýraheilbrigðiseftirlit á innri landamærumbandalagsins fellur niður.

1 Stjtíð. ESB 1989 L 395, bls. 13.

10 Article 1 of the Directive reads:

Member States shall ensure that the veterinary checks to be carried out on products of animal origin covered by the acts referred to in Annex A or by Article 14 and which are intended for trade are no longer carried out … at frontiers but are carried out in accordance with this Directive.

11 It is not disputed that the reference to Annex A covers products such as those at issue in the main proceedings.

12 Article 2(1) of the Directive contains the following definition:

'Veterinary check' means any physical check and/or administrative formality which applies to the products referred to in Article 1 and which is intended for the protection, direct or otherwise, of public or animal health;

13 Chapter I of the Directive is concerned with "Checks at origin", and consists of Articles 3 and 4. The first subparagraph of Article 3(1) reads:

Member States shall ensure that the only products intended for trade are those referred to in Article 1 which have been obtained, checked, marked and labelled in accordance with Community rules for the destination in question and which are accompanied to the final consignee mentioned therein by a health certificate, animal-health certificate or by any other document provided for by Community veterinary rules.

14 The first sentence of Article 4(1) reads:

Member States of dispatch shall take the necessary measures to ensure that operators comply with veterinary requirements at all stages of the production, storage, marketing and transport of the products referred to in Article 1.

15 Chapter II of the Directive contains rules on "Checks on arrival at the destination". In that regard, Article 5(1)(a) requires EEA States to implement the following measure:

10 Í 1. gr. tilskipunarinnar segir:

Aðildarríkin skulu tryggja að dýraheilbrigðiseftirlitið með afurðum úr dýraríkinu, sem falla undir tilskipanirnar sem eru taldar upp í viðauka A eða 14. gr. og hafa á viðskipti með, fari ekki lengur fram, … við landamærastöðvar heldur samkvæmt þessari tilskipun.

11 Óumdeilt er að tilvísunin til viðauka A taki til vara á borð við þær sem málið, sem rekið er fyrir landsdómstólnum, varðar.

12 Í 1. mgr. 2. gr. tilskipunarinnar er að finna eftirfarandi skilgreiningu:

„dýraheilbrigðiseftirlit“: eftirlit með ástandi og/eða formsatriðum á sviði stjórnsýslu sem tekur til afurðanna sem um getur í 1. gr. og er ætlað að vernda, beint eða óbeint, heilbrigði manna eða dýra;

13 1. kafli tilskipunarinnar varðar „eftirlit á upprunastað“ og samanstendur af 3. og 4. gr. Í fyrstu undirgrein 1. mgr. 3. gr. segir:

Aðildarríkin skulu tryggja að einu afurðirnar sem viðskipti eru höfð með séu þær sem um getur í 1. gr. og hafa verið fengnar, skoðaðar og merktar í samræmi við reglur bandalagsins, sem gilda um viðtökustaðinn, og þarf heilbrigðisvottorð að fylgja til endanlegs móttakanda sem þar er getið, dýraheilbrigðisvottorð eða eitthvert annað skjal sem kveðið er á um í dýraheilbrigðisreglum bandalagsins.

14 Fyrsta setning 1. mgr. 4. gr. er svohljóðandi:

Sendingaraðildarríkin skulu gera nauðsynlegar ráðstafanir til að tryggja að stjórnendur fullnægi dýraheilbrigðiskröfum á öllum stigum framleiðslunnar, geymslu, markaðssetningar og flutninga afurðanna sem um getur í 1. gr.

15 II. kafli tilskipunarinnar varðar „eftirlit á viðtökustað“: Varðandi það atriði, er í 1. mgr. 5. gr. lögð sú skylda á EES-ríki að þau komi eftirfarandi ráðstöfunum til framkvæmda:

The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport.

16 Articles 7 and 8 of the Directive lay down the measures to be taken if the competent authority of the EEA State of destination establishes the presence of agents responsible for a disease named in Directive 82/894/EEC, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans. In such a case, protective measures provided for in Article 9 may be applied.

17 In Chapter I of Annex I to the EEA Agreement under heading 7.1, which sets out the basic texts concerning measures relating to many sectors, point 13 refers to Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety[2] ("the Regulation"), and to subsequent amendments to that regulation. Point 13 also contains a number of adaptations of the Regulation for the purposes of the EEA Agreement.

18 Article 1(1) and (2) of the Regulation reads:

1. *This Regulation provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to*

2 OJ 2002 L 31, p. 1, and Icelandic EEA Supplement 2011 No 59, p. 123.

Lögbært yfirvald getur, á viðtökustað varanna, kannað með óhlutdrægum dýraheilbrigðisskyndikönnunum hvort kröfum 3. gr. hefur verið fullnægt; það getur einnig tekið sýni í þessu sambandi.

Jafnframt getur lögbært yfirvald umflutningsaðildarríkisins eða viðtökuaðildarríkisins, hafi það rökstuddan grun um brot, einnig látið fara fram eftirlit við flutning varanna á yfirráðasvæði sínu, þar með talið eftirlit með að flutningatækin fullnægi gildandi reglum;

16 Í 7. og 8. gr. tilskipunarinnar er kveðið á um þær ráðstafanir sem grípa beri til verði lögbær yfirvöld aðildarríkis vör við sjúkdómsvalda sem orsaka sjúkdóm sem nefndur er í tilskipun 82/894/EBE, dýrasjúkdóm sem getur einnig lagst á menn, eða eitthvert það ástand sem getur stofnað dýrum eða mönnum í hættu. Í slíkum tilvikum má grípa til þeirra verndarráðstafana sem mælt er fyrir um í 9. gr.

17 Í undirkafla 7.1 í I. kafla I. viðauka EES-samningsins, er í 13. undirlið vísað til reglugerðar Evrópuþingsins og ráðsins nr. 178/2002/EB frá 28. janúar 2002 um almennar meginreglur og kröfur samkvæmt lögum um matvæli, um stofnun Matvælaöryggisstofnunar Evrópu og um málsmeðferð vegna öryggis matvæla[2] (reglugerðin), ásamt áorðnum breytingum á reglugerðinni. 13. undirliður hefur einnig að geyma fjölda breytinga á reglugerðinni í tengslum við EES-samninginn.

18 Í 1. og 2. mgr. 1. gr. reglugerðarinnar segir:

1. *Með þessari reglugerð er lagður grunnur að því að tryggja heilbrigði manna og hagsmunum neytenda víðtæka vernd með tilliti til*

2 Stjtíð. ESB 2002 L 31, bls. 1, og íslenskur EES-viðbætir 2011 Nr. 59, bls. 123.

food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market. It establishes common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.

2. *For the purposes of paragraph 1, this Regulation lays down the general principles governing food and feed in general, and food and feed safety in particular, at Community and national level.*

…

19 Article 5(1) and (2) of the Regulation, under Chapter II on "General food law", reads:

1. *Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment.*
2. *Food law shall aim to achieve the free movement in the Community of food and feed manufactured or marketed according to the general principles and requirements in this Chapter.*

20 Article 6 of the Regulation reads:

1. *In order to achieve the general objective of a high level of protection of human health and life, food law shall be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure.*

matvæla og einkum tekið mið af fjölbreyttu framboði matvæla, þ.m.t. hefðbundin matvæli, um leið og skilvirk starfsemi innri markaðarins er tryggð. Í reglugerðinni eru ákveðnar sameiginlegar meginreglur og ábyrgð, leiðir til að byggja traustan vísindalegan grundvöll, koma á skilvirku skipulagi og verklagsreglum til að renna stoðum undir ákvarðanatöku í málum er varða öryggi matvæla og fóðurs.

2. *Að því er varðar ákvæði 1. mgr. er í þessari reglugerð kveðið á um almennar meginreglur í Bandalaginu og einstökum aðildarríkjum um matvæli og fóður almennt og um öryggi matvæla og fóðurs sérstaklega.*

…

19 Í 1. og 2. mgr. 5. gr. reglugerðarinnar, í II. kafla, „Almenn lög um matvæli“, segir:

1. *Tilgangur laganna um matvæli er víðtæk vernd lífs og heilsu manna og vernd hagsmuna neytenda, þ.m.t. vernd góðra starfsvenja í matvælaviðskiptum, að teknu tilliti til verndar heilbrigðis og velferðar dýra, plöntuheilbrigðis og umhverfis.*

2. *Í lögum um matvæli er leitast við að koma á frjálsum flutningum í Bandalaginu á matvælum og fóðri sem er unnið eða markaðssett í samræmi við almennar meginreglur og kröfur samkvæmt þessum kafla.*

20 Í 6. gr. reglugerðarinnar segir:

1. *Til að ná því almenna markmiði að tryggja lífi og heilsu manna víðtæka vernd skulu lög um matvæli byggjast á áhættugreiningu nema það sé ekki heppilegt vegna aðstæðna eða vegna eðlis ráðstöfunarinnar.*

2. Risk assessment shall be based on the available scientific evidence and undertaken in an independent, objective and transparent manner.

3. Risk management shall take into account the results of risk assessment, and in particular, the opinions of the Authority referred to in Article 22, other factors legitimate to the matter under consideration and the precautionary principle where the conditions laid down in Article 7(1) are relevant, in order to achieve the general objectives of food law established in Article 5.

21 Article 7 of the Regulation lays down the following "Precautionary principle":

1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.

2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment.

22 Article 14 of the Regulation on "Food safety requirements" reads:

2. *Áhættumat skal byggjast á fyrirliggjandi vísindalegum heimildum og skal framkvæmt á sjálfstæðan, hlutlausan og gagnsæjan hátt.*

3. *Til að ná þeim almennu markmiðum í lögum um matvæli sem um getur í 5. gr. skal í áhættustjórnun taka tillit til niðurstaðna úr áhættumati, einkum til álitsgerða Matvælaöryggisstofnunarinnar, sem um getur í 22. gr., annarra þátta, sem málið varða, og til varúðarreglunnar ef skilyrðin samkvæmt 1. mgr. 7. gr. eiga við.*

21 Í 7. gr. reglugerðarinnar er að finna eftirfarandi „varúðarreglu“:

1. *Í sérstökum tilvikum, þar sem mat á fyrirliggjandi upplýsingum leiðir í ljós möguleika á heilsuspillandi áhrifum en vísindaleg óvissa ríkir áfram, er heimilt að samþykkja nauðsynlegar bráðabirgðaráðstafanir í áhættustjórnun til að tryggja þá víðtæku heilsuvernd sem Bandalagið hefur kosið sér uns fengist hafa frekari vísindalegar upplýsingar fyrir umfangsmeira áhættumat.*

2. *Ráðstafanir, sem eru samþykktar á grundvelli 1. mgr., skulu vera í réttu hlutfalli við markmiðið og ekki hamla viðskiptum meira en nauðsynlegt er til að ná fram þeirri víðtæku heilsuvernd sem Bandalagið hefur kosið sér, að teknu tilliti til tæknilegrar og efnahagslegrar hagkvæmni og annarra þátta sem nauðsynlegt er að skoða í viðkomandi máli. Ráðstafanirnar skulu endurskoðaðar innan eðlilegs tíma miðað við eðli þeirrar áhættu fyrir líf eða heilbrigði manna, sem greind hefur verið, og þá tegund vísindalegra upplýsinga sem þarf til að eyða vísindalegri óvissu og til að framkvæma umfangsmeira áhættumat.*

22 Í 14. gr. reglugerðarinnar, sem fjallar um“kröfur um öryggi matvæla“ segir:

1. *Food shall not be placed on the market if it is unsafe.*

…

7. *Food that complies with specific Community provisions governing food safety shall be deemed to be safe insofar as the aspects covered by the specific Community provisions are concerned.*

8. *Conformity of a food with specific provisions applicable to that food shall not bar the competent authorities from taking appropriate measures to impose restrictions on it being placed on the market or to require its withdrawal from the market where there are reasons to suspect that, despite such conformity, the food is unsafe.*

…

NATIONAL LAW

23 Since 1882, the import of horses, cattle and sheep to Iceland has been prohibited. There are therefore a number of diseases against which the Icelandic animal population has not developed immunity. Based on the finding that not only live animals, but also animal products such as raw meat can transmit pathogens, Iceland has for decades also banned the import of raw meat, allowing exceptions only if the meat has undergone heat treatment or freezing.

24 Article 10 of Act No 25/1993 on Animal Diseases and Preventive Measures against them[3] ("the Act") reads:

To prevent animal diseases from reaching the country it is prohibited to import the following types of goods:

3 *Lög nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim.*

1. *Ekki skal markaðssetja matvæli ef þau eru ekki örugg.*

...

7. *Ef matvæli eru í samræmi við tiltekin Bandalagsákvæði um öryggi matvæla skulu þau teljast örugg að því er varðar þá þætti sem þessi tilteknu Bandalagsákvæði taka til.*

8. *Þótt matvæli séu í samræmi við sérákvæði sem gilda um þau matvæli skal það ekki hindra lögbær yfirvöld í að grípa til viðeigandi ráðstafana til að takmarka setningu þeirra á markað eða krefjast þess að þau séu tekin af markaðnum ef rökstuddur grunur leikur á um að matvælin séu ekki örugg þrátt fyrir samræmi þeirra við ákvæðin.*

...

LANDSRÉTTUR

23 Allt frá árinu 1882 hefur innflutningur hrossa, nautgripa og sauðfjár til íslands verið bannaður. Dýr á Íslandi hafa því ekki myndað ónæmi gegn fjölda sjúkdóma. Á grundvelli niðurstaðna um að smitefni geti ekki einungis borist með lifandi dýrum, heldur einnig með hráu kjöti, hefur Ísland um áratugaskeið einnig lagt bann við innflutningi hrárra kjötvara. Undanþágur hafa aðeins verið veittar ef kjötið hefur verið fryst eða fengið hitameðferð.

24 Í 10. gr. *laga nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim*[3] (lögin) segir:

Til að hindra að dýrasjúkdómar berist til landsins er óheimilt að flytja til landsins eftirtaldar vörutegundir:

3 *Lög nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim.*

a. *Raw and lightly salted slaughter products, both processed and non-processed …*

Despite the provisions of paragraph 1 the Minister [of Fisheries and Agriculture] is authorized to allow the import of products mentioned in items a-e, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause animal diseases.[4] *The Minister can decide by regulation that paragraph 1 shall not apply to certain categories of those mentioned if the product is disinfected in production or a special disinfection is performed before importation and the product is accompanied with a satisfactory certificate of origin, production and disinfection. The Minister is authorized to prohibit by notice the import of products which carry the risk of transmitting contamination agents that could cause danger to the health of animals.*

…

25 Regulation No 448/2012 on Measures to prevent the Introduction of Animal Diseases and Contaminated Products[5] ("the Icelandic Regulation") sets out detailed provisions on the implementation of Article 10 of the Act. Article 3 of the Icelandic Regulation reads:

The importation to Iceland of the following animal products and products that may carry infectious agents which cause diseases in animals and humans is not permitted; cf. however, further details in Chapter III:

a. *Raw meat, processed or unprocessed, chilled or frozen, as well as offal and slaughter wastes, which have not been treated by heating,*

4 The second paragraph of Article 10 was amended by Act No 71/2015 which, *inter alia*, transferred the authority to permit the import of products mentioned in items (a) to (e) from the Minister to the Food and Veterinary Authority.

5 *Reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins.*

a. *hráar og lítt saltaðar sláturafurðir, bæði unnar og óunnar [...]*

Þrátt fyrir ákvæði 1. mgr. er [sjávarútvegs – og landbúnaðar-] ráðherra heimilt að leyfa innflutning á vörum þeim sem eru taldar upp í a–e-lið enda þyki sannað að ekki berist smitefni með þeim er valda dýrasjúkdómum. [4] *Ráðherra er heimilt að ákveða með reglugerð að ákvæði 1. mgr. skuli ekki gilda fyrir einstakar vörutegundir sem þar eru taldar upp ef varan sótthreinsast við tilbúning eða sérstök sótthreinsun er framkvæmd fyrir innflutning og vörunni fylgir fullnægjandi vottorð um uppruna, vinnslu og sótthreinsun Ráðherra er heimilt að banna með reglugerð innflutning á vörum, óháð uppruna, sem hætta telst á að smitefni geti borist með og hætta telst geta stafað af varðandi heilbrigði dýra.*

...

25 Reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins[5] (íslenska reglugerðin) kveður ítarlega á um beitingu 10. gr. laganna. Í 3. gr. reglugerðarinnar segir:

Eftirtaldar afurðir dýra og vörur sem geta borið með sér smitefni er valda sjúkdómum í dýrum og mönnum er óheimilt að flytja til landsins samanber þó nánari útlistun í III. kafla:

a. *Hrátt kjöt, unnið sem óunnið, kælt sem frosið, svo og innmat og sláturúrgang, sem ekki hefur hlotið hitameðferð, þannig að kjarnhiti*

4 2. mgr. 10. gr. var breytt með lögum nr. 71/2015 sem, meðal annars, færðu valdið til að heimila innflutning á þeim vörum sem minnst er á í liðum a til e frá ráðherra til Matvælastofnunar.

5 *Reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins.*

> *so that the core temperature has reached 72°C for 15 seconds, or other comparable treatment in the assessment of the Food and Veterinary Authority.*

…

26 Article 4 of the Icelandic Regulation reads:

The Minister of Fisheries and Agriculture is authorized to allow the import of products mentioned in Article 3, cf. Article 10 of [the Act] and subsequent amendments, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause diseases in animals and humans, and the conditions imposed for the import have been fulfilled, see however Article 7.

When an application is submitted for the first time to import a raw or unsterilized product as referred in the first paragraph, an importer must provide the Ministry of Fisheries and Agriculture with the necessary information on the product for consideration and approval before the product is dispatched from the country of export.

An importer of raw products shall in all cases apply for a permit to the Minister of Fisheries and Agriculture and submit, for the consideration of the Food and Veterinary Authority, an import declaration, information on the country of origin and production, the type of product and producer, and the required certificates, as provided for in Article 5.

27 Article 5 of the Icelandic Regulation reads:

Imported foods which are listed under [Combined Nomenclature (CN) Codes] 0202 … which the Minister has authorised for import to the country as referred to in Article 4 and which have not received satisfactory heat treatment must be accompanied by the following certificates:

a. …

hafi náð 72°C í 15 sekúndur eða aðra sambærilega meðferð að mati Matvælastofnunar.

...

26 Í 4. gr. reglugerðarinnar segir:

Sjávarútvegs- og landbúnaðarráðherra er heimilt, að fengnum meðmælum Matvælastofnunar, að leyfa innflutning á vörum, sem taldar eru upp í 3. gr., sbr. 10. gr. laga nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim, ásamt síðari breytingum, enda þyki sannað að ekki berist smitefni með þeim er valda sjúkdómum í dýrum og mönnum og þau skilyrði sem sett hafa verið fyrir innflutningnum séu uppfyllt, sjá þó 7. gr.

Þegar sótt er um innflutning á hrárri eða ósótthreinsaðri vöru skv. 1. mgr. í fyrsta sinn skal innflytjandi láta sjávarútvegs- og landbúnaðarráðuneytinu í té nauðsynlegar upplýsingar um vöruna til athugunar og samþykkis áður en varan er send frá útflutningslandi.

Innflytjandi hrárrar vöru skal alltaf sækja um leyfi til sjávarútvegs- og landbúnaðarráðherra og leggja fram, til umsagnar Matvælastofnunar, aðflutningsskýrslu, upplýsingar um uppruna- og framleiðsluland vörunnar, tegund vöru og framleiðanda auk tilskilinna vottorða skv. 5. gr.

27 Í 5. gr. reglugerðarinnar segir:

Innfluttum matvælum sem flokkast undir vöruliði 0202 [númer skv. sameinuðu tollnafnaskránni] [...] sem ráðherra hefur veitt heimild til að flytja til landsins sbr. 4. gr. og hafa ekki hlotið fullnægjandi hitameðferð skulu fylgja þau vottorð sem hér greinir:

a. ...

b. *…*

c. *a certificate confirming that the products have been stored at a temperature of at least -18°C for a month prior to customs clearance;*

d. *…*

e. *an official certificate confirming that the products are free of salmonella bacteria;*

f. *animal meat products and by-products, dairy products and eggs shall conform to the appropriate provisions of the current regulation on food contaminants;*

g. *the product shall be labelled in conformity with current rules on labelling, advertising and promotion of foodstuffs.*

28 CN Code 0202, as referred to in Article 5 of the Icelandic Regulation, covers frozen meat of bovine animals. Fresh or chilled meat of bovine animals, on the other hand, is included under CN Code 0201.

INFRINGEMENT PROCEEDINGS AGAINST ICELAND

29 On 30 October 2013, the EFTA Surveillance Authority ("ESA") sent a letter of formal notice to Iceland, concluding that Iceland had failed to fulfil its obligations under the Directive, in particular its Article 5, by maintaining in force the authorisation system for fresh meat and meat products provided for in Article 10 of the Act and Articles 3 to 5 of the Icelandic Regulation. Alternatively, ESA considered the authorisation system to be in breach of Article 18 EEA. That conclusion was maintained in a reasoned opinion submitted on 8 October 2014 in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). However, it appears from

b. …

c. *Vottorð sem staðfestir að vörurnar hafi verið geymdar við a.m.k. -18°C í einn mánuð fyrir tollafgreiðslu.*

d. …

e. *Opinbert vottorð sem staðfestir að afurðirnar séu lausar við salmonellusýkla.*

f. *Slátur- og mjólkurafurðir og egg skulu uppfylla ákvæði gildandi reglugerðar um aðskotaefni í matvælum.*

g. *Varan skal merkt í samræmi við gildandi reglur um merkingu, auglýsingu og kynningu matvæla.*

28 Vöruliðir undir númeri 0202 samkvæmt sameinuðu tollnafnaskránni, sem vísað er til í 5. gr. íslensku reglugerðarinnar, tekur til frysts kjöts af nautgripum. Ferskt eða kælt kjöt af nautgripum fellur hins vegar undir númer 0201.

RANNSÓKN ESA Á MEINTU SAMNINGSBROTI ÍSLANDS

29 Hinn 30. október 2013 veitti Eftirlitsstofnun EFTA (ESA) Íslandi formlega viðvörun og komst að þeirri niðurstöðu að Ísland hefði ekki uppfyllt skyldur sínar samkvæmt tilskipuninni, sérstaklega 5. gr., með því að halda við lýði leyfisveitingakerfi fyrir hrátt kjöt og kjötafurðir, sem mælt er fyrir um í 10. gr. laganna og 3. til 5. gr. íslensku reglugerðarinnar. ESA taldi leyfisveitingakerfið einnig vera brot á 18. gr. EES-samningsins. Hinn 8. október 2014 staðfesti ESA þá niðurstöðu sína með rökstuddu áliti, sbr. 31. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls (SED). Þó virðist mega ráða af skriflegum greinargerðum stofnunarinnar til dómstólsins, að hún hafi ákveðið að fresta frekari aðgerðum í

its written observations to the Court that ESA has decided to postpone further handling of the infringement case until the Court has given its Advisory Opinion in the present case.

III FACTS AND PROCEDURE

30 In February 2014, the plaintiff ordered 83 kg of beef fillets from a Dutch company for EUR 1 909. On 26 February 2014, the plaintiff applied to the Icelandic Minister of Fisheries and Agriculture for permission to import the meat to Iceland. The day after, the meat was transported by air from Denmark to Iceland. The freight costs amounted to ISK 80 606. The meat was stored at the customs office in Keflavík awaiting a decision on the application to permit the import.

31 On 6 March 2014, acting on behalf of the Minister of Fisheries and Agriculture, the Minister of Industries and Innovation authorised the import, provided that the conditions in Article 5(c), (e) and (g) of the Icelandic Regulation were met.

32 On 11 March 2014, stating that the purpose of the import was to offer consumers fresh meat that had not been frozen, the plaintiff requested the Food and Veterinary Authority to process a request to allow the import and to permit customs clearance of the fresh meat without requiring it to be frozen in accordance with Article 5(c).

33 On 14 March 2014, the Food and Veterinary Authority replied that it was not able to grant the request. It stated that the conditions imposed were in accordance with the Icelandic Regulation. It also stated that the authority to allow the import lay with the Ministry and that the role of the Food and Veterinary Authority was merely to give its comments.

tengslum við málsmeðferðina vegna brots Íslands þar til dómstóllinn hafi veitt ráðgefandi álit í máli þessu.

III MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

30 Í febrúar 2014 pantaði stefnandi 83 kíló af nautalundum frá hollensku fyrirtæki fyrir 1.909 evrur. Stefnandi sótti þann 26. febrúar 2014 um innflutningsleyfi fyrir kjötið hjá sjávarútvegs- og landbúnaðarráðuneytinu. Daginn eftir voru vörurnar fluttar með flugi frá Danmörku til Íslands. Flutningskostnaður nam 80.606 krónur. Kjötið var geymt á starfsstöð tollstjórans í Keflavík á meðan beðið var ákvörðunar varðandi innflutningsleyfið.

31 Þann 6. mars veitti atvinnuvega- og nýsköpunarráðherra innflutningsleyfið, fyrir hönd sjávarútvegs- og landbúnaðarráðherra, með þeim fyrirvara að skilyrði c-, e- og g- liðar 5. gr. íslensku reglugerðarinnar væru uppfyllt.

32 Í beiðni stefnanda til Matvælastofnunar frá 11. mars 2014 kom fram að innflutningur hans miðaði að því að bjóða neytendum upp á ferska kjötvöru sem ekki hefði verið fryst. Hann óskaði því þess að Matvælastofnun heimilaði innflutning hins ferska kjöts og tollafgreiðslu þess án þess að gerð væri krafa um frystingu í samræmi við c-lið 5. gr.

33 Þann 14. mars 2014 hafnaði Matvælastofnun ósk stefnanda með vísan til þess að skilyrðin væru í samræmi við íslensku reglugerðina. Matvælastofnun benti einnig á að heimild til veitingar innflutningsleyfis lægi hjá ráðuneytinu og að stofnunin hefði aðeins hlutverk umsagnaraðila.

34 Following this correspondence, the Directorate of Customs stopped clearance of the meat, and it was subsequently discarded at the request of the plaintiff.

35 In April 2014, the plaintiff brought a case before Reykjavík District Court, claiming compensation for the costs of the meat and its transport. The plaintiff claims that the defendant's refusal to grant permission to import fresh meat violates Icelandic law and EEA law, in particular Article 18 EEA, the Directive and the Regulation.

36 By order of 24 February 2015, Reykjavík District Court accepted the request of the plaintiff to refer certain questions to the Court. Following an appeal from the defendant, the Supreme Court of Iceland (*Hæstirettur Íslands*) decided by judgment of 27 April 2015 to rephrase and amend the questions. Accordingly, by letter of 22 May 2015, registered at the Court on 16 June 2015, the District Court referred the following questions to the Court:

1. **Does the field of application of the EEA Agreement, as defined in Article 8 thereof, entail that a Member State of the Agreement has discretion regarding the setting of rules on the importation of raw meat products and is, in this respect, not bound by the provisions of the Agreement and the acts based thereon?**

2. **If the answer to the first question is in the negative, then the question arises whether it is compatible with the provisions of [the Directive] that a Member State of the EEA Agreement should set rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and require the submission, for this purpose, of an import declaration, information on the country of origin and production, the type of product and**

34 Í kjölfar þessara bréfaskipta hafnaði tollstjóri tollafgreiðslu kjötsins og var því fargað í kjölfarið að beiðni stefnanda.

35 Þann 14. apríl 2014 lagði stefnandi málið fyrir Héraðsdóm Reykjavíkur og fór fram á bætur sem nema kaupverði vörunnar auk flutningskostnaðar. Stefnandi telur að höfnun stefnda á umsókn um leyfi til innflutnings á fersku kjöti brjóti í bága við íslensk lög og EES-rétt, sérstaklega 18. gr. EES-samningsins, tilskipunina og reglugerðina.

36 Með úrskurði 24. febrúar 2015 féllst Héraðsdómur Reykjavíkur á beiðni stefnanda um að beina tilteknum spurningum til EFTA-dómstólsins. Í kjölfar kæru stefnda á úrskurðinum kvað Hæstiréttur upp dóm 27. apríl 2015 þar sem spurningarnar voru endurorðaðar og framsetningu þeirra breytt. Í samræmi við þetta beindi Héraðsdómur Reykjavíkur eftirfarandi spurningum til dómstólsins með bréfi dagsettu 22. maí 2015, sem skráð var í málaskrá dómstólsins 16. júní sama ár:

1. **Leiðir gildissvið EES-samningsins, eins og það er markað í 8. gr. hans, til þess að ríki, sem aðild á að samningnum, hafi frjálsar hendur um setningu reglna um innflutning hrárrar kjötvöru og sé í þeim efnum óbundið af ákvæðum samningsins og þeim gerðum, sem á honum byggja?**

2. **Ef svarið við fyrstu spurningunni er neikvætt, er í öðru lagi spurt, hvort það samrýmist ákvæðum tilskipunar ráðsins 89/662/EBE, að ríki, sem aðild á að EES-samningnum, setji reglur, þar sem þess er krafist, að innflytjandi hrárrar kjötvöru sæki um sérstakt leyfi áður en varan er flutt inn, og áskilji að lagðar séu fram í þeim tilgangi aðflutningsskýrslur, upplýsingar um uppruna- og framleiðsluland vörunnar, tegund vöru og framleiðanda**

the producer, and the required certificates, including a certificate confirming that the products have been stored frozen for a certain period prior to customs clearance.

3. **The national court requests the opinion of the Court whether the provisions of [the Regulation] are relevant in answering the second question.**

4. **Following on from the second and third questions, an answer is requested to the question of whether it constitutes a technical barrier to trade in the sense of Article 18 EEA if an EEA State sets rules under which the importation to that State of raw meat products is not permitted.**

5. **An opinion is requested on whether it affects the answer to the fourth question, if it is permitted, under the rules of the EEA State of destination, to grant exceptions from the general prohibition referred to in that question.**

6. **If the answer to the fourth and/or fifth question is in the affirmative, an answer is then requested to the question of in which cases such a prohibition on the importation of raw meat products taking into account, as appropriate, the circumstances described in the fifth question, could be considered justifiable with reference to Article 13 EEA. Also, an answer is requested to the question of what requirements should be made regarding proof in this connection, particularly in the light of the precautionary principle of EEA law.**

auk tilskilinna vottorða, þar á meðal um að kjötið hafi verið fryst í tiltekinn tíma fyrir tollafgreiðslu.

3. **Í tengslum við aðra spurninguna er óskað álits á því, hvort ákvæði reglugerðar Evrópuþingsins og ráðsins (EB) nr. 178/2002 hafi sérstaka þýðingu, þegar spurningunni er svarað.**
4. **Í framhaldi af annarri og þriðju spurningunni er óskað svara við því, hvort það feli í sér tæknilega hindrun í skilningi 18. gr. EES-samningsins, að ríki, sem á aðild að samningnum, setji reglur þess efnis, að óheimilt sé að flytja til landsins hráa kjötvöru.**
5. **Í tengslum við fjórðu spurninguna er óskað álits á því, hvort það hafi þýðingu þegar henni er svarað, ef heimilt er samkvæmt reglum innflutningslandsins að veita undanþágu frá slíku almennu banni, sem um getur í fjórðu spurningunni.**
6. **Ef svarið við fjórðu og/eða fimmtu spurningunni er jákvætt, þá er óskað svara við því, í hvaða tilvikum slíkt bann við innflutningi hrárrar kjötvöru, eftir atvikum að teknu tilliti til aðstæðna sem lýst er í fimmtu spurningunni, geti talist réttlætanlegt með vísan til 13. gr. EES-samningsins. Jafnframt er óskað svara við því, hvaða kröfur beri að gera til sönnunar í því sambandi, einkum í ljósi varúðarreglu EES-réttar.**

IV WRITTEN PROCEDURE BEFORE THE COURT

37 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 Arnar Þór Stefánsson, Supreme Court Attorney, acting as Counsel;
- the defendant, represented by Kristján Andri Stefánsson, Director General, Ministry of Foreign Affairs, and Einar Karl Hallvarðsson, State Attorney General and Supreme Court Attorney, acting as Agents, and Jóhannes Karl Sveinsson and Gizur Bergsteinsson, Supreme Court Attorneys, acting as Counsel;
- the Government of Norway, represented by Janne Tysnes Kaasin, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;
- ESA, represented by Carsten Zatschler, Director, Maria Moustakali, Officer, and Íris Ísberg, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission (“the Commission”), represented by Daniele Bianchi, member of its Legal Service, and Kathleen Skelli, a national civil servant on secondment to the Legal Service, acting as Agents.

IV SKRIFLEG MÁLSMEÐFERÐ FYRIR DÓMSTÓLNUM

37 Í samræmi við 20. gr. stofnsamþykktar EFTA-dómstólsins og 97. gr. málsmeðferðarreglna hans hafa skriflegar greinargerðir borist frá eftirtöldum aðilum:

– Stefnanda, í fyrirsvari er Arnar Þór Stefánsson, hrl.

– Stefnda, í fyrirsvari eru Kristján Andri Stefánsson, skrifstofustjóri hjá utanríkisráðuneytinu, og Einar Karl Hallvarðsson, ríkislögmaður og hrl., sem umboðsmenn, auk Jóhannesar Karls Sveinssonar, hrl., og Gizurar Bergsteinssonar, hrl., sem málflutningsmenn;

– Ríkisstjórn Noregs, í fyrirsvari sem umboðsmenn eru Janne Tysnes Kaasin, lögfræðingur á lagasviði utanríkisráðuneytisins og Torje Sunde, lögmaður hjá skrifstofu ríkislögmanns.

– ESA, í fyrirsvari sem umboðsmenn eru Carsten Zatschler, framkvæmdastjóri lögfræði- og framkvæmdasviðs, Maria Moustakali og Íris Ísberg, lögfræðingar á lögfræði- og framkvæmdasviði.

– Framkvæmdastjórn Evrópusambandsins (framkvæmdastjórnin), í fyrirsvari sem umboðsmenn eru Daniele Bianchi og Kathleen Skelli, frá lagaskrifstofu framkvæmdastjórnarinnar, en sú síðarnefnda er opinber starfsmaður aðildarríkis sem starfar tímabundið á lagaskrifstofunni samkvæmt sérstöku samkomulagi um skipti á embættismönnum.

V SUMMARY OF THE OBSERVATIONS SUBMITTED TO THE COURT

QUESTION 1

38 By its first question, the referring court asks in essence whether an EEA State is bound by the provisions of the EEA Agreement and secondary legislation when setting rules on the import of raw meat products.

39 There is agreement between those who have submitted written observations that, pursuant to Article 8(3) EEA, the products at issue fall outside the scope of the EEA Agreement unless otherwise specified. However, there are different views on the significance of Articles 17, 18 and 23 EEA and the legal acts referred to in Annexes I and II.

THE PLAINTIFF

40 The plaintiff submits that the provisions of Chapters 2 and 4 of Part II to the EEA Agreement are applicable to the products at issue. Those provisions limit the discretion of the EEA States in setting rules on the import of raw meat products.

41 The plaintiff observes that there are specific provisions and arrangements concerning veterinary and phytosanitary matters in Annex I, and concerning technical regulations, standards, testing and certification in Annex II to the EEA Agreement. Article 18 EEA prohibits technical barriers to trade other than those laid down in those arrangements.[6] Accordingly, rules which concern the import of fresh meat and meat products are subject to Article 18 EEA. The

6 Reference is made to Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 42.

V SAMANTEKT YFIR MÁLSÁSTÆÐUR OG RÖK AÐILA

SPURNING 1

38 Kjarninn í fyrstu spurningu héraðsdóms er hvort EES-ríki sé bundið af ákvæðum EES-samningsins og afleiddri löggjöf hans þegar það setur reglur um innflutning hrárra kjötvara.

39 Þeir sem skilað hafa skriflegum greinargerðum eru sammála um að umræddar vörur falli utan gildissviðs EES-samningsins, nema annað sé sérstaklega tekið fram. Þá greinir hins vegar á um lagalega þýðingu 17., 18. og 23. gr. EES-samningsins og lagagerða sem vísað er til í I. og II. viðauka.

STEFNANDI

40 Stefnandi telur að 2. og 4. kafli II. hluta EES-samningsins eigi við um vörurnar sem málið varðar, en þau takmarki heimildir EES-ríkja til að setja reglur um innflutning hrárra kjötvara.

41 Stefnandi bendir á að sérstök ákvæði og tilhaganir varðandi heilbrigði dýra og plantna megi finna í I. viðauka EES-samningsins, og varðandi tæknilegar reglugerðir, staðla, prófanir og vottun í II. viðauka. 18. gr. samningsins leggi bann við öðrum tæknilegum viðskiptahindrunum en þeim sem kveðið er á um í framangreindum viðaukum.[6] Reglur um innflutning á fersku kjöti og ferskum kjötafurðum telur stefnandi því falla undir 18. gr. EES-samningsins.

6 Vísað er til máls E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, 42. mgr.

plaintiff considers that the rules at issue cannot be justified under Article 13 EEA.

42 Moreover, the plaintiff argues that the disputed rules must be in conformity with the Directive, which was incorporated into the EEA Agreement without any adaptation of relevance for this case. The Regulation is also of relevance in this regard.

THE DEFENDANT

43 The defendant submits that it follows from Article 8 EEA that an EEA State has discretion in establishing rules on the imports of raw meat, unless otherwise specified by the Agreement. Article 18 EEA and the arrangements referred to there do not alter that conclusion.

44 As regards the Directive, the defendant contends that the legal effects of it are different in the EU and in Iceland. First, Iceland is not part of the EU's agricultural policy, so it is unable to adjust to the EU rules in the manner expected within the EU. Therefore, unrestricted trade in agricultural products cannot be maintained for Iceland. This was the basis for the negotiation of the EEA Agreement and in particular its Article 17. Second, the application and objective of the Directive is completely different in the EU to what it is in the EEA. The Directive aims at the completion of the internal market for agricultural products, but there is no internal EEA market for such products.

45 Consequently, the defendant argues, by introducing the Directive into the EEA context, Iceland merely contributed to ensuring that certain procedures and formalities in terms of health standards would apply to facilitate trade in agricultural products. However, the point has always been maintained that the agricultural system falls in its entirety outside the scope of the EEA Agreement. Iceland can therefore adopt the required safety measures concerning protection of livestock and public health.

Hann telur ekki unnt að réttlæta hinar umdeildu reglur með vísan til 13. gr. samningsins.

42 Jafnframt heldur stefnandi því fram að hinar umdeildu reglur verði að samrýmast tilskipuninni, sem tekin var upp í EES-samninginn án nokkurrar aðlögunar sem þýðingu geti haft fyrir mál þetta. Reglugerðin hafi einnig þýðingu í þessu samhengi.

STEFNDI

43 Stefndi bendir á að af 8. gr. EES-samningsins leiði að EES-ríki hafi heimild til reglusetningar um innflutning hrás kjöts, ef annað er ekki tekið fram í samningnum. 18. gr. samningsins og þær tilhaganir sem þar er mælt fyrir um breyti ekki þeirri niðurstöðu.

44 Stefndi heldur því fram að lagaleg áhrif tilskipunarinnar séu önnur innan ESB en á Íslandi. Í fyrsta lagi eigi landbúnaðarstefna ESB ekki við um Ísland og því geti Ísland ekki lagað sig að ESB-reglum með þeim hætti sem ætlast sé til innan ESB. Óheft viðskipti með landbúnaðarvörur geti því ekki átt við gagnvart Íslandi. Þetta atriði hafi verið grundvöllur samningaviðræðna um EES-samninginn, sérstaklega í tengslum við 17. gr. Í öðru lagi séu beiting og markmið EES-samningsins allt önnur innan ESB en EES. Tilskipunin stefni að því að koma á innri markaði fyrir landbúnaðarafurðir, en innri markaður fyrir slíkar vörur sé ekki til innan EES.

45 Stefndi telur þar af leiðandi að við innleiðingu tilskipunarinnar í íslenskan rétt hafi Ísland einungis lagt sitt af mörkum til að tryggja tiltekið verklag og tiltekin formsatriði myndu gilda í tengslum við heilsustaðla til að auðvelda viðskipti með landbúnaðarafurðir. Því hafi hins vegar alltaf verið haldið til streitu að landbúnaðarkerfið falli algjörlega utan gildissviðs EES-samningsins. Ísland geti því innleitt nauðsynlegar öryggisráðstafanir um verndun búfénaðar og lýðheilsu.

THE GOVERNMENT OF NORWAY

46 The Government of Norway observes that the EEA States have agreed to a common regulation of some aspects of trade in agricultural and fishery products. This is shown, in particular, in Article 17 EEA with its reference to Annex I on veterinary and phytosanitary matters. Annex I largely reflects the unique expansion of the EEA Agreement that took place from 1999, with the "veterinary agreement" adopted by EEA Joint Committee Decision No 69/98.[7] This expansion was a result of the gradual acknowledgement of the need to ease especially the border controls of animal products to avoid unnecessary delays in the transport of such goods. The legal acts in Annex I therefore apply both to agricultural products and to fishery products.

47 In the view of the Norwegian Government, Article 18 EEA is intended to ensure that the effects of the harmonised legal acts in Annex I are not counteracted by technical barriers to trade not foreseen in those acts. It is clear from its wording that this provision is not meant to bring agricultural products within the general scope of the EEA Agreement. That is why Article 18 EEA refers specifically to Article 13 EEA to ensure the applicability of that provision.[8]

48 The Norwegian Government argues that the scope and purpose of the EEA Agreement as regards agricultural products is an example of an area where EEA law and EU law is not fully harmonised. Thus, a difference in the interpretation of the two agreements cannot be excluded.[9] Accordingly, it must be assessed on a case-by-case basis to what extent the EEA regulatory framework leaves discretion for the EEA States to have specific national regulations.

7 OJ 1999 L 158, p. 1, and EEA Supplement 1999 No 27, p. 1.
8 Reference is made to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 27.
9 Reference is made to Joined Cases E-9/07 and E-10/07 *L'Oréal* [2008] EFTA Ct. Rep. 259, paragraph 27.

RÍKISSTJÓRN NOREGS

46 Ríkisstjórn Noregs bendir á að EES-ríki hafi samþykkt sameiginlegt regluverk í tengslum við ákveðin atriði í viðskiptum með landbúnaðar- og sjávarútvegsafurðir. Þessa sjái sérstaklega stað í 17. gr. EES-samningsins þar sem vísað er til I. viðauka um heilbrigði dýra og plantna. I. viðauki endurspegli að miklu leyti þá sérstöku viðbót við EES-samninginn sem átti sér stað árið 1999, með ákvörðun sameiginlegu EES-nefndarinnar nr. 69/98 um dýraheilbrigði.[7] Sú viðbót var hluti af stigvaxandi viðurkenningu á því að losa yrði um landamæraeftirlit, sérstaklega hvað varðar dýraafurðir, til að koma í veg fyrir óþarfa tafir á flutningum slíkra vara. Reglur I. viðauka eiga því bæði við um landbúnaðar- og sjávarútvegsafurðir.

47 Að mati ríkisstjórnar Noregs er 18. gr. EES-samningsins ætlað að tryggja að ekki sé unnið gegn áhrifum samræmdra ákvæða í I. viðauka með tæknilegum viðskiptahindrunum sem ekki voru fyrirséðar við samningu þeirra. Ljóst sé af orðalagi 18. gr. að henni sé ekki ætlað að færa landbúnaðarafurðir undir almennt gildissvið EES-samningsins. Af sömu ástæðu vísi 18. gr. sérstaklega til 13. gr. samningsins til að tryggja gildissvið hennar.[8]

48 Ríkisstjórn Noregs telur að gildissvið og tilgangur EES-samningsins, hvað landbúnaðarafurðir varðar, sé dæmi um svið þar sem reglur EES- og ESB-réttar hafa ekki verið samræmdar að fullu. Ekki sé því hægt að útiloka mismunandi túlkun á samningunum tveimur.[9] Þar af leiðandi verði að meta að hvaða marki regluverk EES veiti EES-ríkjum svigrúm til að setja sérstaka löggjöf í landsrétt, í hverju tilviki fyrir sig.

7 Stjtíð. ESB 1999 L 158, bls. 1, og EES-viðbætir 1999 Nr. 27, bls. 1.
8 Vísað er til máls E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, 27. mgr.
9 Vísað er til sameinaðra mála E-9/07 og E-10/07 *L'Oréal* [2008] EFTA Ct. Rep. 259, 27. mgr.

49 The Government of Norway proposes that the first question should be answered as follows:

The regulatory discretion of the EEA States is limited by the provisions of the EEA Agreement, also as regards agricultural products, but only within the scope of the Agreement and to the extent that the relevant rules in the Agreement apply in the case at hand.

ESA

50 ESA submits that agricultural products and foodstuffs remain subject to the provisions of Chapter 2 and 4 of Part II of the Agreement. Article 17 EEA refers to Annex I, which includes the Directive as well as the foodstuffs legislation known as the "Hygiene Package" and relevant animal health and welfare rules applicable in the EEA.[10] Those legal acts harmonised the conditions under which products of animal origin are produced and placed on the market and circulated in the EEA. Furthermore, Article 23(a) EEA refers to Annex II on technical regulations, standards, testing and certification, which contains a specific chapter related to foodstuffs.

51 ESA submits that the inclusion of Chapters 2 and 4 and the legal acts referred to in Annexes I and II would be devoid of any meaning and effectiveness if EEA States were free not to apply those provisions. Pursuant to Article 7 EEA, Iceland is bound to ensure the full implementation of the relevant acts.[11] Thus, any national measure related to veterinary checks on raw meat has to be compatible with the Directive and related legislation on animal products.

10 Reference is made to Regulation (EC) No 853/2004 and Regulation (EC) No 854/2004 forming part of the "Hygiene Package" and Regulation (EC) No 882/2004 on animal welfare, referred to at point 17 of subchapter 6.1, point 12 of subchapter 1.1 and point 11 of subchapter 1.1, respectively, of Chapter I of Annex I to the EEA Agreement.

11 Reference is made to Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 46.

49 Ríkisstjórn Noregs leggur til að dómstóllinn svari fyrstu spurningunni með eftirfarandi hætti:

Svigrúm EES-ríkis til lagasetningar takmarkast af ákvæðum EES-samningsins, einnig á sviði landbúnaðarafurða, en einungis innan gildissviðs samningsins og að því marki sem viðeigandi reglur hans gilda um málið sem um ræðir.

ESA

50 ESA telur að landbúnaðarafurðir og matvæli falli undir ákvæði 2. og 4. kafla II. hluta EES-samningsins. 17. gr. vísi til I. viðauka, sem inniheldur tilskipunina og matvælalöggjöfina sem gengur undir nafninu „hollustulöggjöfin“ auk tengdra reglna um dýraheilbrigði og -velferð innan EES.[10] Þessi lagaákvæði hafi samræmt skilyrðin fyrir framleiðslu, markaðssetningu og dreifingu dýraafurða innan EES. A-liður 23. gr. vísi þar að auki til II. viðauka um tæknilegar reglugerðir, staðla, prófanir og vottun, sem innihalda sérstakan kafla um matvæli.

51 ESA telur að ákvæði 2. og 4. kafla, auk þeirra ákvæða sem vísað sé til í I. og II. viðauka væru þýðingarlaus og án allrar virkni ef EES-ríkjum væri frjálst að fara ekki eftir þeim. Samkvæmt 7. gr. EES-samningsins beri Íslandi að tryggja innleiðingu viðeigandi ákvæða, að fullu.[11] Allar ráðstafanir að landsrétti aðildarríkja um dýraheilbrigðiseftirlit verði því að samrýmast tilskipuninni og tengdri löggjöf um dýraafurðir.

10 Vísað er til reglugerðar 853/2004/EB og reglugerðar 854/2004/EB sem eru hluti af „hollustulöggjöfinni“, auk reglugerðar 882/2004/EB um dýravelferð sem vísað er til í 17. lið undirkafla 6.1, 12. lið undirkafla 1.1 og 11. lið undirkafla 1.1, sem eru allar hluti af I. kafla viðauka I við EES-samninginn.

11 Vísað er til máls E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, 46. mgr.

52 ESA proposes that the Court should answer the first question as follows:

The field of application of the free movement of goods under the EEA Agreement, as it results from Articles 8, 17 and 23(a) and (b) thereof, entails that an EEA State is bound by the provisions of the EEA Agreement and the acts based thereon in setting rules on the importation of raw meat products.

THE COMMISSION

53 The Commission submits that Chapters 2 and 4 of Part II of the EEA Agreement extend the scope of the agreement to include agricultural and food products. Articles 17 and 23(a) refer to Annexes I and II, respectively, thereby giving effect to the Directive and related legislation. The inclusion of those articles of the EEA Agreement would be rendered ineffective and meaningless if the EEA States could elect not to apply them. It is in this context that the scope of Article 8(3) EEA must be understood.

54 Furthermore, the Commission continues, an uncertainty concerning the scope of those articles is dispelled by Article 18 EEA, which specifically provides that those articles apply to products other than those covered by Article 8(3) EEA, and that they shall not be compromised by other technical barriers to trade.

55 As the Commission understands it, it is therefore clear from the intention of the EEA Agreement that agricultural and food products may be captured by specific provisions incorporated into Part II of the EEA Agreement.[12] Consequently, an EEA State is obliged to fully apply and implement the provisions of Chapters 2 and 4 of Part II of

12 Reference is made to *HOB-vín*, cited above, paragraph 27.

52 ESA leggur til að dómstóllinn svari fyrstu spurningunni með eftirfarandi hætti:

Gildissvið frjálsra vöruflutninga samkvæmt EES-samningnum, eins og það leiðir af 8. gr., 17. gr. og a- og b-liðum 23. gr., felur í sér að EES-ríki eru bundin af ákvæðum EES-samningsins og afleiddra gerða þegar þau setja reglur um innflutning hrárra kjötvara.

FRAMKVÆMDASTJÓRNIN

53 Framkvæmdastjórnin telur að 2. og 4. kafli II. hluta EES-samningsins útvíkki gildissvið samningsins með þeim hætti að það nái til landbúnaðarafurða og matvæla. 17. gr. og a-liður 23. gr. vísi til I. og II. viðauka og veiti þar með tilskipuninni og reglum sem henni tengjast lagagildi. Framkvæmdastjórnin telur að umrædd ákvæði yrðu þýðingarlaus og án allrar virkni ef EES-ríkjum væri frjálst að fara ekki eftir þeim. Skýra verði 3. mgr. 8. gr. EES-samningsins með hliðsjón af þessu.

54 Framkvæmdastjórnin bendir enn fremur á að 18. gr. EES-samningsins víki til hliðar allri óvissu um gildissvið umræddra ákvæða. Í henni sé sérstaklega tekið fram að þau eigi við um aðrar vörur en þær sem 3. mgr. 8. gr. samningsins tekur til og að þeim skuli ekki stefnt í hættu með öðrum tæknilegum viðskiptahindrunum.

55 Það sé því, að mati framkvæmdastjórnarinnar, ljóst af markmiðum EES-samningsins að landbúnaðarafurðir og matvæli geti fallið undir sérstök ákvæði sem tekin eru upp í II. hluta samningsins.[12] EES-ríkjum sé þar af leiðandi skylt að innleiða og tryggja beitingu ákvæða 2. og 4. kafla II. hluta EES-samningsins og þeirra lagagerða sem

12 Vísað er til áður tilvitnaðs máls *HOB-víns*, 46. mgr.

the EEA Agreement and the legal acts referred to in Annexes I and II. With regard to veterinary checks on raw meat, the provisions of the Directive apply. An EEA State does not have discretion to substitute or supplement those provisions with its own national rules.

56 The Commission proposes the following answer to the first question:

The field of application of the EEA Agreement, as defined in Article 8 thereof, does not entail that a Member State of the Agreement has discretion regarding the setting of rules on the importation of raw meat products but is, in this respect bound by the provisions of the Agreement and the acts based thereon.

QUESTION 2

57 By its second question, which arises in the case of a negative answer to the first question, the referring court asks, in essence, whether requirements imposed on the importer of raw meat, such as those contained in Articles 3 to 5 of the Icelandic Regulation, are compatible with the Directive.

THE PLAINTIFF

58 The plaintiff argues that it is clear from the wording of the Directive and the consistent interpretation of its Article 5 that the Directive exhaustively harmonises the veterinary checks that can take place in the State of destination of the products covered by the Directive.[13] The Directive does not contain any provision that would allow EEA

13 Reference is made to Cases C-186/88 *Commission* v *Germany* [1989] ECR 3997; C-102/96 *Commission* v *Germany* [1998] ECR I-6871; C-111/03 *Commission* v *Sweden* [2005] ECR I-8789; and C-455/06 *Danske Slagterier* [2009] ECR I-2119.

vísað sé til í I. og II. viðauka. Með tilliti til dýraheilbrigðiseftirlits með hráu kjöti, gildi ákvæði tilskipunarinnar. EES-ríki eigi ekki að hafa svigrúm til að breyta þessum ákvæðum eða auka við þau með reglum landsréttar.

56 Framkvæmdastjórnin leggur til að dómurinn svari fyrstu spurningunni með eftirfarandi hætti:

Gildissvið EES-samningsins, eins og það er markað í 8. gr. hans, leiðir ekki til þess að ríki, sem aðild á að samningnum, hafi frjálsar hendur um setningu reglna um innflutning hrárrar kjötvöru og sé í þeim efnum óbundið af ákvæðum samningsins og þeim gerðum, sem á honum byggja.

SPURNING 2

57 Í annarri spurningu héraðsdóms, sem leiðir af hinni fyrri sé henni svarað neitandi, er spurt hvort skyldur þær sem lagðar eru á innflutningsaðila hrárra kjötvara, á borð við þær skyldur sem mælt er fyrir um í 3. til 5. gr. íslensku reglugerðarinnar, samrýmist tilskipuninni.

STEFNANDI

58 Stefnandi heldur því fram að það leiði af ótvíræðu orðalagi tilskipunarinnar og ítrekaðri skýringu á 5. gr. hennar í dómaframkvæmd, að tilskipunin samræmi með tæmandi hætti dýraheilbrigðiseftirlit með þeim vörum sem fjallað sé um í henni og sem fram megi fara í innflutningslandinu.[13] Tilskipunin hafi engin

13 Vísað er til mála C-186/88 *Framkvæmdastjórnin* gegn Þýskalandi [1989] ECR 3997; C-102/96 *Framkvæmdastjórnin* gegn Þýskalandi [1998] ECR I-6871; C-111/03 *Framkvæmdastjórnin* gegn *Svíþjóð* [2005] ECR I-8789; og C-455/06 *Danske Slagterier* [2009] ECR I-2119.

States to impose stricter rules, save "protective measures" which are temporary by nature and strictly circumscribed. Furthermore, the European Court of Justice ("the ECJ") has held that a detailed and harmonised system of health inspections of fresh meat replaces all other inspection systems existing within the country of destination.[14]

59 In this regard, the plaintiff argues that, in areas where European legislation provides for harmonisation, recourse to justification under Article 36 of the Treaty on the Functioning of the European Union ("TFEU"), corresponding to Article 13 EEA, is not available.[15]

60 In the plaintiff's view, the administrative formalities mentioned in the question referred constitute veterinary checks within the meaning of Article 2 of the Directive. As those requirements constitute obligations that go beyond the controls permitted at the place of destination under Article 5 of the Directive, they are not permitted.

61 The plaintiff contends that the ECJ has ruled that similar additional veterinary checks placed on imports of animal products are not compatible with harmonised rules on veterinary checks.[16] The reasoning in those cases shows that even a prior notification system is not in line with the requirements of the Directive. Thus, it must be clear that a prior authorisation system, such as the one at issue, is incompatible with the Directive.

62 Moreover, the plaintiff submits that the administrative formalities require importers to fulfil certain substantive conditions. That is not

14 Reference is made to *Commission* v *Sweden*, cited above, and Joined Cases C-277/91, C-318/91 and C319/91 *Ligur Carni and Others* [1993] ECR I-6621.

15 Reference is made to Cases C-52/92 *Commission* v *Portugal* [1993] ECR I-2961, 251/78 *Denkavit Futtermittel* [1979] ECR 3369 and C-1/96 *Compassion in World Farming* [1998] ECR I-1251.

16 Reference is made to Case C-186/88 *Commission* v *Germany* and *Commission* v *Sweden*, both cited above.

ákvæði að geyma sem heimilað gætu EES-ríki að setja strangari reglur, ef frá eru taldar „verndarráðstafanir“, sem séu tímabundnar í eðli sínu og skýrlega afmarkaðar. Evrópudómstóllinn hafi jafnframt talið að nákvæmt og samræmt kerfi heilbrigðiseftirlits með fersku kjöti komi í stað allra annarra eftirlitskerfa innflutningslandsins.[14]

59 Stefnandi telur því, að ríki geti ekki reitt sig á 36. gr. sáttmálans um starfshætti Evrópusambandsins (SSESB), sem svarar til 13. gr. EES-samningsins, á þeim sviðum þar sem Evrópuréttur kveður á um samræmingu.[15]

60 Að mati stefnanda falli þau formsatriði á sviði stjórnsýslu, sem minnst sé á í annarri spurningunni, undir dýraheilbrigðiseftirlit í skilningi 2. gr. tilskipunarinnar. Þar sem umrædd skilyrði feli í sér skyldur sem gangi lengra en það eftirlit sem heimilt sé samkvæmt 5. gr. tilskipunarinnar séu þau óheimil.

61 Stefnandi bendir á að Evrópudómstóllinn hafi kveðið á um að sambærilegt viðbótar-dýraheilbrigðiseftirlit sé ósamrýmanlegt samræmdu reglunum um dýraheilbrigðiseftirlit.[16] Í forsendum þessara dóma komi fram að jafnvel kerfi sem feli í sér fyrirfram tilkynningarskyldu standist ekki kröfur tilskipunarinnar. Því sé ljóst að kerfi, líkt og það sem til skoðunar sé í þessu máli, samrýmist ekki tilskipuninni.

62 Jafnframt telur stefnandi að formsatriði á sviði stjórnsýslu leggi þá skyldu á innflutningsaðila að þeir uppfylli tiltekin efnisleg skilyrði.

14 Vísað er til áður tilvitnaðs máls *Framkvæmdastjórnin* gegn *Svíþjóð*, og sameinaðra mála C-277/91, C-318/91 og C319/91 *Ligur Carni og aðrir* [1993] ECR I-6621.

15 Vísað er til mála C-52/92 *Framkvæmdastjórnin* gegn *Portúgal* [1993] ECR I-2961, 251/78 *Denkavit Futtermittel* [1979] ECR 3369 og C-1/96 *Compassion in World Farming* [1998] ECR I-1251.

16 Vísað er til áður tilvitnaðra mála C-186/88 *Framkvæmdastjórnin* gegn Þýskalandi og *Framkvæmdastjórnin* gegn *Svíþjóð*.

permitted under Article 5 of the Directive, as veterinary checks in the State of destination can only aim at verifying, by means of non-discriminatory veterinary spot-checks, that the requirements of Article 3 of the Directive have been complied with, that is whether the product has been obtained, checked, marked and labelled in accordance with EEA rules. EEA States cannot therefore impose checks that do not find their basis in EEA rules. In the plaintiff's view, there is no basis in those rules for the requirement in Article 5(c) of the Icelandic Regulation to demonstrate that products have been stored frozen for a certain period of time prior to customs clearance.

63 Against that background, the plaintiff concludes that the administrative formalities at issue and the imposition of substantive requirements on the importers, such as the obligation to freeze raw meat, are in breach of Article 5 of the Directive.

THE DEFENDANT

64 The defendant submits that the Directive was enacted with a view to completing the internal market and pursuing the common agricultural policy.[17] In the EEA there is no internal market for the products at issue and there is no common agricultural policy. The products at issue do not enjoy a right to free movement within the EEA. The isolated geographical location of Iceland and the immunological vulnerability of the country's animal population is also reflected by the numerous acts in Annex I to the EEA Agreement that are not applicable to Iceland. Thus, the specific EEA context of the Directive and the special circumstances of Iceland must be taken into account when interpreting the Directive.[18]

17 Reference is made to Case C-102/96 *Commission* v *Germany*, paragraph 27, and *Commission* v *Sweden*, paragraph 42, both cited above.

18 Reference is made to Case C-128/94 *Hönig* [1995] ECR I-3389, paragraph 9, and *L'Oréal*, cited above, paragraph 28.

Slíkt sé óheimilt samkvæmt 5. gr. tilskipunarinnar þar sem dýraheilbrigðiseftirlit í innflutningslandinu megi aðeins miða að því að því að kannað sé með hlutlausum dýraheilbrigðisskyndikönnunum hvort kröfum 3. gr. hafi verið fullnægt, það er hvort vörurnar hafi verið skoðaðar, skráðar og merktar í samræmi við EES-reglur. EES-ríki geti því ekki gert kröfur sem eigi sér enga stoð í EES-rétti. Að mati stefnanda er enga slíka stoð að finna fyrir þeim kröfum, sem gerðar eru í c-lið 5. gr. íslensku reglugerðarinnar, um að sýna verði fram á að vörurnar hafi verið frystar í tiltekinn tíma fyrir tollafgreiðslu.

63 Að þessu virtu telur stefnandi að þau formsatriði á sviði stjórnsýslu sem um ræði í málinu og efnislegar kröfur sem gerðar séu til innflutningsaðila, líkt og þær að krafist sé frystingar á hráu kjöti, séu andstæðar 5. gr. tilskipunarinnar.

STEFNDI

64 Stefndi telur að tilskipuninni hafi verið ætlað að koma á hinum innra markaði og leitast við að fylgja eftir sameiginlegri landbúnaðarstefnu.[17] Innan EES sé hvorki innri markaður fyrir vörurnar sem mál þetta fjallar um, né sameiginleg landbúnaðarstefna. Vörurnar sem um ræðir njóti ekki frjálsrar farar innan EES. Einangruð landfræðileg lega Íslands og ónæmisfræðilegt varnarleysi dýrastofns landsins endurspeglist einnig í þeim fjölmörgu ákvæðum I. viðauka EES-samningsins sem gilda ekki um Ísland. Því verði við túlkun tilskipunarinnar að taka mið af tilteknu EES-samhengi hennar og hinum sérstöku aðstæðum Íslands.[18]

17 Vísað er til áður tilvitnaðra mála C-102/96 *Framkvæmdastjórnin* gegn Þýskalandi, 27. mgr., og *Framkvæmdastjórnin* gegn *Svíþjóð*, 42. mgr.

18 Vísað er til áður tilvitnaðra mála C-128/94 *Hönig* [1995] ECR I-3389, 9. mgr., og *L'Oréal*, 28. mgr.

65 The defendant observes that the matter in dispute in the main proceedings concerns the "freezing certificate". However, it is not clear from the reference from the District Court for what reason all the Icelandic rules concerning the import of raw meat should be reviewed in the light of the Directive in the present proceedings.

66 As regards the "freezing certificate" at issue, the defendant submits that the certificate does not discourage imports of raw meat, as can be seen from the increasing volume of imported meat over the last ten years. Moreover, the certificate does not seek to double-check compliance with requirements that have been checked in the State of dispatch. Iceland has full trust in the veterinary checks that are conducted in other EEA States by virtue of the common EEA rules. The certificate only seeks to take care of the very special situation of Iceland. That objective lies beyond the EEA rules.

67 Against that background, the defendant submits that the requirement that a "freezing certificate" be presented at import does not come within the scope of the Directive.

ESA

68 ESA essentially shares the observations on the second question submitted by the plaintiff. In addition, it has submitted observations on the compatibility with the Directive of Article 5(e), (f) and (g) of the Icelandic Regulation.

69 In relation to the salmonella certificate required under Article 5(e) of the Icelandic Regulation, ESA observes that, according to Article 8 of Regulation (EC) No 853/2004, EEA States may impose additional guarantees in respect of salmonella only if they meet certain requirements. Such additional guarantees have been established for Finland and Sweden, and there is a possibility for other EEA States to apply them if they have a control programme recognised as equivalent to that approved in Finland and Sweden. Iceland has

65 Stefndi bendir á að málið sem rekið sé fyrir héraðsdómi varði „frystingarvottorðið“. Ekki sé þó ljóst af beiðni héraðsdóms hvers vegna skýra eigi allar íslenskar reglur um innflutning á hráu kjöti með hliðsjón af tilskipuninni í þessu máli.

66 Stefndi telur að „frystingarvottorðið“ hafi ekki letjandi áhrif á innflutning á hráu kjöti, líkt og ráða megi af auknu magni innflutts kjöts á síðastliðnum áratug. Kröfunni um vottorðið sé þar að auki ekki ætlað að endurtaka yfirferð á því hvort sendingaraðildarríkið hafi gengið úr skugga um að öll skilyrði séu uppfyllt. Ísland beri fullt traust til dýraheilbrigðiseftirlits sem fram fer í öðrum aðildarríkjum í samræmi við sameiginlegar EES-reglur. Vottorðinu sé einungis ætlað að fást við sérstakar aðstæður Íslands. Það markmið standi utan við EES-rétt.

67 Samkvæmt framansögðu telur stefndi að skilyrðið um að „frystingarvottorð“ liggi fyrir við innflutning vörunnar falli ekki undir gildissvið tilskipunarinnar.

ESA

68 Í aðalatriðum er ESA sammála athugasemdum stefnanda varðandi aðra spurninguna. Að auki hefur stofnunin gert athugasemdir um samþýðanleika e-, f- og g-liða 5. gr. íslensku reglugerðarinnar við tilskipunina.

69 Varðandi salmónelluvottorðið sem krafist er samkvæmt e-lið 5. gr. íslensku reglugerðarinnar bendir ESA á að EES-ríki megi, samkvæmt 8. gr. reglugerðar 853/2004, aðeins krefjast viðbótarábyrgða varðandi salmónellu að uppfylltum ákveðnum skilyrðum. Slíkar viðbótarábyrgðir séu í gildi fyrir Finnland og Svíþjóð. Öðrum EES-ríkjum standi til boða að beita þeim ef þau eru með eftirlitskerfi sem búið er að viðurkenna að sé jafngilt þeim sem samþykkt hafa verið í Finnlandi og Svíþjóð. Ísland hafi lagt fyrir ESA landsbundna

submitted to ESA a national control programme for salmonella in poultry and poultry products, but it has not applied for a recognition of equivalence to that approved in Finland and Sweden. Iceland may therefore not apply the additional guarantees provided for in Article 8 of that regulation.

70 In relation to Article 5(f) of the Icelandic Regulation and the requirement that the products mentioned therein conform to the regulation on food contaminants, ESA notes that the EEA legislation on contaminants in food sets out maximum levels for certain contaminants.[19] That legislation does not contain any provisions giving EEA States a legal basis to impose on importers the completion of a systematic procedure to demonstrate that food products are in conformity with the current legislation on food contaminants.

71 ESA understands Article 5(g) of the Icelandic Regulation to the effect that this entails a systematic obligation for the importer to present to the Food and Veterinary Authority photographs/pdf documents illustrating the packaging. ESA notes that the EEA legislation on the labelling of foodstuffs[20] does not provide a legal basis for EEA States to impose on importers the completion of a systematic procedure to demonstrate that food products are in conformity with legislation on labelling.

72 Consequently, ESA submits that the substantive requirements imposed on the importer under Article 5(c), (e), (f) and (g) of the Icelandic Regulation do not find a legal basis in EEA law and go

19 Reference is made to Regulation (EEC) No 315/93 and Regulation (EC) No 1881/2006, referred to at points 54f and 54zzzz, respectively, of Chapter XII of Annex II to the EEA Agreement.

20 Reference is made to Regulation (EU) No 1169/2011, referred to at point 86 of Chapter XII of Annex II to the EEA Agreement.

eftirlitsáætlun vegna salmónellu í alifuglum og alifuglaafurðum, en hafi ekki sótt um viðurkenningu til jafns við þá sem samþykkt var fyrir Finnland og Svíþjóð. Íslandi sé því ekki heimilt að beita þeim viðbótarábyrgðum sem kveðið er á um í 8. gr. reglugerðarinnar.

70 Varðandi f-lið 5. gr. íslensku reglugerðarinnar og skilyrðið um að þær vörur sem þar er minnst á uppfylli skilyrði reglugerðarinnar um aðskotaefni í matvælum, bendir ESA á að EES-löggjöfin um aðskotaefni í matvælum kveði á um hámarksgildi tiltekinna aðskotaefna.[19] Engin ákvæði þeirra laga veiti EES-ríkjum lagalega heimild til að leggja þá skyldu á innflutningsaðila, að þeir undirgangist kerfisbundið ferli til að sýna fram á að matvæli standist gildandi reglur um aðskotaefni í matvælum.

71 Skilningur ESA á g-lið 5. gr. íslensku reglugerðarinnar er sá að hún feli í sér kerfisbundna skyldu innflutningsaðila til að leggja fyrir Matvælastofnun ljósmyndir/pdf-skjöl sem sýna umbúðir. ESA bendir á að EES-löggjöf um merkingu matvæla[20] veiti EES-ríkjum ekki heimild til að leggja þá skyldu á innflutningsaðila, að þeir undirgangist kerfisbundið ferli til að sýna fram á að matvæli standist gildandi lög um merkingu matvæla.

72 ESA telur því að þau efnislegu skilyrði sem lögð eru á herðar innflutningsaðilum samkvæmt c-, e-, f- og g-lið 5. gr. íslensku reglugerðarinnar eigi sér ekki lagastoð í EES-rétti og gangi lengra en

19 Vísað er til. reglugerðar 315/93/EBE og reglugerðar 1881/2006/EB, sem vísað er til í XII. kafla viðauka II við EES-samninginn (liðir 54 f og zzzz).

20 Vísað er til reglugerðar nr. 1169/2011/EB, sem vísað er til í 86. lið XII. kafla viðauka II við EES-samninginn.

beyond the veterinary checks allowed under Article 5 of the Directive.

73 ESA rejects Iceland's argument that, since there remain border controls in the EEA in the form of customs controls, the Directive cannot be read as excluding systematic border controls. In ESA's view, the existence of customs controls on agricultural goods by EFTA States cannot justify the existence of additional veterinary checks. Customs controls and veterinary checks follow different purposes and operate in different spheres of the EEA Agreement.

74 ESA proposes that the Court should answer the second question as follows:

It is not compatible with the provisions of [the Directive] that an EEA State requires an importer of raw meat products to apply for a special permit before the products are imported, and to submit, for this purpose, of an import declaration, information on the country of origin and production, the type of product and the producer, and certain certificates, including a certificate confirming that the products have been stored frozen for a certain period prior to customs clearance.

THE COMMISSION

75 The Commission submits that the rules and requirements in question fall within the definition of veterinary checks under Article 2 of the Directive. The Directive's aim, expressed in recital 4 of its preamble, to harmonise the basic requirements relating to the safeguarding of public health and animal health is incompatible with the notion that an EEA State has discretion to impose additional rules or alternative requirements on those trading in animal products.[21]

21 Reference is made to *Commission* v *Sweden*, cited above, paragraph 63.

dýraheilbrigðiseftirlit það sem heimilað er í 5. gr. tilskipunarinnar.

73 ESA hafnar röksemdum Íslands um að þar sem landamæraeftirlit sé enn til staðar innan EES í formi tolleftirlits verði tilskipunin ekki skýrð með þeim hætti að hún útiloki kerfisbundið landamæraeftirlit. Að mati ESA getur tilvist tolleftirlits með landbúnaðarvörum hjá EFTA-ríkjunum ekki réttlætt viðbótar-dýraheilbrigðiseftirlit. Tolleftirlit og dýraheilbrigðiseftirlit þjóni ólíkum tilgangi og heyri undir ólík svið EES-samningsins.

74 ESA leggur til að dómstóllinn svari annarri spurningunni með eftirfarandi hætti:

Það samrýmist ekki ákvæðum tilskipunarinnar að EES-ríki krefjist þess að innflutningsaðili hrárrar kjötvöru sæki um sérstakt leyfi áður en varan er flutt inn, og leggi í þeim tilgangi fram aðflutningsskýrslur, upplýsingar um uppruna- og framleiðsluland vörunnar, tegund vöru og framleiðanda auk tilskilinna vottorða, þar á meðal vottorð um að kjötið hafi verið fryst í tiltekinn tíma fyrir tollafgreiðslu.

FRAMKVÆMDASTJÓRNIN

75 Framkvæmdastjórnin telur að reglur og kröfur þær sem til umfjöllunar eru falli undir skilgreiningu 2. gr. tilskipunarinnar á dýraheilbrigðiseftirliti. Markmið tilskipunarinnar, eins og það sé orðað í 4. lið formálsorða hennar, sé að samræma grundvallarkröfur um verndun heilbrigðis manna og dýra. Það markmið sé ósamrýmanlegt þeirri hugmynd að EES-ríki hafi svigrúm til að setja ítarlegri reglur eða gera aðrar kröfur til þeirra sem stunda viðskipti með dýraafurðir.[21]

21 Vísað er til áður tilvitnaðs máls *Framkvæmdastjórnin* gegn *Svíþjóð*, 63. mgr.

76 In the Commission's view, the Directive provides for a uniform, harmonised method for the application of EEA rules relating to veterinary checks of animal products traded within the area to which the EEA Agreement applies.[22] Within the context of this harmonised system, the scope for an EEA State to impose additional controls or requirements with respect to products being imported into its territory is strictly limited.[23] The checks that may be carried out at the place of destination are described in Article 5 of the Directive. EEA States are given no discretion to impose more rigorous measures, save for "protective measures" which are temporary in nature and are required to control an established outbreak of a zoonosis or disease or a cause likely to constitute a serious hazard to animals or humans. Furthermore, as the Directive has exhaustively harmonised the regulatory regime for veterinary checks for animal products, the imposition of additional requirements or rules by the EEA State of destination cannot be justified under Article 13 EEA or Article 36 TFEU.[24]

77 According to the Commission, the kind of rules and requirements described by the national court appear not to fall within the type of checks permitted by Article 5 of the Directive. Insofar as the requirements are systematic, they cannot be described as spot-checks, and as such go beyond what is permissible pursuant to Article 5. In particular, the requirement that the product must have been stored frozen for a certain period of time prior to customs clearance is wholly outside and beyond what is required under the Directive or any act to which it refers.

22 Reference is made to Cases C-186/88 *Commission* v *Germany*, C-102/96 *Commission* v *Germany*, paragraphs 26 and 27, and *Commission* v *Sweden*, paragraph 51, all cited above.
23 Reference is made to *Commission* v *Sweden*, cited above, paragraph 52.
24 Reference is made to *Commission* v *Portugal*, paragraph 17, *Denkavit Futtermittel*, paragraph 14 and *Compassion in World Farming*, paragraph 47, all cited above.

76 Að mati framkvæmdastjórnarinnar kveður tilskipunin á um einsleita og samræmda aðferð við beitingu EES-reglna um dýraheilbrigðiseftirlit með dýraafurðum sem verslað er með á því svæði sem EES-samningurinn gildir um.[22] Innan þessa samræmda kerfis sé heimild EES-ríkis til að beita auknu eftirliti eða gera aðrar kröfur vegna þeirra vara sem fluttar eru inn á yfirráðasvæði þess verulega takmarkaðar.[23] Því eftirliti sem heimilt sé að framkvæma á áfangastað sé lýst í 5. gr. tilskipunarinnar. EES-ríkjum sé ekkert svigrúm veitt til að beita strangari reglum, ef frá eru taldar „verndarráðstafanir", sem séu tímabundnar í eðli sínu og miði að því að hemja útbreiðslu dýrasjúkdóms sem geti einnig lagst á menn eða eitthvert það ástand sem geti stofnað dýrum eða mönnum í hættu. Tilskipunin hafi enn fremur samræmt reglukerfi um dýraheilbrigðiseftirlit vegna dýraafurða með tæmandi hætti. Verði því setning annarra reglna eða skilyrða af hálfu innflutningslandsins ekki réttlætt með skírskotun til 13. gr. EES-samningsins eða 36. gr. SSESB.[24]

77 Að mati framkvæmdastjórnarinnar virðast þær reglur og kröfur sem landsdómstóllinn lýsir ekki falla undir það eftirlit sem heimilað sé í 5. gr. tilskipunarinnar. Að því marki sem kröfurnar séu kerfisbundnar verði þeim ekki lýst sem skyndikönnunum og gangi því lengra en heimilt sé samkvæmt 5. gr. Sérstaklega falli krafan um að varan skuli hafa verið fryst um tiltekinn tíma fyrir tollafgreiðslu algjörlega utan við þær kröfur sem tilskipunin geri, eða nokkur lagagerð sem hún vísi til.

22 Vísað er til áður tilvitnaðra mála C-186/88 *Framkvæmdastjórnin* gegn Þýskalandi, C-102/96 *Framkvæmdastjórnin* gegn Þýskalandi, 26. og 27. mgr., og *Framkvæmdastjórnin* gegn *Svíþjóð*, 51. mgr.

23 Vísað er til áður tilvitnaðs máls *Framkvæmdastjórnin* gegn *Svíþjóð*, 52. mgr.

24 Vísað er til áður tilvitnaðra mála *Framkvæmdastjórnin* gegn *Portúgal*, 17. mgr., *Denkavit Futtermittel*, 14. mgr. og *Compassion in World Farming*, 47. mgr.

78 Furthermore, the Commission maintains that the ECJ has held that rules similar to those set out in the question referred are not compatible with harmonised rules on veterinary checks.[25]

79 The Commission proposes that the second question should be answered as follows:

It is not compatible with the provisions of [the Directive] that a Member State of the EEA Agreement should set rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and require the submission, for this purpose, of an import declaration, information on the country of origin and production, the type of products and the producer, and the required certificates, including a certificate confirming that the products have been stored frozen for a certain period of time prior to customs clearance.

QUESTION 3

80 By its third question, the referring court asks whether the provisions of the Regulation are relevant in answering the second question.

THE PLAINTIFF

81 The plaintiff submits that the disputed administrative formalities must be considered in the light of the aim of food law, laid down in Article 5(2) of the Regulation, that is to achieve the free movement in the EEA of food and feed manufactured or marketed according to the general principles and requirements in Chapter II of the Regulation. According to the plaintiff, the disputed measures fail to satisfy the requirements of risk analysis and risk assessment laid down in Article 6(1) and (2) of the Regulation.

25 Reference is made to *Commission* v *Sweden*, cited above, paragraphs 58 and 63.

78 Framkvæmdastjórnin bendir jafnframt á að Evrópudómstóllinn hafi talið reglur á borð við þær sem önnur spurningin lúti að séu ekki samrýmanlegar samræmdum reglum um dýraheilbrigðiseftirlit.[25]

79 Framkvæmdastjórnin leggur til að dómstóllinn svari annarri spurningunni með eftirfarandi hætti:

Það samrýmist ekki ákvæðum tilskipunarinnar að aðildarríki krefjist þess að innflutningsaðili hrárrar kjötvöru sæki um sérstakt leyfi áður en varan er flutt inn, og leggi í þeim tilgangi fram aðflutningsskýrslur, upplýsingar um uppruna- og framleiðsluland vörunnar, tegund vöru og framleiðanda auk tilskilinna vottorða, þar á meðal um að kjötið hafi verið fryst í tiltekinn tíma fyrir tollafgreiðslu.

SPURNING 3

80 Þriðja spurning héraðsdóms lýtur að því hvort ákvæði reglugerðarinnar hafi þýðingu þegar annarri spurningunni er svarað.

STEFNANDI

81 Stefnandi telur að hin umdeildu formsatriði á sviði stjórnsýslu verði að skoða með í ljósi þess markmiðs 2. mgr. 5. gr. reglugerðarinnar að matvæli og fóður sem er framleitt eða markaðssett í samræmi við þær almennu meginreglur og skilyrði sem fram koma í II. kafla reglugerðarinnar, njóti frjálsrar farar innan EES svæðisins. Samkvæmt stefnanda uppfylla hinar umdeildu ráðstafanir ekki kröfur 1. og 2. mgr. 6. gr. reglugerðarinnar um áhættugreiningu og áhættumat.

25 Vísað er til áður tilvitnaðs máls *Framkvæmdastjórnin* gegn *Svíþjóð*, 58. og 63. mgr.

82 The plaintiff also challenges the defendant's application of the precautionary principle in Article 7 of the Regulation. Neither the conditions in Article 7(1) for provisional risk management measures, nor the limits applying under Article 7(2) to the contents and duration of such measures, have been respected as regards the disputed measures.

83 Finally, the plaintiff refers to Chapter III of the Regulation, establishing the European Food Safety Authority ("EFSA"). In the plaintiff's view, the EFSA undoubtedly plays an important role in maintaining harmonisation concerning food safety and relevant criteria concerning food and feed safety in the internal market. Therefore, the responsibility concerning this matter rests with EFSA, not unilaterally with individual EEA States.

THE DEFENDANT

84 The defendant submits that the Regulation lays down general principles and requirements for food law with which Iceland complies. The requirement of a "freezing certificate" is nevertheless not affected by the Directive. Accordingly, the defendant submits that the Regulation does not alter the answer to the second question.

ESA

85 ESA submits that the Regulation sets out the general principles and requirements of food safety legislation, and that it relies on more specific EEA legislation setting requirements destined to ensure the safety of foodstuffs placed on the market in the EEA. It is primarily those specific rules, such as the Hygiene Package, which determine, as far as food safety is concerned, whether foods of animal origin can be placed on the market. That is confirmed by Article 14(7) of the Regulation. It also follows from case law that the Regulation is

82 Stefnandi mótmælir einnig beitingu stefnda á varúðarreglu 7. gr. reglugerðarinnar. Hinar umdeildu ráðstafanir hafi hvorki uppfyllt skilyrði 1. mgr. 7. gr. um bráðabirgðaráðstafanir í áhættustjórnun, né þær takmarkanir sem mælt sé fyrir um í 2. mgr. 7. gr. varðandi efni þeirra og gildistíma.

83 Að lokum vísar stefnandi til III. kafla reglugerðarinnar, sem kveður á um að koma skuli á fót Matvælaöryggisstofnun Evrópu (ME). Stefnandi telur að ME gegni lykilhlutverki við að viðhalda samræmingu á sviði matvælaöryggis og forsendum fyrir matvæla- og fóðuröryggi á innri markaðnum. Ábyrgðin á þessum málaflokki liggi því hjá ME, en ekki einhliða hjá hverju EES-ríki.

STEFNDI

84 Stefndi telur að reglugerðin hafi að geyma almennar meginreglur og kröfur um matvælalöggjöf sem Ísland fari eftir. Tilskipunin hafi þó engin áhrif á skilyrðið um „frystingarvottorð“. Í samræmi við það telur stefndi að reglugerðin breyti engu um það hvernig annarri spurningunni sé svarað.

ESA

85 ESA telur að reglugerðin hafi að geyma meginreglur og kröfur um matvælalög sem styðjist við sértækari löggjöf EES-réttar sem ætlað sé að tryggja öryggi matvæla sem markaðssett séu innan EES. Þær sértæku reglur, líkt og reglur hollustulöggjafarinnar, stýri því aðallega hvort setja megi dýraafurðir á markað, með tilliti til matvælaöryggis. 7. mgr. 14. gr. reglugerðarinnar staðfesti þann skilning. ESA telur það einnig leiða af dómaframkvæmd að reglugerðin eigi ekki við þegar EES-regla hafi að geyma sérstök

inapplicable to the extent to which an EEA rule contains specific provisions for certain categories of foodstuffs.[26] ESA submits therefore that the Regulation is not relevant as such for the purpose of assessing the conformity of national measures with the Directive.

86 ESA proposes that the Court should answer the third question as follows:

The provisions of [the Regulation] are not relevant in answering the second question.

THE COMMISSION

87 The Commission submits that the Regulation is not intended to supersede more specific regulation. In fact it relies on more specific regulation to determine whether food meets the requisite standard in order to be placed on the market, cf. Article 14(7) of the Regulation.[27] Accordingly, any provision of the Regulation concerning checks on meat products is precluded to the extent to which a specific provision in the Directive applies.

88 The Commission proposes that the third question should be answered as follows:

The provisions of [the Regulation] are not relevant in answering the second question.

26 Reference is made to Joined Cases C-211/03, C-299/03 and C-316/13 to C-318/03 *HLH Warenvertrieb and Orthica* [2005] ECR I-5141, paragraph 39.
27 Reference is made to *HLH Warenvertrieb and Orthica*, cited above, paragraphs 38 and 39.

ákvæði um tiltekna flokka matvæla.[26] ESA telur reglugerðina því ekki eiga við þegar meta skuli hvort reglur landsréttar samrýmist tilskipuninni.

86 ESA leggur til að dómstóllinn svari þriðju spurningunni með eftirfarandi hætti:

Ákvæði reglugerðarinnar eiga ekki við þegar annarri spurningunni er svarað.

FRAMKVÆMDASTJÓRNIN

87 Framkvæmdastjórnin telur að reglugerðinni sé ekki ætlað að ganga framar sértækari reglum. Hún styðjist raunar við sértækari reglur við mat á því hvort matvæli séu í samræmi við gildandi staðla um öryggi vara sem til stendur að setja á markað, samanber 7. mgr. 14. gr. reglugerðarinnar.[27] Þar af leiðandi fari hvers kyns ákvæði reglugerðarinnar um eftirlit með kjötafurðum í bága við ákvæði tilskipunarinnar.

88 Framkvæmdastjórnin leggur til að dómstóllinn svari þriðju spurningunni með eftirfarandi hætti:

Ákvæði reglugerðarinnar eiga ekki við þegar annarri spurningunni er svarað.

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26 Vísað er til sameinaðra mála C-211/03, C-299/03 og C-316/13 til C-318/03 *HLH Warenvertrieb og Orthica* [2005] ECR I-5141, 39. mgr.

27 Vísað er til áður tilvitnaðs máls *HLH Warenvertrieb og Orthica*, 38. og 39. mgr.

QUESTION 4

89 By its fourth question, the referring court asks, in essence, whether a national prohibition on the import of raw meat constitutes a technical barrier to trade under Article 18 EEA.

THE PLAINTIFF

90 The plaintiff submits that the requirement of a "freezing certificate" is in breach of Article 18 EEA, in that it constitutes a technical barrier to trade, in other words, it imposes a requirement of the same kind as the arrangements laid down in Annex I to the EEA Agreement.

91 Annex I contains numerous acts dealing with animal health protection, which serve the same purpose as the obligation to freeze all meat products. These acts constitute a coherent and harmonised approach to animal health protection so that individual EEA States do not need to adopt restrictive national measures. By maintaining the requirement of a "freezing certificate", Iceland departs from this harmonised approach and compromises the objectives of this body of rules. The same applies to other additional requirements for importing meat to Iceland, for example the obligation to demonstrate that the imported product is free of salmonella, requirements concerning food contaminants and labelling, etc.

THE DEFENDANT

92 The defendant submits that a prohibition, or a conditional prohibition, on the import of raw meat must be assimilated to a quantitative restriction within the meaning of Article 11 EEA.[28]

28 Reference is made to Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraphs 11 to 13.

SPURNING 4

89 Aðalinntak fjórðu spurningar héraðsdóms er hvort bann aðildarríkis við innflutningi á hráu kjöti feli í sér tæknilega viðskiptahindrun í skilningi 18. gr. EES-samningsins.

STEFNANDI

90 Stefnandi telur að skilyrðið um „frystingarvottorðið" sé brot á 18. gr. EES-samningsins þar sem hún feli í sér tæknilega viðskiptahindrun. Með öðrum orðum, felist í henni krafa af sama meiði og þær ráðstafanir sem fjallað sé um í I. viðauka EES-samningsins.

91 Stefnandi segir I. viðauka geyma fjölda gerða sem fjalla um verndun dýraheilbrigðis, sem þjóni sama tilgangi og skyldan til að frysta allar kjötafurðir. Þær gerðir séu hluti af heildstæðri og samræmdri nálgun varðandi vernd dýraheilbrigðis til að einstök EES-ríki þurfi ekki að beita takmarkandi ráðstöfunum í landsrétti. Með því að halda fast í kröfuna um „frystingarvottorð" sé brugðið frá þeirri samræmdu nálgun og grafið undan markmiði regluverksins. Hið sama á, að mati stefnanda, við um annars konar aukaskilyrði sem gerð séu vegna innflutnings á kjöti til Íslands, til dæmis um skylduna til að sýna fram á að hin innflutta vara sé laus við salmónellu, auk krafna sem lúti að merkingu matvæla, aðskotaefni o.s.frv.

STEFNDI

92 Stefndi telur að bann, eða skilyrt bann, við innflutningi á hráu kjöti verði að jafna til magntakmarkana í skilningi 11. gr. EES-samningsins.[28] Bann 18. gr. EES-samningsins við tæknilegum

28 Vísað er til máls 34/79 *Henn og Darby* [1979] ECR 3795, 11.-13. mgr.

However, the prohibition on technical barriers to trade laid down in Article 18 EEA cannot be equated with the terms of Article 11 EEA.[29] This means that the obligation under Article 18 EEA to refrain from technical barriers to trade is not relevant for the determination of Iceland's compliance with EEA law in the present case.

93 The defendant further submits that a ban on imports does not constitute a measure of the same kind as veterinary checks envisaged by the Directive. The import prohibition is not a veterinary check of any kind, as it relates to the protection of a unique status in the country of import, allowing ample time to prevent irreparable harm and not physically examining the imported goods. In the defendant's view, since Article 18 EEA deals with products which are not included within the scope of the free movement of goods, it allows EEA States to introduce other measures. In this context, Article 13 EEA is applicable.

94 According to the defendant, the term technical barriers to trade must primarily mean a situation where the State concerned uses remedies or measures to discriminate against the import of agricultural products for the benefit of domestic production of the same type. The defendant submits that this is not the case here, as the disputed measures are only adopted to protect animal populations and public and animal health.

ESA

95 ESA stresses its conclusion that the Icelandic legislation breaches the Directive and cannot be justified under Article 13 EEA. A response to the fourth, fifth and sixth question is therefore strictly not necessary and the observations related to Article 18 and 13 EEA should be considered only in the event that the Court were not to consider the

29 Reference is made to *Pedicel*, cited above, paragraph 27.

viðskiptahindrunum verði hins vegar ekki lagt að jöfnu við ákvæði 11. gr.[29] Það þýði að skyldan samkvæmt 18. gr. um að forðast beitingu tæknilegra viðskiptahindrana hafi ekkert um það að segja hvort Ísland hafi uppfyllt skyldur sínar að EES-rétti í málinu.

93 Stefndi bendir jafnframt á að innflutningsbann jafngildi ekki ráðstöfun á borð við dýraheilbrigðiseftirlitið sem mælt er fyrir um í tilskipuninni. Innflutningsbannið sé ekki neins konar dýraheilbrigðiseftirlit, þar sem því sé ætlað að vernda einstakar aðstæður í innflutningslandinu, og veita nægan tíma til að koma í veg fyrir óbætanlegt tjón í stað þess að framkvæma skoðun á innfluttum vörum. Þar sem 18. gr. EES-samningsins taki til vara sem ekki falli undir gildissvið frjálsra vöruflutninga, telur stefndi að EES-ríkjum sé heimilt að grípa til annarra úrræða varðandi þær vörur. 13. gr. EES-samningsins gildi því um þær.

94 Stefndi telur að hugtakið tæknilegar viðskiptahindranir vísi fyrst og fremst til aðstæðna þar sem ríkið sem um ræðir noti úrræði eða aðgerðir til að mismuna innflutningi landbúnaðarafurða, innlendri framleiðslu til hagsbóta. Stefndi telur ekki að um slíkt sé að ræða í þessu máli, þar sem einungis hafi verið gripið til hinna umdeildu ráðstafana til verndunar dýrastofna og heilbrigðis dýra og manna.

ESA

95 ESA minnir á þá afstöðu sína að íslenska löggjöfin brjóti gegn tilskipuninni og verði ekki réttlætt með vísan til 13. gr. EES-samningsins. Strangt til tekið sé því óþarfi að svara spurningum fjögur, fimm og sex og athugasemdir varðandi 18. og 13. gr. EES-samningsins ætti aðeins að taka til athugunar ef dómstóllinn telur

29 Vísað er til áður tilvitnaðs máls *Pedicel*, 27. mgr.

Directive to exhaustively harmonise veterinary checks and/or the Court were not to find a breach of Article 5 of the Directive. ESA furthermore considers the combination of the provisions referred to in the fourth and fifth questions to establish an authorisation procedure. It therefore provides a joint answer to those two questions.

96 ESA submits that the Icelandic measures are technical barriers to trade, in that they entail requirements of the same kind as those imposed in acts referred to in Annex I to the EEA Agreement.[30] The authorisation system constitutes veterinary checks for fresh meat which are additional to those provided for in the harmonised system for veterinary checks on products of animal origin traded in the EEA established by the Directive. Furthermore, the requirements laid down in Article 5(c), (e), (f) and (g) of the Icelandic Regulation all constitute additional requirements of the same kind as those provided for and implemented in the EEA legislation.

97 Consequently, ESA submits that the authorisation procedure and related requirements represent technical barriers to trade within the meaning of Article 18 EEA.

98 ESA proposes the following answer to the fourth and fifth questions:

A measure, such as that in Article 10 of [the Act] read in conjunction with Articles 3 to 5 of [the Icelandic Regulation] in place in Iceland, in the form of a systematic authorisation procedure for operators who want to import raw meat into Iceland, constitutes an obstacle to trade in the form of a "technical barrier" within the meaning of Article 18 EEA.

30 Reference is made to *Pedicel*, cited above, paragraph 27.

að tilskipunin samræmi ekki með tæmandi hætti dýraheilbrigðiseftirlit og/eða niðurstaðan verði sú að ekki hafi verið brotið gegn 5. gr. EES-samningsins. ESA telur jafnframt að samspil þeirra ákvæða sem vísað sé til í fjórðu og fimmtu spurningunni komi á fót málsmeðferð við leyfisveitingu. Stofnunin svarar þeim spurningum því sameiginlega.

96 ESA bendir á að íslensku ráðstafanirnar séu tæknilegar viðskiptahindranir vegna þess að þær innihaldi sams konar kröfur og þær sem vísað sé til í I. viðauka EES-samningsins.[30] Leyfisveitingakerfið feli í sér dýraheilbrigðiseftirlit með fersku kjöti til viðbótar við eftirlitið sem gert sé ráð fyrir í samræmda kerfinu um dýraheilbrigðiseftirlit vegna dýraafurða sem verslað sé með innan EES, sem komið hafi verið á með tilskipuninni. Enn fremur jafngildi kröfurnar sem gerðar séu í c-, e-, f- og g-liðum 5. gr. íslensku reglugerðarinnar aukakröfum sömu gerðar og þær sem kveðið sé á um og komið á með EES-löggjöfinni.

97 ESA telur því að málsmeðferðin við leyfisveitingu og kröfur henni tengdar feli í sér tæknilegar viðskiptahindranir í skilningi 18. gr. EES-samningsins.

98 ESA leggur til að dómstóllinn svari fjórðu og fimmtu spurningunni með eftirfarandi hætti:

Ráðstöfun á borð við þá sem í gildi er á Íslandi og mælt er fyrir um í 10. gr. laganna, með hliðsjón af 3. til 5. gr. íslensku reglugerðarinnar, sem kemur á kerfisbundinni meðferð við leyfisveitingu fyrir þá sem hyggjast flytja hrátt kjöt til Íslands, felur í sér viðskiptahindrun sem telst tæknileg hindrun í skilningi 18. gr. EES-samningsins.

30 Vísað er til áður tilvitnaðs máls *Pedicel*, 27. mgr.

THE COMMISSION

99 The Commission submits that the reference in Article 18 EEA to other technical barriers to trade should be construed as any additional rules or requirements imposed of the same kind as the arrangements or acts cited in the relevant annexes.[31] The Directive is such an arrangement referred to in Article 18 EEA. It provides a comprehensive and harmonised system for veterinary checks for products of animal origin traded within the EEA. It thus follows that rules or technical requirements imposed concerning veterinary checks for raw meat, which come in addition to those provided for in the Directive, should be considered as other technical barriers to trade.

100 The Commission proposes the following answer to the fourth question:

It constitutes a technical barrier to trade in the sense of Article 18 EEA if an EEA State sets rules under which the importation to that State of raw meat products is not permitted.

QUESTION 5

101 The essence of the fifth question referred is whether it affects the answer to the fourth question if the rules of the EEA State of destination permit the granting of exceptions from the general prohibition on the import of raw meat.

THE PLAINTIFF

102 The plaintiff maintains that applicable Icelandic law provides no exception from the prohibition on the import of raw meat products

31 Reference is made to *Pedicel*, cited above, paragraph 27.

FRAMKVÆMDASTJÓRNIN

99 Framkvæmdastjórnin telur að túlka beri tilvísun 18. gr. EES-samningsins til annarra tæknilegra viðskiptahindrana með þeim hætti að hún taki til allra viðbótarreglna eða –krafna sem eigi við um fyrirkomulag eða gerðir sem vísað sé til í viðkomandi viðaukum.[31] Tilskipunin sé fyrirkomulag af því tagi sem vísað sé til í 18. gr. samningsins. Hún mæli fyrir um yfirgripsmikið og samræmt kerfi dýraheilbrigðiseftirlits með afurðum úr dýraríkinu sem verslað sé með innan EES. Af því leiði að reglur, eða tæknilegar kröfur, varðandi dýraheilbrigðiseftirlit með hráu kjöti, sem koma til viðbótar við ákvæði tilskipunarinnar, skuli teljast tæknilegar viðskiptahindranir.

100 Framkvæmdastjórnin leggur til að dómstóllinn svari fjórðu spurningunni með eftirfarandi hætti:

Ef EES-ríki setur reglur sem banna innflutning á hráum kjötafurðum til ríkisins telst það tæknileg viðskiptahindrun í skilningi 18. gr. EES-samningsins.

SPURNING 5

101 Aðalinntak fimmtu spurningar héraðsdóms er hvort áhrif hafi á svarið við fjórðu spurningunni að reglur innflutningsríkisins heimili veitingu undanþága frá almennu banni við innflutningi hrárrar kjötvöru til landsins.

STEFNANDI

102 Stefnandi telur að þau lög sem í gildi séu á Íslandi veiti enga undanþágu frá banninu við innflutningi hrárrar kjötvöru til

31 Vísað er til áður tilvitnaðs máls *Pedicel*, 27. mgr.

to Iceland. Even if there were such an exception, the main rule of prohibition would still constitute a technical barrier to trade. Nevertheless, a case-by-case assessment would be necessary, and the scope of such exception or exceptions could influence that assessment.

THE DEFENDANT

103 For the purposes of the present case, the defendant interprets the fifth question as asking whether the requirement that a "freezing certificate" be presented at import amounts to a technical barrier to trade within the meaning of Article 18 EEA. Such a requirement would, in the defendant's view, be a physical barrier to trade rather than a technical barrier, at least according to the terminology that was current when the EEA Agreement was negotiated.

THE COMMISSION

104 The Commission stresses the fact that any rule which imposes further requirements of the same kind as those requirements provided for under the acts set out in Annexes I or II, in so far as they relate to trade in raw meat, must be considered a technical barrier to trade pursuant to Article 18 EEA. In connection with Article 13 EEA, the Commission submits that the rules concerning veterinary checks of products of animal origin traded within the EEA have been fully harmonised by the Directive. Accordingly, an EEA State is not permitted to impose rules or requirements concerning the import of raw meat that go beyond the requirements under the Directive.[32] An EEA State cannot circumvent the legal effects of

32 Reference is made to *Danske Slagterier*, cited above, paragraph 25.

landsins. Jafnvel þótt slík undanþága væri til staðar, fæli meginreglan um innflutningsbann engu að síður í sér tæknilega viðskiptahindrun. Ef svo væri yrði engu að síður að meta hvert mál fyrir sig og gildissvið slíkrar undanþágu gæti haft áhrif á það mat.

STEFNDI

103 Stefndi leggur þann skilning í fimmtu spurninguna að leitað sé svars við því hvort krafan um framlagningu „frystingarvottorðs" við innflutning jafngildi tæknilegri viðskiptahindrun í skilningi 18. gr. EES-samningsins. Að mati stefnda fæli slík krafa frekar í sér efnislega hindrun en tæknilega hindrun, að minnsta kosti samkvæmt þeirri orðnotkun sem hafi verið við lýði þegar á samningaviðræðunum stóð.

FRAMKVÆMDASTJÓRNIN

104 Framkvæmdastjórnin leggur áherslu á að hvers konar regla sem kveði á um viðbótarkröfur af sömu gerð og kröfur þær sem gerðar séu samkvæmt lagagerðum í I. og II. viðauka, að því marki sem þær eigi við um innflutning hrárra kjötvara, verði að teljast tæknileg viðskiptahindrun í skilningi 18. gr. EES-samningsins. Varðandi 13. gr. EES-samningsins bendir framkvæmdastjórnin á að tilskipunin hafi að fullu samræmt reglur um dýraheilbrigðiseftirlit með afurðum úr dýraríkinu sem verslað er með innan EES. Þar af leiðandi sé EES-ríki ekki heimilt að setja reglur um innflutning hrárra kjötvara, eða gera kröfur sem ganga lengra en krafist sé samkvæmt tilskipuninni.[32] EES-ríki geti ekki komist hjá lagalegum áhrifum samræmingar með

32 Vísað er til áður tilvitnaðs máls *Danske Slagterier*, 25. mgr.

harmonisation by invoking either the precautionary principle or Article 13 EEA.[33] A rule imposed by an EEA State of destination prohibiting the import of raw meat cannot therefore be justified on the grounds that it constitutes an exception to the general prohibition on technical barriers to trade.

105 The Commission proposes the following answer to the fifth question:

It does not affect the answer to the fourth question if it is permitted, under the rules of the EEA State of destination, to grant exceptions from the general prohibition referred to in that question.

QUESTION 6

106 By its sixth question, which arises if Article 18 EEA is considered to apply, the referring court asks, in essence, whether and under what circumstances a system such as that described in the fourth and fifth question could be justified under Article 13 EEA, and what the requirements of proof are in that regard, particularly in the light of the precautionary principle of EEA law.

THE PLAINTIFF

107 The plaintiff submits that even though EEA States may decide on the level of protection they intend to provide for the legitimate interest pursued, they must nevertheless comply with the principle of proportionality.[34] An EEA State imposing a national ban or an authorisation system for a particular product must therefore show that the restriction is limited to what is necessary to attain the

33 Reference is made to Case C-102/96 *Commission* v *Germany*, paragraphs 21 and 22, and *Commission* v *Sweden*, paragraph 51, both cited above.

34 Reference is made to Cases E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86 and C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375.

því að beita fyrir sig varúðarreglunni eða 13. gr. EES-samningsins.[33] Regla sem innflutningsríki setji um bann við innflutning á hráu kjöti verði því ekki réttlætt á grundvelli þess að í henni felist undanþága frá almennu banni við tæknilegum viðskiptahindrunum.

105 Framkvæmdastjórnin leggur til að dómstóllinn svari fimmtu spurningunni með eftirfarandi hætti:

Það hefur engin áhrif á svarið við fjórðu spurningunni að heimilt sé, samkvæmt lögum innflutningsríkisins, að veita undanþágu frá almennu banni sem um getur í þeirri spurningu.

SPURNING 6

106 Með sjöttu spurningu héraðsdóms, sem vaknar ef talið verður að 18. gr. EES-samningsins eigi við í málinu, er hvort, og undir hvaða kringumstæðum, unnt sé að réttlæta kerfi sem lýst er í fjórðu og fimmtu spurningunni með vísan til 13. gr. EES-samningsins, og hvaða sönnunarkröfur eigi við í slíku tilfelli, sérstaklega með hliðsjón af varúðarreglu EES-réttar.

STEFNANDI

107 Stefnandi bendir á að þótt EES-ríkjum sé heimilt að ákveða að hvaða marki þau hyggi vernda tiltekna lögmæta hagsmuni, verði þau engu að síður að fylgja meðalhófsreglunni.[34] EES-ríki sem komi á innflutningsbanni eða leyfisveitingakerfi vegna tiltekinnar vöru verði því að sýna fram á að slíkar takmarkanir einskorðist við

33 Vísað er til áður tilvitnaðra mála C-102/96 *Framkvæmdastjórnin* gegn Þýskalandi, 21. og 22. mgr., og *Framkvæmdastjórnin* gegn *Svíþjóð*, 51. mgr.

34 Vísað er til máls E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86 og C-41/02 *Framkvæmdastjórnin* gegn *Hollandi* [2004] ECR I-11375.

legitimate aim of protection of public health, and that the aim cannot be achieved by any other means that would have a less restrictive effect on intra-EEA trade.[35] Furthermore, according to settled case law, decision makers may not base their decisions on a "zero risk" approach.[36]

108 In the plaintiff's view, the restrictions placed on the import of meat to Iceland, for example the "freezing requirement", are not proportionate to the risk addressed. In relation to the pathogens identified in the risk assessments presented by Iceland, harmonised measures have already been laid down in current EEA legislation.[37] Those measures minimise the risk of products originating in the EEA introducing a number of the diseases identified in the risk assessment.

109 The plaintiff contends that restrictions imposed on the basis of the precautionary principle should only be of a provisional nature, pending the availability of more reliable scientific data.[38] However, the Icelandic rules on import of meat are not provisional in nature and do not depend on the development of scientific knowledge.

110 Finally, the plaintiff submits that the burden of proof regarding the legal and factual basis for measures under Article 13 EEA, is borne by

35 Reference is made to Cases C-270/02 *Commission* v *Italy* [2004] ECR I-1559 and 104/75 *de Peijper* [1976] ECR 613.

36 Reference is made to Cases T-257/07 *France* v *Commission* [2011] ECR II-5827, T-13/99 *Pfizer Animal Health* v *Council* [2002] ECR II-3305 and T-70/99 *Alpharma* v *Council* [2002] ECR II-3495.

37 Reference is made by way of example to Regulation (EC) No 853/2004 and Regulation (EC) No 2160/2003 (as regards salmonella), Directive 2002/60/EC (as regards African swine fever), Directive 2001/89/EC (as regards classical swine fever), and Directive 2005/94/EC (as regards avian influenza), referred to at point 17 of subchapter 6.1, point 8b of subchapter 7.1, point 9b of subchapter 3.1, point 3 of subchapter 3.1 and point 5a of subchapter 3.1, respectively, of Chapter I of Annex I to the EEA Agreement.

38 Reference is made to Case C-504/04 *Agraproduktion Staebelow* [2006] ECR I-679.

nauðsynlegar aðgerðir til að ná lögmætu markmiði lýðheilsuverndar, og að markmiðinu verði ekki náð með öðrum aðferðum sem hefðu vægari takmarkanir í för með sér fyrir viðskipti innan EES.[35] Það hafi enn fremur verið viðurkennt í dómaframkvæmd að löggjafinn megi ekki byggja ákvörðun sína á nálgun sem miði við að áhættan verði engin.[36]

108 Stefnandi telur að þær takmarkanir sem settar hafa verið á innflutning kjöts til Íslands, til dæmis „frystingarkrafan", séu ekki í samræmi við hættuna sem þeim sé ætlað að sporna gegn. Þegar hafi verið gripið til samræmdra aðgerða í gildandi EES-löggjöf vegna þeirra smitefna sem fjallað er um í áhættumatinu sem Ísland hefur lagt fram.[37] Þær ráðstafanir dragi úr hættu á smiti vegna vara sem eiga uppruna sinn innan EES og taki til fjölda sjúkdóma sem til umfjöllunar séu í áhættumatinu.

109 Stefnandi telur að takmarkanirnar sem settar hafa verið með skírskotun til varúðarreglunnar eigi aðeins að vera tímabundnar, á meðan þess sé beðið að áreiðanlegri vísindaleg gögn liggi fyrir.[38] Íslensku reglurnar um kjötinnflutning séu hins vegar ekki tímabundnar eða háðar þróun vísindalegra gagna.

110 Loks telur stefnandi að sönnunarbyrðin um lagaatriði og staðreyndir sem liggja til grundvallar ráðstöfunum samkvæmt 13. gr. EES-

35 Vísað er til mála C-270/02 *Framkvæmdastjórnin* gegn Ítalíu [2004] ECR I-1559 og 104/75 *de Peijper* [1976] ECR 613.

36 Vísað er til mála T-257/07 *Frakkland* gegn *Framkvæmdastjórninni* [2011] ECR II-5827, T-13/99 *Pfizer Animal Health* gegn *Ráðinu* [2002] ECR II-3305 og T-70/99 *Alpharma* gegn *Ráðinu* [2002] ECR II-3495.

37 Sem dæmi er vísað til reglugerðar 853/2004/EB og reglugerðar 2160/2003/EB (varðandi salmónellu), tilskipunar 2002/60/EB (varðandi afríska svínaflensu), tilskipunar 2001/89/EB (varðandi hefðbundna svínaflensu),og tilskipunar 2005/94/EB (varðandi fuglaflensu), sbr. 17. lið undirkafla 6.1, lið 8b í undirkafla 7.1, lið 9b í undirkafla 3.1, 3. lið undirkafla 3.1 og lið 5a í undirkafla 3.1, I. kafla viðauka I við EES-samninginn, í þeirri röð.

38 Vísað er til máls C-504/04 *Agraproduktion Staebelow* [2006] ECR I-679.

the EEA State. An EEA State banning the import of raw meat must prove beyond any doubt that the import of such meat would seriously jeopardise human health and the wellbeing of animals. The plaintiff contends that Iceland has failed to demonstrate such a risk. Consequently, the plaintiff argues that the measures at issue are not justified under Article 13 EEA.

THE DEFENDANT

111 According to the defendant, an EEA State may aim at a very high level of protection of public and animal health and biodiversity.[39] The measures adopted must nevertheless be suitable and necessary for attaining that level of protection. As the referring court is closer to the matters of law and fact in the main proceedings, that court is in a better position to conduct the proportionality review.[40] This conclusion is also supported by the clear separation of functions on which Article 34 SCA is based.

112 The defendant contends that when applying Article 13 EEA concerning agricultural products, it must be kept in mind, first, that the EU agricultural policy does not as such fall within the scope of the EEA Agreement. The EEA Agreement was never intended nor drafted to reduce or concede the health requirements that apply to Iceland for specific reasons. Second, Article 13 EEA and related case law apply primarily to products for which there is an internal market in the EEA. In the defendant's view, Article 13 EEA cannot therefore be interpreted in the same stringent manner in the field of

39 Reference is made to Cases C-67/97 *Bluhme* [1998] ECR I-8033, paragraph 33, and E-16/10 *Philip Morris Norway* [2011] EFTA Ct. Rep. 330, paragraph 77.

40 Reference is made to *Philip Morris Norway*, cited above, paragraph 86, and Case C-405/98 *Gourmet* [2001] ECR I-1795, paragraph 33.

samningsins, hvíli á ríkinu sem beiti fyrir sig greininni. EES-ríki sem banni innflutning á hráu kjöti verði að sanna, svo hafið sé yfir allan vafa, að innflutningur slíks kjöts geti stofnað heilsu manna og dýravelferð í verulega hættu. Stefnandi telur að íslenska ríkinu hafi ekki tekist að sýna fram á að svo sé. Ráðstafanirnar verði því ekki réttlættar með vísun til 13. gr. EES-samningsins.

STEFNDI

111 EES-ríkjum er að mati stefnda heimilt að stefna að umfangsmikilli vernd lýðheilsu, dýraheilbrigðis og líffræðilegs fjölbreytileika.[39] Ráðstafanirnar sem gripið sé til verði engu að síður að vera nauðsynlegar og hentugar til að ná því takmarki. Þar sem málsatvik og staðreyndir máls standi landsdómstólnum nærri, sé hann í betri aðstöðu til að meta hvort meðalhófs hafi verið gætt.[40] Sú niðurstaða styðjist einnig við þá skýru verkaskiptingu sem liggur til grundvallar 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls.

112 Stefndi heldur því fram, að við beitingu 13. gr. EES-samningsins um landbúnaðarafurðir verði fyrst að hafa í huga að landbúnaðarstefna ESB falli utan gildissviðs EES-samningsins. EES-samningnum hafi aldrei verið ætlað, og hann ekki saminn með það í huga, að draga úr eða gefa eftir heilsufarslegar kröfur sem eigi, af sérstökum ástæðum, við um Ísland. 13. gr. samningsins og dómaframkvæmd sem henni tengist eigi þar að auki aðallega við um vörur sem enginn innri markaður sé fyrir innan EES. Að mati stefnda sé því ekki unnt að túlka 13. gr. EES-samningsins, þegar kemur að sviði

39 Vísað er til mála C-67/97 *Bluhme* [1998] ECR I-8033, 33. mgr., og E-16/10 *Philip Morris Norway* [2011] EFTA Ct. Rep. 330, 77. mgr.

40 Vísað er til áður tilvitnaðs máls *Philip Morris Norway*, 86. mgr., og máls C-405/98 *Gourmet* [2001] ECR I-1795, 33. mgr.

agricultural products as it is in relation to goods covered by the provisions on free movement.

113 The defendant argues further that where there is uncertainty as to the existence or extent of risks to public or animal health, an EEA State is entitled to take protective measures without having to wait until the reality of those risks become fully apparent. It suffices therefore to demonstrate that it is reasonable to assume that the measure can contribute to the protection of public and animal health.[41]

114 The defendant submits that when the harmonisation of rules is absent and there is scientific uncertainty with regard to the risk in question, it is for the EEA States to decide what degree of protection of human health they intend to assure, having regard to the fundamental requirements of EEA law, notably the free movement of goods. It is within the discretion of the EEA State to decide as to the level of risk it considers appropriate.[42] The defendant argues that the discretion should be even wider where the principle of free movement of goods does not apply.

115 The defendant asserts therefore that it maintains all its rights to safeguard full public and animal health in conformity with Article 18 EEA read in conjunction with Article 13 EEA. Iceland is not obliged to bear the risk of incidents that may cause irreparable harm to the animal populations in Iceland and/or considerably undermine public and animal health. When there is scientific uncertainty concerning risk, the onus of proof is on the party causing the risk to show that Iceland has gone to unnecessary lengths in its decision to counteract the risk.

41 Reference is made to *Philip Morris Norway*, cited above, paragraphs 82 and 83.
42 Reference is made to Case E-3/00 *ESA* v *Norway* [2000-2001] EFTA Ct. Rep. 73.

landbúnaðarafurða, með sama stranga hætti og eigi við um aðrar vörur sem ákvæðin um frjálsa vöruflutninga taka til.

113 Stefndi telur jafnframt að þegar óvissa ríkir um umfang hættu sem steðjar að lýðheilsu og dýraheilbrigði, megi EES-ríki grípa til verndarráðstafana án þess að þurfa að bíða þess að hættan sé fyllilega komin í ljós. Því nægi að sýna fram á að réttmætt sé að gera ráð fyrir því að ráðstafanirnar geti aukið vernd lýðheilsu og dýraheilbrigðis.[41]

114 Stefndi bendir á að þegar reglur hafi ekki verið samræmdar og vísindaleg óvissa ríki um hættuna sem um ræðir, sé það aðildarríkjanna að ákveða að hvaða marki þau grípa til ráðstafana til að sporna við henni og tryggja heilbrigði manna, að grundvallarreglum EES-réttar virtum, sérstaklega þeim reglum sem lúta að frjálsum vöruflutningum. Stefndi telur vera á valdsviði hvers EES-ríkis að meta viðbrögð við aðsteðjandi hættu.[42] Hann telur að ríki skuli hafa meira svigrúm til þess í tilvikum þar sem reglur um frjálsa vöruflutninga eigi ekki við.

115 Stefndi áskilur sér því allan rétt til að tryggja heilsu manna og dýra að fullu, í samræmi við 18. gr. EES-samningsins, eins og hana beri að skýra með hliðsjón af 13. gr. Íslandi sé ekki skylt að bera áhættuna af atvikum sem geta valdið óbætanlegu tjóni á íslenskum dýrastofnum og/eða grafið alvarlega undan lýðheilsu og dýraheilbrigði. Þegar vísindaleg óvissa ríki um hættuna hvíli sönnunarbyrðin á þeim aðila sem henni valdi og verði hann að sýna fram á að Ísland hafi gengið óþarflega langt í ákvörðun sinni um að sporna gegn hættunni.

41 Vísað er til áður tilvitnaðs máls *Philip Morris Norway*, 82. og 83. mgr.
42 Vísað er til máls E-3/00 *ESA* gegn *Noregi* [2000-2001] EFTA Ct. Rep. 73.

116 According to the defendant, the measures at issue do not serve to ensure perfect absence of risk. However, Iceland can best safeguard its interests by maintaining protection in accordance with new scientific data on the causes of the dangers for animal populations and human health. The expert opinions obtained and submitted to ESA during the earlier infringement proceedings demonstrate that scientific research and evaluation support the measures taken by Iceland. However, this is for the national court to assess.

117 The defendant consequently submits that the objectives pursued by the requirement of a "freezing certificate" are fully justifiable under Article 13 EEA and that it is for the referring court to review the proportionality of the requirement.

ESA

118 ESA asserts that in harmonised fields of European legislation, recourse to justifications under Article 13 EEA is not available.[43] However, if the Directive is considered not to harmonise veterinary checks exhaustively, ESA submits that the Icelandic rules on the import of raw meat products cannot be justified under Article 13 EEA.

119 ESA notes that Article 13 EEA, being an exception from Article 18 EEA, should be interpreted narrowly, and the burden to prove that the measure is justified lies with the EEA State.[44] Although the EEA States can decide on the level of protection they intend to provide for the legitimate interest pursued,[45] they must comply with the

43 Reference is made to *Compassion in World Farming*, cited above, paragraph 47.
44 Reference is made to *Commission* v *Italy*, paragraph 22, and *Commission* v *Netherlands*, paragraph 47, both cited above.
45 Reference is made to *Ladbrokes*, cited above, paragraph 42.

116 Stefndi telur að ráðstöfununum sem um ræðir sé ekki ætlað að koma algjörlega í veg fyrir alla áhættu. Hagsmunum Íslands sé þó best borgið með því að viðhalda verndinni í samræmi við vísindaleg gögn um orsakir þeirrar hættu sem steðji að heilbrigði dýrastofna og manna. Sérfræðiálit sem aflað hafi verið og lögð fyrir ESA í fyrri málsmeðferð vegna samningsbrota sýni að vísindalegar rannsóknir og úttektir styðji þær ráðstafanir sem Ísland hafi gripið til. Það sé þó landsdómstólsins að meta hvort svo sé.

117 Stefndi telur þar af leiðandi að markmiðin sem skilyrðið um „frystingarvottorð“ sé ætlað að stefna að séu að öllu leyti réttlætanleg samkvæmt 13. gr. EES-samningsins og að það sé landsdómstólsins að meta hvort meðalhófs hafi verið gætt.

ESA

118 ESA bendir á að ekki sé unnt að réttlæta ráðstafanir með vísan til 13. gr. EES-samningsins þegar um samræmd svið Evrópuréttar sé að ræða.[43] Komist dómstóllinn á hinn bóginn að þeirri niðurstöðu að dýraheilbrigðiseftirlit hafi ekki verið samræmt með tæmandi hætti í tilskipuninni heldur ESA því fram að íslensku reglurnar um innflutning á hráu kjöti verði ekki réttlættar með vísan til 13. gr. EES-samningsins.

119 ESA bendir á að þar sem 13. gr. EES-samningsins geymi undanþágu frá 18. gr. verði að skýra hana þröngt og að sönnunarbyrðin varðandi það hvort ráðstöfunin hafi verið réttlætanleg hvíli á aðildarríkinu.[44] Þótt EES-ríkjum sé heimilt að ákveða hversu ríka vernd þau veiti þeim lögmætu hagsmunum sem stefnt sé að,[45] verði þau að gæta

43 Vísað er til áður tilvitnaðs máls *Compassion in World Farming*, 47. mgr.
44 Vísað er til áður tilvitnaðra mála *Framkvæmdastjórnin* gegn Ítalíu, 22. mgr., og *Framkvæmdastjórnin* gegn *Hollandi*, 47. mgr.
45 Vísað er til áður tilvitnaðs máls *Ladbrokes*, 42. mgr.

principle of proportionality.[46] EEA States imposing a ban on a product or subjecting it to an authorisation system must show that the measure is appropriate and limited to what is necessary to attain the legitimate aim pursued, in this case the protection of public and animal health.[47] This includes an obligation to provide the relevant evidence.[48]

120 ESA alleges that the two risk assessments submitted by Iceland during the infringement procedure, dealing with animal health and public health respectively, do not support the view that unrestricted import of meat and meat products causes a risk to the Icelandic livestock or to public health that ought to be controlled with a systematic authorisation procedure. As decisions may not be based on a "zero risk" approach, ESA maintains that the Icelandic measures are not proportionate to the objective pursued.[49]

121 With regard to animal health, ESA submits that, according to the risk assessment, the main risk of spreading pathogens is linked to the keeping of hobby pigs or backyard poultry, which appears to be a growing trend in Iceland. On the other hand, the risk to the commercial herds is negligible. Furthermore, most of the pathogens posing a non-negligible risk would survive freezing for a 30-day period. Therefore, the "freezing requirement" does not appear to be suitable and necessary to eliminate the risk of infection of Icelandic livestock.

122 With regard to public health, ESA considers that, although the risk assessment concludes that the possibility cannot be excluded that

46 Reference is made to *Commission* v *Netherlands*, cited above, paragraph 46.
47 Reference is made to *de Peijper*, cited above, paragraph 17.
48 Reference is made to *Commission* v *Italy*, cited above.
49 Reference is made to *France* v *Commission*, paragraph 79, *Pfizer Animal Health* v *Council*, paragraphs 139 and 141, and *Alpharma* v *Council*, paragraphs 152 and 154, all cited above.

meðalhófsreglunnar.[46] EES-ríki sem banni tiltekna vöru eða komi á leyfisveitingakerfi verði að sýna fram á að sú ráðstöfun sé viðeigandi og takmarkist við það sem nauðsynlegt geti talist til að ná hinu lögmæta markmiði, sem í þessu tilviki sé vernd lýðheilsu og dýraheilbrigðis.[47] Það feli í sér skyldu til að leggja fram viðeigandi sönnunargögn.[48]

120 ESA telur að áhættugreiningarnar tvær sem Ísland lagði fram við málsmeðferðina vegna meintra samningsbrota, annars vegar um dýraheilbrigði og hins vegar um lýðheilsu, styðji ekki þá skoðun að ótakmarkaður innflutningur kjöts og kjötafurða sé svo hættulegur íslenskum búfénaði eða lýðheilsu að honum verði að stjórna með kerfisbundinni meðferð við leyfisveitingu. Þar sem ekki megi byggja ákvörðun á nálgun sem miði við að áhættan sé engin, telur ESA íslensku ráðstafanirnar ekki gæta meðalhófs með tilliti til þeirrar hagsmunagæslu sem stefnt sé að.[49]

121 Hvað dýraheilbrigði varðar telur ESA að samkvæmt áhættumatinu tengist aðalhættan á dreifingu smitefna frístundabúskap með svín og alifuglarækt í bakgörðum, sem virðist fara vaxandi á Íslandi. Áhættan fyrir bústofn sem alinn sé í atvinnuskyni sé óveruleg. ESA telur jafnframt að smitefni, sem gæti skapað verulega hættu, myndu lifa af 30 daga frystingu. Þar af leiðandi sé „frystingarkrafan“ ekki hentug eða nauðsynleg leið til að uppræta hættuna á smiti íslensks búfjár.

122 Hvað lýðheilsu varðar, telur ESA að þótt áhættumatið bendi til þess að ekki sé útilokað að innflutningur hrárrar kjötvöru úr nautgripum,

46 Vísað er til áður tilvitnaðs máls *Framkvæmdastjórnin* gegn *Hollandi*, 46. mgr.
47 Vísað er til áður tilvitnaðs máls *de Peijper*, 17. mgr.
48 Vísað er til áður tilvitnaðs máls *Framkvæmdastjórnin* gegn Ítalíu.
49 Vísað er til áður tilvitnaðra mála *Frakkland* gegn *Framkvæmdastjórninni*, 79. mgr., *Pfizer Animal Health* gegn *Ráðinu*, 139. og 141. mgr., og *Alpharma* gegn *Ráðinu*, 152. og 154. mgr.

the import of raw beef, pork and broiler meat from the EU could have a negative impact on public health in Iceland, the report does not address the question of the necessity and appropriateness of a general and highly restrictive authorisation system such as the one at issue, nor the substantive requirements necessary in order to obtain an import authorisation.

123 ESA submits further that, as regards the pathogens identified in the risk assessments presented by Iceland, there are already harmonised measures laid down in current EEA legislation.[50] As also Iceland acknowledges, these measures minimise the risk that products originating in the EEA will introduce a number of the diseases identified in the risk assessment. However, Iceland has not provided information establishing that the freezing requirement is appropriate and necessary in this context and that no less restrictive measures are available.

124 ESA contends that resort to the precautionary principle is conditional upon an identification of the potentially negative consequences for health and a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research.[51] Measures taken must be based on scientific evidence, and they must be proportionate, non-discriminatory, transparent and consistent with similar measures already taken.[52]

125 In ESA's view, Iceland has not provided information in the present case that would establish a scientific uncertainty. The measures are based solely on the hypothesis that the possibility cannot be

50 Reference is made by way of example to Directive 2002/60/EC (as regards African swine fever), Directive 2001/89/EC (as regards classical swine fever) and Directive 2005/94/EC (as regards avian influenza).

51 Reference is made to Cases C-333/08 *Commission* v *France* [2010] ECR I-757, paragraph 92, and C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 60.

52 Reference is made to *ESA* v *Norway*, cited above, paragraphs 26, 30 and 32.

svínum eða alifuglum frá ESB gæti haft neikvæð áhrif á lýðheilsu á Íslandi, fjalli skýrslan hvorki um það hvort strangt leyfisveitingakerfi, á borð við það sem hér sé um að ræða, geti talist nauðsynlegt eða viðeigandi, né um þær efnislegu kröfur sem gerðar séu til þeirra sem sæki um slíkt innflutningsleyfi.

123 Enn fremur telur ESA að gildandi reglur EES-réttar mæli þegar fyrir um samræmdar ráðstafanir vegna þeirra smitefna sem til umfjöllunar eru í áhættumatinu.[50] Rétt eins og Ísland viðurkenni dragi þær ráðstafanir úr hættunni á því að vörur sem eigi uppruna sinn innan EES geti borið með sér marga af þeim sjúkdómum sem minnst sé á í áhættumatinu. Ísland hafi hins vegar ekki veitt upplýsingar sem benda til þess að skilyrðið um frystingu sé hentugt og nauðsynlegt í þessu samhengi, eða að ekki megi grípa til ráðstafana sem ekki séu jafn íþyngjandi.

124 ESA telur það skilyrði þess að grípa megi til varúðarreglunnar að búið sé að bera kennsl á þætti sem geti hugsanlega haft neikvæðar afleiðingar fyrir heilsu og að fyrir liggi ítarleg matsgerð á heilbrigðisáhættu, sem byggð sé á áreiðanlegustu vísindalegu gögnunum sem fyrir liggi og nýlegustu niðurstöðum alþjóðlegra rannsókna.[51] Grípa verði til ráðstafana á grundvelli vísindalegra heimilda og þær verði að vera hóflegar, án mismununar, gagnsæjar og í samræmi við svipaðar ráðstafanir sem þegar hafi verið gerðar.[52]

125 Að mati ESA hefur Ísland ekki lagt fram gögn í máli þessu sem benda myndu til vísindalegrar óvissu. Ráðstafanirnar séu að öllu leyti byggðar á tilgátu um að ekki sé hægt að útiloka að innflutningur

50 Sem dæmi er vísað til reglugerðar tilskipunar 2002/60/EB (varðandi afríska svínaflensu), tilskipunar 2001/89/EB (varðandi hefðbundna svínaflensu), og tilskipunar 2005/94/EB (varðandi fuglaflensu).

51 Vísað er til mála C-333/08 *Framkvæmdastjórnin* gegn *Frakklandi* [2010] ECR I-757, 92. mgr., og C-343/09 *Afton Chemical* [2010] ECR I-7027, 60. mgr.

52 Vísað er til áður tilvitnaðs máls *ESA* gegn *Noregi*, 26., 30. og 32. mgr.

excluded that the import of fresh meat and meat products from the EEA could have a negative impact on the public and animal health in Iceland. However, a preventive measure cannot be based on a hypothetical approach, founded on a mere assumption which has not been scientifically verified.[53]

126 Finally, ESA notes that there is nothing to indicate that the Icelandic rules on import of meat are provisional in nature and that maintenance of the measures depends on the development of scientific knowledge, as required in the case of measures adopted under the precautionary principle.[54]

127 ESA concludes that, if Article 18 EEA is considered applicable, the information provided in the request for an Advisory Opinion as well as in the course of the infringement proceedings strongly indicates that the national measures fail to meet the proportionality test inherent in Article 13 EEA.

128 ESA proposes that the sixth question is answered in the following manner:

In case Article 18 EEA applies, a measure, such as that in Article 10 of [the Act] read in conjunction with Article 3 to 5 of [the Icelandic Regulation], as it is not suitable, necessary and proportionate to attain the aim of protecting public and animal health, cannot be regarded as being justified under Article 13 EEA.

53 Reference is made to *Pfizer Animal Health* v *Council*, paragraph 143, and *Commission* v *France*, paragraph 91, both cited above, and to Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraph 106.

54 Reference is made to *Agraproduktion Staebelow*, cited above, paragraph 40, Case C-601/11 P *France* v *Commission*, judgment of 11 July 2013, published electronically, paragraph 110, and Communication from the Commission of 2 February 2000 on the precautionary principle, COM(2000) 1 final, p. 1.

fersks kjöts og kjötafurða frá EES geti haft neikvæð áhrif á lýðheilsu og dýraheilbrigði á Íslandi. Fyrirbyggjandi ráðstafanir megi þó ekki byggja á tilgátum, sem geri ráð fyrir einhverju sem ekki hefur verið staðfest með vísindalegum aðferðum.[53]

126 Loks bendir ESA á að ekkert bendi til þess að íslensku reglurnar um kjötinnflutning séu tímabundnar í eðli sínu eða að viðhald þeirra sé undir þróun vísindalegrar þekkingar komið, eins og krafist sé af ráðstöfunum sem gerðar séu með skírskotun til varúðarreglunnar.[54]

127 Niðurstaða ESA er því sú, að ef 18. gr. telst eiga við, bendi upplýsingarnar sem veittar eru í beiðninni um ráðgefandi álit, líkt og þær sem veittar voru í málsmeðferðinni vegna samningsbrots, sterklega til þess að íslensku ráðstafanirnar fari í bága við meðalhófsregluna sem felist 13. gr. EES-samningsins.

128 ESA leggur til að dómstóllinn svari sjötti spurningunni með eftirfarandi hætti:

Ef 18. gr. EES-samningsins verður talin eiga við, er ekki hægt að telja ráðstöfun á borð við 10. gr. laganna, með hliðsjón af 3. til 5. íslensku reglugerðarinnar réttlætanlega samkvæmt 13. gr., þar sem hún er hvorki hentug né nauðsynleg og gætir ekki meðalhófs í samræmi við það markmið að vernda lýðheilsu og dýraheilbrigði.

53 Vísað er til áður tilvitnaðra mála *Pfizer Animal Health* gegn *Ráðinu*, 143. mgr., og *Framkvæmdastjórnin* gegn *Frakklandi*, 91. mgr. og til máls C-236/01 *Monsanto Agricoltura Italia og aðrir* [2003] ECR I-8105, 106. mgr.

54 Vísað er til áður tilvitnaðs máls *Agraproduktion Staebelow*, 40. mgr., máls C-601/11 P *Frakkland* gegn *Framkvæmdastjórninni*, dómur frá 11. júlí 2013, birtur með rafrænum hætti, 110. mgr., og orðsendingu framkvæmdastjórnarinnar frá 2. febrúar 2000 um varúðarregluna, COM(2000) 1 final, bls. 1.

THE COMMISSION

129 The Commission considers the sixth question to be moot and suggests that it should not be considered by the Court.

Per Christiansen
Judge-Rapporteur

FRAMKVÆMDASTJÓRNIN

129 Framkvæmdastjórnin telur sjöttu spurninguna ekki hafa neina þýðingu fyrir málið og leggur til að dómstóllinn taki hana ekki til greina.

Per Christiansen
Framsögumaður

Case

E-20/15

EFTA Surveillance Authority

Iceland

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2013/10/EU amending Directive 75/324/EEC on aerosol dispensers)

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Judgment of the Court, 1 February 2016

Summary of the Judgment

1 Article 3 EEA imposes upon the EEA/EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EEA/EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. The lack of direct legal effect of those acts makes timely implementation crucial for the proper functioning of the EEA Agreement also in Iceland.

2 The question whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion.

3 Iceland failed to fulfil its obligations under Article 3 of the Act referred to at point 1 of Chapter VIII of Annex II to the Agreement on the European Economic Area (Commission Directive 2013/10/EU of 19 March 2013 amending Council Directive 75/324/EEC on the approximation of the laws of the Member States relating to aerosol dispensers in order to adapt its labelling provisions to Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures) as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.

Judgment of the Court

1 February 2016

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2013/10/EU amending Directive 75/324/EEC on aerosol dispensers)

In Case E-20/15,

EFTA Surveillance Authority, *represented by Øyvind Bø, Officer, and Íris Ísberg, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,*

— applicant,

≡V≡

Iceland, *represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry of Foreign Affairs, acting as Agent,*

— defendant,

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under Article 3 of the Act referred to at point 1 of Chapter VIII of Annex II to the Agreement on the European Economic Area (Commission Directive 2013/10/EU of 19 March 2013 amending Council Directive 75/324/EEC on the approximation of the laws of the Member States relating to aerosol dispensers in order to adapt its labelling provisions to Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures) as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.

The Court

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

Judgment

I INTRODUCTION

1 By an application lodged at the Court Registry on 12 August 2015, 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") seeking a declaration from the Court that Iceland has failed to fulfil its obligations under Article 3 of the Act referred to *at point 1 of Chapter VIII of Annex II to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), that is Commission Directive 2013/10/EU of 19 March 2013 amending Council Directive 75/324/EEC on the approximation of the laws of the Member States relating to aerosol dispensers in order to adapt its labelling provisions to Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures (OJ 2013 L 77, p. 20, and Icelandic EEA Supplement 2014 No 54, p. 316) ("the Directive" or "the Act"), as adapted to the Agreement under its Protocol 1*, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time pre*scribed.*

II LAW

2 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

…

3 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.

4 Article 31 SCA 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.

5 EEA Joint Committee Decision No 120/2014 of 27 June 2014 (OJ 2014 L 342, p. 14, and EEA Supplement 2014 No 71, p. 14) ("Decision 120/2014") amended Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement by adding the Directive to point 1 of Chapter VIII of the Annex. No constitutional requirements were indicated, so Decision 120/2014 entered into force on 28 June 2014, in accordance with its Article 3. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III FACTS AND PRE-LITIGATION PROCEDURE

6 By letter of 3 July 2014, ESA reminded Iceland of its obligation to implement the Directive. Iceland did not reply to this letter.

7 On 15 October 2014, ESA issued a letter of formal notice, concluding that Iceland had failed to fulfil its obligations under the Act and Article 7 EEA by failing to adopt, or in any event, to inform ESA of the national measures adopted to implement the Directive. Iceland did not reply to the letter of formal notice.

8 On 28 January 2015, ESA delivered a reasoned opinion maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the necessary measures to comply with the reasoned opinion within two months following the notification, that is no later than 28 March 2015. Iceland did not reply to the reasoned opinion.

9 On 15 July 2015, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

10 ESA lodged the present application at the Court Registry on 12 August 2015. Iceland's statement of defence was registered at the Court on 13 October 2015. By letter of 27 November 2015, ESA waived its right to submit a reply and consented to dispense with the oral procedure should the Court wish to do so. By letter of 22 December 2015, Iceland also consented to dispense with the oral procedure.

11 The applicant, ESA, requests the Court to:

1. *Declare that by failing to adopt the measures necessary to implement the Act referred to at point 1 of Chapter VIII of Annex II to the Agreement on the European Economic Area (Commission Directive 2013/10/EU of 19 March 2013 amending Council Directive 75/324/EEC on the approximation of the laws of the Member States relating to aerosol dispensers in order to adapt its labelling provisions to Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures) as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under Article 3 of the Act and under Article 7 of the Agreement.*
2. *Order Iceland to bear the costs of these proceedings.*

12 The defendant, Iceland, submits that it does not dispute the facts of the case as they are set out by ESA in its application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its defence, Iceland indicates that an administrative regulation implementing the Directive is intended to be adopted by 30 October 2015.

13 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided, pursuant to

Article 41(2) of the Rules of Procedure ("RoP"), to dispense with the oral procedure.

V FINDINGS OF THE COURT

14 Article 3 EEA imposes upon the EEA/EFTA States 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, *inter alia*, Case E-18/15 *ESA* v *Iceland*, judgment of 16 December 2015, not yet reported, paragraph 17 and case law cited).

15 Under Article 7 EEA, the EEA/EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directive also follows from its Article 3. The Court notes that the lack of direct legal effect of acts referred to in decisions by the EEA Joint Committee makes timely implementation crucial for the proper functioning of the EEA Agreement also in Iceland. The EEA/EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Iceland,* cited above, paragraph 18 and case law cited).

16 Decision 120/2014 entered into force on 28 June 2014. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

17 The question whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 20 and case law cited). It is undisputed that Iceland had not adopted the measures necessary to implement the Directive by the expiry of the time limit set in the reasoned opinion.

18 It must therefore be held that Iceland has failed to fulfil its obligations under Article 3 of the Act referred to at point 1 of Chapter VIII of Annex II to the Agreement on the European Economic Area (Commission Directive 2013/10/EU of 19 March 2013 amending Council Directive 75/324/EEC on the approximation of the laws of the Member States relating to aerosol dispensers in order to adapt its labelling provisions to Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures) as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.

VI COSTS

19 Under Article 66(2) RoP, 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 none of the exceptions in Article 66(3) RoP apply, Iceland must therefore be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under Article 3 of the Act referred to at point 1 of Chapter VIII of Annex II to the Agreement on the European Economic Area (Commission Directive 2013/10/EU of 19 March 2013 amending Council Directive 75/324/EEC on the approximation of the laws of the Member States relating to aerosol dispensers in order to adapt its labelling provisions to Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures) as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.**
2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Delivered in open court in Luxembourg on
1 February 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Case

E-21/15

EFTA Surveillance Authority

Iceland

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2011/88/EU amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme)

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— defendant,

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II LAW

2 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

…

3 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.

4 Article 31 SCA 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.

5 EEA Joint Committee Decision No 126/2014 of 27 June 2014 (OJ 2014 L 342, p. 26, and EEA Supplement 2014 No 71, p. 25) ("Decision 126/2014") amended Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement by adding the Directive to point 1a of Chapter XXIV of the Annex.
No constitutional requirements were indicated, so Decision 126/2014 entered into force on 28 June 2014, in accordance with its Article 3. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III FACTS AND PRE-LITIGATION PROCEDURE

6 By letter of 3 July 2014, ESA reminded Iceland of its obligation to implement the Directive. Iceland did not reply to this letter.

7 On 15 October 2014, ESA issued a letter of formal notice, concluding that Iceland had failed to fulfil its obligations under the Act and Article 7 EEA by failing to adopt, or in any event, to inform ESA of the national measures adopted to implement the Directive. Iceland did not reply to the letter of formal notice.

8 On 28 January 2015, ESA delivered a reasoned opinion maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the necessary measures to comply with the reasoned opinion within two months following the notification, that is no later than 28 March 2015. Iceland did not reply to the reasoned opinion.

9 On 15 July 2015, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

10 ESA lodged the present application at the Court Registry on 12 August 2015. Iceland's statement of defence was registered at the Court on 13 October 2015. By letter of 27 November 2015, ESA waived its right to submit a reply and consented to dispense with the oral procedure should the Court wish to do so. By letter of 22 December 2015, Iceland also consented to dispense with the oral procedure.

11 The applicant, ESA, requests the Court to:

1. *Declare that by failing to adopt the measures necessary to implement the Act referred to at 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Directive 2011/88/EU of the European Parliament and of the Council of 16 November 2011 amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme) as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under Article 2 of that Act and under Article 7 of the Agreement.*

2. *Order Iceland to bear the costs of these proceedings.*

12 The defendant, Iceland, submits that it does not dispute the facts of the case as they are set out by ESA in its application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its defence, Iceland indicates that an administrative regulation implementing the Directive is intended to be adopted by 30 October 2015.

13 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided, pursuant to Article 41(2) of the Rules of Procedure ("RoP"), to dispense with the oral procedure.

V FINDINGS OF THE COURT

14 Article 3 EEA imposes upon the EEA/EFTA States 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, *inter alia*, Case E-18/15 *ESA* v *Iceland*, judgment of 16 December 2015, not yet reported, paragraph 17 and case law cited).

15 Under Article 7 EEA, the EEA/EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directive also follows from its Article 2. The Court notes that the lack of direct legal effect of acts referred to in decisions by the EEA Joint Committee makes timely implementation crucial for the proper functioning of the EEA Agreement also in Iceland. The EEA/EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Iceland,* cited above, paragraph 18 and case law cited).

16 Decision 126/2014 entered into force on 28 June 2014. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

17 The question whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 20 and case law cited). It is undisputed that Iceland had not adopted the measures necessary to implement the Directive by the expiry of the time limit set in the reasoned opinion.

18 It must therefore be held that Iceland has failed to fulfil its obligations under Article 2 of the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European

Economic Area (Directive 2011/88/EU of the European Parliament and of the Council of 16 November 2011 amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme) as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.

VI COSTS

19 Under Article 66(2) RoP, 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 none of the exceptions in Article 66(3) RoP apply, Iceland must therefore be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under Article 2 of the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Directive 2011/88/EU of the European Parliament and of the Council of 16 November 2011 amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme) as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.**

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

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Delivered in open court in Luxembourg on
***1 February 2016*.**

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Case

E-22/15

EFTA Surveillance Authority

The Principality of Liechtenstein

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2011/62/EU – Directive 2012/26/EU)

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Judgment of the Court, 1 February 2016

Summary of the Judgment

1 Article 3 EEA imposes upon the EEA/EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EEA/EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directives also follows from Article 2 of both Directive 2011/62/EU of the European Parliament and of the Council of 8 June amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products and Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance.

2 The question whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion. It is undisputed that Liechtenstein had not adopted the measures necessary to implement the Directives by the expiry of the time limit set out in the reasoned opinion.

3 By failing, within the time prescribed, to adopt the measures necessary to implement the Acts referred to at point 15q, ninth and tenth indent, of Chapter XIII of Annex II to the EEA Agreement (Directive 2011/62/EU of the European Parliament and of the Council of 8 June amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products and Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending

Directive 2001/83/EC as regards pharmacovigilance), as adapted to the Agreement by way of Protocol 1 thereto, Liechtenstein failed to fulfil its obligations under Article 2 of each Act and under Article 7 of the EEA Agreement.

Judgment of the Court

1 February 2016

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2011/62/EU – Directive 2012/26/EU)

In Case E-22/15,

EFTA Surveillance Authority, *represented by Clémence Perrin, Officer, and Íris Ísberg, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,*

— applicant,

v

The Principality of Liechtenstein, *represented by Dr Andrea Entner-Koch, Director, and Frederique Lambrecht, Senior Legal Officer, EEA Coordination Unit, acting as Agents,*

— defendant,

APPLICATION for a declaration that by failing to adopt the measures necessary to implement the Acts referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area (Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products and Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, the Principality of Liechtenstein has failed to fulfil its obligations under Article 2 of each Act and under Article 7 of the Agreement.

The Court

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

Judgment

I INTRODUCTION

1 By an application lodged at the Court Registry on 17 August 2015, 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") seeking a declaration from the Court that, by failing, within the time prescribed, to adopt the measures necessary to implement the Acts referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area ("EEA"), Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products (OJ 2011 L 174, p. 74) and Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance (OJ 2012 L 299, p. 1) ("the Directives", "the Acts"

or “Directive 2011/62/EU” and “Directive 2012/26/EU”) as adapted to the Agreement by way of Protocol 1 thereto and by Joint Committee Decisions No 159/2013 of 8 October 2013 (OJ 2014 L 58, p. 12, and EEA Supplement 2014 No 13, p. 14) (“Decision No 159/2013”) and No 160/2013 of 8 October 2013 (OJ 2014 L 58, p. 13), (EEA Supplement 2014 No 13, p. 15) (“Decision No 160/2013”), Liechtenstein has failed to fulfil its obligations under Article 2 of the Acts and under Article 7 EEA.

II LAW

2 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

…

3 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.

4 Article 31 SCA 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.

5 EEA Joint Committee Decisions No 159/2013 and No 160/2013 of 8 October 2013 amended Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement by adding the Directives to point 15q of Chapter XIII of the Annex. As regards Directive 2011/62/EU constitutional requirements were indicated by Liechtenstein and Norway for the purposes of Article 103 EEA. As regards Directive 2012/26/EU constitutional requirements were indicated by Liechtenstein. By 29 April 2014 both States had notified that the constitutional requirements had been fulfilled. Consequently, Decision No 159/2013 and Decision No 160/2013 entered into force on 1 June 2014. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directives expired on the same date.

III FACTS AND PRE-LITIGATION PROCEDURE

6 By a letter of 4 June 2014, ESA reminded Liechtenstein of its obligation to implement the Directives. Liechtenstein did not reply to the letter.

7 On 17 September 2014, having received no further information from Liechtenstein, ESA issued a letter of formal notice, concluding that Liechtenstein had failed to fulfil its obligations under the Acts and

Article 7 EEA by failing to take, or in any event, to notify ESA of the necessary measures to ensure implementation of the Acts. Liechtenstein was invited to submit its observations on the content of the letter of formal notice, within two months of receipt of the letter.

8 On 17 November 2014, Liechtenstein replied to the letter of formal notice. In the reply, Liechtenstein informed ESA that the transposition of the Directives was ongoing and that it would be combined with the transposition of Directive 2010/84/EU of the European Parliament and of the Council of 15 December 2010 amending, as regards pharmacovigilance, Directive 2001/83/EC on the Community code relating to medicinal products for human use. A draft bill would be presented and submitted to comments by interested parties in the autumn of 2014. The first reading in Parliament was foreseen for September 2015, the second reading for December 2015 and the entry into force in March 2016.

9 Furthermore, Liechtenstein argued that implementation of Joint Committee Decision No 158/2013 ("Decision No 158"), by which Directive 2010/84/EU has been incorporated into the EEA Agreement had to be taken into account, and the transposition of the Directives would be combined with the transposition of Directive 2010/84/EU. As for Liechtenstein, Decision No 158 was to enter into force on the same day or on the day of entry into force of the amendments to the Agreement between Liechtenstein and Austria laying down the technical details for Liechtenstein's recognition of Austrian marketing authorisations within the decentralised procedure and the mutual recognition procedure, whichever would be the later.

10 On 11 February 2015, ESA delivered a reasoned opinion arguing that there was no specific adaption which would provide for a later entry into force date for Liechtenstein in Decision No 159/2013 or Decision No 160/2013, which incorporated the Directives into the EEA

Agreement. Furthermore, Liechtenstein had not substantiated how the Directives would be inseparably linked to Directive 2010/84/EU.

11 Pursuant to the second paragraph of Article 31 SCA, ESA required Liechtenstein to take the necessary measures to comply with the reasoned opinion within two months following the notification, that is, no later than 11 April 2015.

12 On 10 April 2015, Liechtenstein replied to the reasoned opinion and reiterated that Decision No 158/2013 had to be taken into account. Liechtenstein added that, although no adaptions had been made to Decision No 159/2013 or Decision No 160/2013, it was nevertheless of the opinion that since Directive 2010/84/EU, Directive 2011/62/EU and Directive 2012/26/EU all amended Directive 2001/83/EC, sometimes even the same provisions, it would not be feasible to transpose the Directives before Directive 2010/84/EU. Liechtenstein informed ESA of a revised timetable for implementation of the Acts. The first reading in Parliament was foreseen for autumn 2015, the second reading for March 2016 and entry into force in summer of 2016. Lastly, Liechtenstein stated that it expected that the mentioned timetable for transposition could be adhered to.

13 On 15 July 2015, having received no further information, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

14 ESA lodged the present application at the Court Registry on 17 August 2015. Liechtenstein's statement of defence was registered at the Court on 19 October 2015. By a letter of 27 November 2015, ESA waived its right to submit a reply and consented to dispense with the oral procedure should the Court wish to do so. By a letter of

3 December 2015, Liechtenstein also consented to dispense with the oral procedure.

15 The applicant, ESA, requests the Court to:

1. *Declare that, by failing to adopt the measures necessary to implement the Act referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area (Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products and Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance) as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Liechtenstein has failed to fulfil its obligations under Article 2 of the Acts and under Article 7 of the EEA Agreement.*

2. *Order Liechtenstein to bear the costs of these proceedings.*

16 The defendant, Liechtenstein, does not dispute the facts of the case as set out in the application. Furthermore, Liechtenstein does not contest the declaration sought by ESA under section 5 paragraph 1 of ESA's application. However, Liechtenstein reiterated its willingness to implement the Directives as swiftly as possible and submitted information for the purposes of providing for an understanding of the delay of the implementing process. As to the costs of the case, Liechtenstein requests the Court to order each party to bear its own costs of the proceedings.

17 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided, pursuant to Article 41(2) of the Rules of Procedure ("RoP"), to dispense with the oral procedure.

V FINDINGS OF THE COURT

18 Article 3 EEA imposes upon the EEA/EFTA States 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, *inter alia*, Case E-18/15 *ESA* v *Iceland*, judgment of 16 December 2015, not yet reported, paragraph 17 and case law cited).

19 Under Article 7 EEA, the EEA/EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directives also follows from Article 2 in each of the two Directives. The Court notes that the lack of direct legal effect of acts referred to in decisions by the EEA Joint Committee makes timely implementation crucial for the proper functioning of the EEA Agreement also in Liechtenstein. The EEA/EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 18 and case law cited).

20 Decision No 159/2013 and Decision No 160/2013 entered into force on 1 June 2014. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directives expired on the same date.

21 The question whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 20 and case law cited). It is undisputed that Liechtenstein had not adopted the measures necessary to implement the Directives by the expiry of the time limit set out in the reasoned opinion.

22 It must therefore be held that by failing, within the time prescribed, to adopt the measures necessary to implement the Acts referred to at

point 15q, ninth and tenth indent, of Chapter XIII of Annex II to the Agreement on the European Economic Area (Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products and Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance) as adapted to the Agreement by way of Protocol 1 thereto, Liechtenstein has failed to fulfil its obligations under Article 2 of each Act and Article 7 EEA.

VI COSTS

23 Under Article 66(2) RoP, 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 Liechtenstein be ordered to pay the costs, and the latter has been unsuccessful, and none of the exceptions in Article 66(3) RoP apply, Liechtenstein must therefore be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that, by failing, within the time prescribed, to adopt the measures necessary to implement the Acts referred to at point 15q, ninth and tenth indent, of Chapter XIII of Annex II to the Agreement on the European Economic Area (Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products and Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance), as adapted to the Agreement by way of Protocol 1 thereto, the Principality of Liechtenstein has failed to fulfil its obligations under Article 2 of each Act and under Article 7 of the EEA Agreement.**

2. **Orders the Principality of Liechtenstein to bear the costs of the proceedings.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Delivered in open court in Luxembourg on ***1 February 2016****.*

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Case

E-23/15

EFTA Surveillance Authority

The Principality of Liechtenstein

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2010/53/EU)

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Judgment of the Court, 1 February 2016

Summary of the Judgment

1 Article 3 EEA imposes upon the EEA/EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EEA/EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

2 The question whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion. It is undisputed that Liechtenstein had not adopted the measures necessary to implement relevant provisions of the Directive by the expiry of the time limit set out in the reasoned opinion.

3 By failing, within the time prescribed, to adopt the measures necessary to implement Articles 15 and 16 of the Act referred to at point 15zn of Chapter XIII of Annex II to the EEA Agreement (Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation, as corrected), as adapted to the Agreement by way of Protocol 1 thereto, Liechtenstein failed to fulfil its obligations under Article 31 of that Act and under Article 7 of the EEA agreement.

Judgment of the Court

1 February 2016

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2010/53/EU)

In Case E-23/15,

EFTA Surveillance Authority, *represented by Clémence Perrin, Officer, and Marlene Lie Hakkebo, Officer, Department of Legal & Executive Affairs, acting as Agents,*

— applicant,

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The Principality of Liechtenstein, *represented by Dr Andrea Entner-Koch, Director, and Frederique Lambrecht, Senior legal Officer, EEA Coordination Unit, acting as Agents,*

— defendant,

APPLICATION for a declaration that by failing to adopt the measures necessary to implement Articles 15 and 16 of the Act referred to at point 15zn of Chapter XIII of Annex II to the Agreement on the European Economic Area (Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation, as corrected), as adapted to the Agreement by way of Protocol 1 thereto and by Joint Committee Decision No 164/2013 of 8 October 2013, within the time prescribed, the Principality of Liechtenstein has failed to fulfil its obligations under Article 31 of that Act and under Article 7 of the Agreement.

The Court

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

Judgment

I INTRODUCTION

1 By an application lodged at the Court Registry on 17 August 2015, 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") seeking a declaration from the Court that, by failing, within the time prescribed, to adopt the measures necessary to implement Articles 15 and 16 of the Act referred to at point 15zn of Chapter XIII of Annex II to the Agreement on the European Economic Area ("EEA"), that is Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation, (OJ 2010 L 207, p. 14, as corrected by OJ 2010 L 243, p. 68) ("the Directive" or "the Act") as adapted to the Agreement by way of Protocol 1 thereto and by Joint Committee Decision No 164/2013 of 8 October 2013 (OJ 2014 L 58, p. 17, and EEA Supplement 2014 No 13, p. 19) ("Decision No 164/2013"), Liechtenstein has failed to fulfil its obligations under Article 31 of the Act and under Article 7 EEA.

II LAW

2 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

…

3 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.

4 Article 31 SCA 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.

5 EEA Joint Committee Decision No 164/2013 of 8 October 2013 amended Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement by adding the Directive to point 15zn of Chapter XIII of the Annex. As for Liechtenstein, the Directive should not apply to it, with the exception of Articles 15 and 16. The definitions in Article 3 and the general provisions in Articles 17(2)(h) and 23 should only apply to Liechtenstein as far as necessary for transposing Articles 15 and 16 of the Directive. Constitutional requirements were indicated by Iceland and Liechtenstein for the purposes of Article 103 EEA. By 27 May 2014 both States had notified the fulfilment of constitutional requirements. Consequently, Decision No 164/2013 entered into force on 1 July 2014. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III FACTS AND PRE-LITIGATION PROCEDURE

6 By a letter of 9 July 2014, ESA reminded Liechtenstein of its obligation to implement the Directive. Liechtenstein did not reply to this letter.

7 On 8 October 2014, having received no further information from Liechtenstein, ESA issued a letter of formal notice, concluding that Liechtenstein had failed to fulfil its obligations under Article 31 of the Act and Article 7 EEA by failing to take, or in any event, to notify ESA of the necessary measures to ensure implementation of Articles 15 and 16 of the Act. Liechtenstein was invited to submit its observations on the content of the letter of formal notice, within two months of receipt of the letter.

8 On 5 December 2014, Liechtenstein replied to the letter of formal notice. In the reply, Liechtenstein informed ESA that the transposition of the Directive was ongoing and that it would be combined with the transposition of Commission Implementing

Directive 2012/25/EU of 9 October 2012, laying down information procedures for the exchange, between Member States, of human organs intended for transplantation. Furthermore, Liechtenstein informed that it expected the measures to transpose the Directive to enter into force in March 2016.

9 On 11 February 2015, ESA delivered a reasoned opinion maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Liechtenstein to take the necessary measures to comply with the reasoned opinion within two months following the notification, that is no later than 11 April 2015.

10 On 10 April 2015, Liechtenstein replied to the reasoned opinion and reiterated that it expected the measures to transpose the Directive to enter into force in March 2016.

11 On 15 July 2015, having received no further information, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

12 ESA lodged the present application at the Court Registry on 17 August 2015. Liechtenstein's statement of defence was registered at the Court on 19 October 2015. By a letter of 27 November 2015, ESA waived its right to submit a reply and consented to dispense with the oral procedure should the Court wish to do so. By a letter of 3 December 2015, Liechtenstein also consented to dispense with the oral procedure.

13 The applicant, ESA, requests the Court to:

1. *Declare that by failing to adopt the measures necessary to implement Articles 15 and 16 of the Act referred to at 15zn of Chapter XIII of*

Annex II to the Agreement on the European Economic Area (Directive 2010/53/EU of 7 July 2010 of the European Parliament and of the Council on standards of quality and safety of human organs intended for transplantation, as corrected) as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Liechtenstein has failed to fulfil its obligations under Article 31 of that Act and under Article 7 of the EEA Agreement.

2. *Order Liechtenstein to bear the costs of these proceedings.*

14 The defendant, Liechtenstein, submits that the facts of the case as set out in the application are correct and undisputed. Liechtenstein does not contest the declaration sought by ESA. However, Liechtenstein underlines its willingness to implement the Directive as swiftly as possible. As to the costs, the Liechtenstein Government requests the Court to order each party to pay its own costs of the proceedings.

15 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided, pursuant to Article 41(2) of the Rules of Procedure ("RoP"), to dispense with the oral procedure.

V FINDINGS OF THE COURT

16 Article 3 EEA imposes upon the EEA/EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (Case E-18/15 *ESA* v *Iceland*, judgment of 16 December 2015, not yet reported, paragraph 17 and case law cited).

17 Under Article 7 EEA, the EEA/EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to

implement the Directive also follows from Article 31 of the Directive. The Court notes that the lack of direct legal effect of acts referred to in decisions by the EEA Joint Committee makes timely implementation crucial for the proper functioning of the EEA Agreement also in Liechtenstein. The EEA/EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 18 and case law cited).

18 Decision No 164/2013 entered into force on 1 July 2014. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

19 The question whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 20 and case law cited). It is undisputed that Liechtenstein had not adopted the measures necessary to implement relevant provisions of the Directive by the expiry of the time limit set out in the reasoned opinion.

20 It must therefore be held that by failing, within the time prescribed, to adopt the measures necessary to implement Articles 15 and 16 of the Act referred to at point 15zn of Chapter XIII of Annex II to the Agreement on the European Economic Area (Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation, as corrected), as adapted to the Agreement by way of Protocol 1 thereto, Liechtenstein has failed to fulfil its obligations under Article 31 of the Act and Article 7 EEA.

VI COSTS

21 Under Article 66(2) RoP, 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 Liechtenstein be ordered to pay the costs, and the latter has been unsuccessful, and none of the exceptions in Article 66(3) RoP apply, Liechtenstein must therefore be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that, by failing, within the time prescribed, to adopt the measures necessary to implement Articles 15 and 16 of the Act referred to at point 15zn of Chapter XIII of Annex II to the Agreement on the European Economic Area (Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation, as corrected), as adapted to the Agreement by way of Protocol 1 thereto, Liechtenstein has failed to fulfil its obligations under Article 31 of that Act and under Article 7 of the EEA Agreement.**
2. **Orders Liechtenstein to bear the costs of the proceedings.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Delivered in open court in Luxembourg on
1 February 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Case

E-4/15

Icelandic Financial Services Association

EFTA Surveillance Authority

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Admissibility – Locus standi – Status of an association)

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Summary of the Judgment

1 Article 62(1) EEA provides that all existing systems of State aid in the EEA/EFTA States shall be subject to constant review by ESA as to their compatibility with Article 61 EEA, in accordance with the rules set out in Protocol 26 to the EEA Agreement on the powers and functions of the EFTA Surveillance Authority in the field of State aid.

2 Article 1 of Part I of Protocol 3 SCA provides that ESA shall, in cooperation with the EFTA States, keep all systems of aid under constant review. As part of that review, ESA is to propose to the EFTA 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, after giving notice to the parties concerned to submit their comments, ESA finds that aid is not compatible with the EEA Agreement having regard to Article 61 EEA, or that such aid is being misused, it shall decide that the EFTA State concerned must abolish or alter such aid within a period of time to be determined by ESA.

3 According to Article 19(1) of Part II of Protocol 3 SCA, where the EFTA State concerned accepts the proposed measures and informs ESA thereof, ESA shall record that finding and inform the Member State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures.

4 In such case, ESA and the EFTA State may discuss the proposed appropriate measures. But it is only where ESA decides, in the exercise of its exclusive power to assess the compatibility of State aid with the functioning of the EEA Agreement, to accept the EFTA State’s commitments as answering its concerns that the investigation procedure is brought to an end by the decision of ESA. The procedure under Article 19(1) of Part II of Protocol 3 SCA is not a quasi-contractual procedure.

5 Actions by an association of undertakings may be admissible in three situations where that association is not the addressee of the contested measure at issue: first, where the association acts in place of one or more of its members who could themselves have brought an admissible action; second, if the association can prove an interest of its own, in altogether special or indeed exceptional circumstances because its position as a negotiator has been affected by the measure of which annulment is sought; and, third, where a legal provision expressly confers on professional associations a number of procedural rights.

6 In State aid law, an applicant who challenges the merits of a decision appraising aid taken on the basis of Article 1(3) of Part I of Protocol 3 SCA or at the end of the formal investigation procedure is considered to be individually concerned by that decision if its market position is substantially affected by the aid, or, as in the present circumstances, in the context of a challenge to an Article 19(1) decision, by the existing aid following implementation of the appropriate measures, to which the contested decision relates.

Order of the Court

31 March 2016

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Admissibility – Locus standi – Status of an association)

In Case E-4/15,

Icelandic Financial Services Association, *represented by Dr Hans-Jörg Niemeyer, Rechtsanwalt, Brussels, Belgium, and Dr Christian Kovács, Rechtsanwalt, Brussels, Belgium, acting as Counsel,*

— applicant,

v

EFTA Surveillance Authority, *represented by Xavier Lewis, Director, Maria Moustakali and Clémence Perrin, Officers, subsequently by Markus Schneider, Deputy Director, Maria Moustakali and Clémence Perrin, Officers, Department of Legal & Executive Affairs, acting as Agents, and subsequently by Carsten Zatschler, Director, Markus Schneider, Deputy Director, Maria Moustakali and Clémence Perrin, Senior Officers, Department of Legal & Executive Affairs, acting as Agents,*

— defendant,

supported by **the Government of Iceland**, *represented by Ambassador Kristján Andri Stefánsson, Director General at the Ministry for Foreign Affairs, acting as Agent, Supreme Court Attorney Jóhannes Karl Sveinsson, acting as Counsel, and District Court Attorney Bjarnveig Eiríksdóttir, acting as Co-Counsel,*

— intervener,

APPLICATION for the annulment of EFTA Surveillance Authority Decision No 298/14/COL of 16 July 2014, notified in OJ 2014 C 400, p. 13, ("the contested decision"), to close the case concerning existing aid to the Icelandic Housing Financing Fund (Íbúðalánasjóður).

The Court

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the applicant, the defendant and the intervener, and the written observations of the European Commission ("the Commission"), represented by Leo Flynn, Legal Adviser, and Lorna Armati and Paul-John Loewenthal, 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 Hans-Jörg Niemeyer, Christian Kovács and Thore Neumann, the defendant, represented by Clémence Perrin and Maria Moustakali, the intervener, represented by Jóhannes Karl Sveinsson, and the Commission, represented by Leo Flynn, Lorna Armati and Paul-John Loewenthal, at the hearing on 12 November 2015,

makes the following

Order

I INTRODUCTION

1 The applicant, Icelandic Financial Services Association ("IFSA"), is an association governed by Icelandic law, which represents all registered financial undertakings in Iceland. These include universal, investment and savings banks as well as insurance, leasing, securities and card companies.

2 For the past 60 years, public intervention in the Icelandic housing market has aimed at encouraging private home ownership. In 1955, a basis for a systematic State involvement, both as regards policy making in the field of housing affairs and the provision of loans for private housing, was created. The State Housing Agency (*Húsnæðisstofnun ríkisins*) was established by Act No 51/1980 and provided, *inter alia*, loans to the general public of Iceland, thereby fostering private home ownership.

3 The Act on Housing Affairs No 44/1998 ("the Housing Act") entered into force on 1 January 1999 and established the Housing Financing Fund ("HFF") (Íbúðalánasjóður). It took over all assets and obligations of the State Housing Agency, including the tasks of issuing housing bonds and providing housing loans through a bond-swap system. The HFF is an independent State-owned institution.

4 The Housing Act was amended by Act No 57/2004, which entered into force on 1 July 2004. A number of changes were made to the housing loan system but the general purpose and structure of the system remained the same.

5 The HFF's activities have been scrutinised by ESA on six separate occasions in the years 2004 to 2012.

6 On 11 August 2004, by Decision No 213/04/COL (notified: OJ 2005 C 112, p. 8; EEA Supplement 2005 No 23, p. 3) ("the 2004 Decision"), ESA declared the HFF's house financing mechanisms compatible with the EEA Agreement. At the time of the 2004 Decision the HFF provided three categories of loans. First, it provided *general loans* to individuals for the purchase, renovation or construction of residential housing. Second, the HFF provided *supplementary loans* awarded to individuals with low income and limited assets upon referral from the housing committee of a municipality. Finally, the HFF provided *loans for rental housing* to municipalities, associations and companies for the construction or purchase of residential housing for rent. The supplementary loans were later abolished by Act No 120/2004, which entered into force on 3 December 2004 (see Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* [2006] EFTA Ct. Rep. 42, paragraph 8).

7 On 7 April 2006, following an application by the Bankers' and Securities' Dealers Association, the predecessor of IFSA, the 2004 Decision was annulled by the Court in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above.

8 On 21 June 2006, in response to the Court's judgment, by Decision No 185/06/COL (OJ 2006 C 314, p. 90; EEA Supplement 2006 No 63, p. 3), ESA decided to initiate a formal investigation into the HFF, considering the aid scheme to be new aid.

9 On 28 February 2007, the HFF submitted comments on ESA Decision No 185/06/COL.

10 On 27 June 2008, by Decision No 405/08/COL (OJ 2010 L 79, p. 40; EEA Supplement 2010 No 14, p. 20), ESA decided to close the formal investigation procedure applicable to new aid. On the same day, ESA opened new proceedings under Article 1(1) of Part I and Articles 17 to 19 of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court

of Justice ("SCA") regarding existing aid. Following this reconsideration, also on 27 June 2008, ESA sent a letter to the Icelandic Government pursuant to Article 17(2) of Part II of Protocol 3 SCA.

11 On 1 September 2008, IFSA submitted comments on ESA's letter of 27 June 2008.

12 On 8 September 2008, the Icelandic Government replied to ESA's letter of 27 June 2008.

13 On 18 July 2011, by Decision No 247/11/COL ("the 2011 Decision"), ESA decided that the HFF scheme in the form of state guarantee, income tax exemption, interest support and lack of adequate rate of return/lack of dividend payments constituted existing aid incompatible with the EEA Agreement, and proposed appropriate measures for the financing of the HFF.

14 On 6 October 2011, the Icelandic Government replied, stating that it was willing to accept ESA's proposal for appropriate measures.

15 On 11 November 2011, IFSA submitted comments on the 2011 Decision, maintaining the position that the response of the Icelandic Government did not constitute proper acceptance of that Decision.

16 On 10 February 2012, ESA requested further information from IFSA regarding its previous submissions.

17 On 1 June 2012, IFSA replied and supplied further information.

18 On 5 June 2012 and 27 April 2013, IFSA participated in two meetings with ESA.

19 On 27 May 2013, IFSA submitted further updated information regarding the Icelandic banking sector and the problems faced by HFF.

20 On 16 July 2014, by Decision No 298/14/COL, ESA recorded Iceland's acceptance of the appropriate measures proposed in the 2011 Decision and noted further commitments entered into by Iceland. ESA then closed the case concerning the review of existing aid to the HFF. The contested decision was notified in the Official Journal of the European Union on 13 November 2014.

21 By an application lodged at the Court on 28 January 2015, IFSA brought an action under the second paragraph of Article 36 SCA seeking the annulment of the contested decision.

II LEGAL BACKGROUND

22 Article 59 EEA reads:

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

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

…

23 Article 61(1) 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.

24 Article 62(1) EEA reads:

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. …

25 Article 16 SCA reads:

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

26 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.

…

27 Article 1(1) of Part I of Protocol 3 SCA reads:

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.

28 Article 18 of Part II of Protocol 3 SCA reads:

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 not longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendations may propose, in particular

(a) substantive amendments of the aid scheme,

or

(b) introduction of procedural requirements,

or

(c) abolition of the aid scheme.

29 Article 19(1) of Part II of Protocol 3 SCA reads:

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.

THE CONTESTED DECISION

30 On 16 July 2014, ESA adopted Decision No 298/14/COL. Pursuant to Article 19(1) of Part II of Protocol 3 SCA, Iceland's acceptance of the appropriate measures proposed in the 2011 Decision on the financing of the HFF was recorded. Further commitments entered into by Iceland were noted and the case concerning the review of existing aid to the HFF was closed. The contested decision was notified in the Official Journal of the European Union on 13 November 2014.

III PROCEDURE AND FORMS OF ORDER SOUGHT

31 On 28 January 2015, IFSA lodged an application pursuant to the second paragraph of Article 36 SCA seeking the annulment of the contested decision.

32 The Applicant requests the Court to:

(i) annul the EFTA Surveillance Authority's decision 298/14/COL of 16 July 2014 (OJ 2014 of 13 November 2014, No C 400, p. 13) to close the case concerning existing aid to the Icelandic Housing Financing Fund (Íbúðalánasjóður), and

(ii) order the EFTA Surveillance Authority to bear the costs of the proceedings.

33 On 26 February 2015, ESA requested an extension of the deadline to lodge a defence. On 27 February 2015, the President, pursuant to Article 35(2) of the Rules of Procedure ("RoP"), granted ESA's request and set the deadline for the defence to 27 April 2015.

34 On 27 April 2015, ESA submitted its defence. The defendant, the EFTA Surveillance Authority, requests the Court to:

(i) dismiss the application, or, in the alternative, declare the application inadmissible in whole or in part;

(ii) *order the applicant to bear the costs.*

35 On 8 May 2015, IFSA requested an extension of the deadline to lodge a reply to the defence. On 11 May 2015, the President, pursuant to Article 78 RoP, granted IFSA's request and set the deadline for the reply to 19 June 2015.

36 On 10 June 2015, the Government of Iceland sought leave to intervene in support of the form of order sought by ESA, pursuant to Article 36(1) of the Statute and Article 89 RoP. On 19 June 2015, IFSA submitted its reply. On 25 and 26 June 2015, ESA and IFSA, respectively, lodged their written observations on the application to intervene.

37 On 3 July 2015, the European Commission submitted written observations. On 8 July 2015, ESA requested an extension of the deadline to submit its rejoinder. On 9 July 2015, the President, pursuant to Article 78 RoP, granted an extension until 17 August 2015. On 13 July 2015, the President by order granted the Government of Iceland leave to intervene pursuant to Article 89(3) RoP.

38 On 4 August 2015, the Government of Iceland requested an extension of the deadline to submit its statement in intervention. On 5 August 2015, the President, pursuant to Article 78 RoP, granted an extension until 1 September 2015. On 17 August 2015, ESA submitted its rejoinder.

39 On 1 September 2015, the Government of Iceland lodged its statement in intervention at the Court's Registry.

40 The intervener, the Government of Iceland, requests the Court to:

(i) *dismiss the application, or, in the alternative, declare the application inadmissible in whole or in part,*

(ii) *order the applicant to bear the costs of the intervener.*

41 On 8 September 2015, IFSA requested an extension of the deadline to submit its comments on the statement in intervention. On 9 September 2015, the President, pursuant to Article 78 RoP, granted an extension until 25 September 2015. On 9 September 2015, ESA requested an extension of the deadline to submit comments on Iceland's statement in intervention. On 10 September 2015, the President, pursuant to Article 78 RoP, granted an extension until 25 September 2015. On 25 September 2015, both IFSA and ESA submitted comments on the statement in intervention.

42 The parties presented oral argument and answered questions put to them by the Court at the hearing on 12 November 2015.

43 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.

IV LAW

ADMISSIBILITY

ARGUMENTS OF THE PARTIES

IFSA

44 IFSA submits that it has standing to challenge the contested decision pursuant to the second paragraph of Article 36 SCA, as the contested decision entails a legally binding effect by terminating a "decision making procedure" under Article 19(1) of Part II of Protocol 3 SCA capable of affecting the interests of IFSA. Further, IFSA claims to have *locus standi* as it is directly and individually concerned by the contested decision. The standing of IFSA's predecessor, the Bankers' and Securities Dealers' Association of Iceland, was recognised by the

Court in Case E9/04 *Bankers' and Securities Dealers' Association of Iceland* v *EFTA Surveillance Authority* [2006] EFTA Ct. Rep. 42, which, in substance, assessed the same aid scheme addressed by the contested decision.

45 In the alternative, IFSA maintains that it has standing in its own right as an association representing the interests of undertakings, which themselves have *locus standi*. According to Article 2 of its Articles of Association, IFSA is entitled to "promote the interests of companies providing financial services" which includes the representation of the Icelandic financial institutions' interests in legal proceedings. Moreover, IFSA has played not only a decisive role, at ESA's express invitation, throughout the administrative proceedings; IFSA and its predecessor have assisted ESA for over ten years. It has also played a significant role in the legislative processes relating to the reform of the HFF.

46 According to IFSA, the commercial banks would be entitled to bring an action for annulment individually, as they are directly and individually concerned by the contested decision. Individual concern may arise from the beneficiary's important and substantial position on the relevant market. The commercial banks and the HFF are competitors on the housing loan market in Iceland, on which the HFF has a dominant market position that is expressly recognised by ESA. Due to benefits from manifold aid measures, in particular the state guarantee ruling out the bankruptcy of the HFF, the company's income tax exemption, the lack of a requirement for the HFF to pay dividends, and the interest support mechanism, the HFF's refinancing costs are significantly reduced, enabling it to offer housing loans at a lower price than commercial banks. In its reply, IFSA submits that direct and individual concern must be inferred not only from factors such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question. It can also be established

by other factors, such as the loss of an opportunity to make a profit or the less favourable development of a company's market share than would have been the case without such aid.

47 In its reply, IFSA submits that the *locus standi* of an association has to be assumed if the association's membership accounts for a significant share in a tight market, which is significantly disturbed by the state measure in question. Consequently, this principle is applicable *a fortiori* where IFSA's members account for the overwhelming majority of the market share held by commercial banks in the market for mortgage loans for residential housing in Iceland.

48 Moreover, IFSA emphasises the relevance of its role as an originator of the complaint leading to the opening of the formal examination procedure and its subsequent active role throughout the proceedings.

49 In IFSA's view, commercial banks offer mortgage loans on the basis of regular market conditions, whereas the conditions offered by the HFF are distorted by State aid and the HFF has used its State funding to deliberately undercut the interest rates at market conditions between 2006 and 2011 by approximately 1%, even as far as operating at a loss. This led to a loss of business opportunities. The increase in the market share held by commercial banks since 2010 does not contradict these adverse effects. Rather, it demonstrates their ability to regain market shares lost during the financial crisis. Moreover, the requirement of a first priority collateral for maximum HFF funding automatically leaves commercial banks' mortgage loans secured with second priority with higher borrowing costs and puts them at a further competitive disadvantage.

50 IFSA submits further that the commercial banks are a limited class of traders identifiable prior to the adoption of the contested decision. While the three major banks, Íslandsbanki, Landsbankinn, and

Arion Bank, were restructured in the aftermath of the financial crisis, they remain identical to their predecessors as regards the provision of mortgage loans. In IFSA's view, the question whether a group's members can be identified at a given moment in time is in no way linked to the fact that the composition of a specific group of individual companies may have not remained stable for more than a decade.

ESA

51 According to ESA, IFSA has not established that it has sufficient standing to challenge the contested decision, which is addressed to Iceland, is legally binding and constitutes a final decision. To the extent that the provisions governing *locus standi* are substantively the same in the EU and the EEA, the principle of homogeneity applies. In State aid law, the *Plaumann* test has been applied with regard to *locus standi* and applicants who challenge the merits of a decision appraising aid are considered to be individually concerned by that decision if their market position is substantially affected by the aid to which the contested decision relates.

52 A professional association that is responsible for protecting the collective interests of its members is entitled to bring an action for the annulment of a final decision on State aid only in two sets of circumstances. First, it may bring an action where the undertakings that it represents or some of those undertakings themselves are sufficiently affected (and are themselves in a position to bring an admissible action). Second, the association may bring an action if it can prove an interest of its own, in particular because its position as a negotiator has been affected by the measure, the annulment of which is sought.

53 In relation to the first limb of the test, ESA contends that IFSA's reference to the fact that it was found to have *locus standi* in Case

E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* and that the judgment and the contested decision concern the same aid scheme is insufficient to meet the test.

54 According to ESA, in the context of actions brought by associations, an applicant can be individually concerned as a result of it having played a significant role in the procedure leading to the adoption of the challenged decision if it occupied a clearly circumscribed position as negotiator that was intimately linked to the actual subject matter of the decision, thus placing it in a factual situation which distinguishes it from all other persons. IFSA cannot be considered to have played such a role considering that it had no procedural right to submit comments in the context of a procedure pursuant to Article 19(1) of Part II of Protocol 3 SCA. It only did so at ESA's invitation and its role did not go further than providing comments on behalf of its members, while the actual negotiations were bilateral between Iceland and ESA. Further, the procedure for review of existing aid is not challengeable in the same way as an assessment by ESA of a new aid scheme.

55 In relation to the second limb of the test, ESA contends that IFSA's statements are insufficient to demonstrate the substantial adverse effect the aid scheme allegedly has on the market position of the commercial banks. IFSA has not demonstrated the extent of the impact of the aid scheme on the economic situation of its members. It has also failed to demonstrate that the market position of any of its members was affected more than that of any competitor in the market and its arguments do not distinguish the situation of one or more of its members.

56 Moreover, the allegation concerning the dominance of the HFF should be rejected as completely unfounded. IFSA's assertion that the commercial banks have regained market share since 2010 contradicts the existence of substantial adverse effects of the aid scheme.

57 IFSA's members cannot be individually concerned because they belong to a group of persons that were identified or identifiable by reason of criteria specific to the members of the group. The number and identity of the commercial banks on the housing loan market were not precisely determined at any point in time whether through a system of approval by decree or by the fact that those banks were granted any sort of exclusive rights before the aid scheme was adopted. Rather, housing loans were also offered by other financial undertakings such as savings banks, pension funds and mortgage companies. Moreover, the membership of IFSA changed in the aftermath of the financial crisis due to the winding up of some of its members.

58 With regard to the applicant's claim to have *locus standi* in its own right as an association, ESA emphasises that the mere fact that the applicant represents all the commercial and savings banks present on the mortgage market in Iceland does not create a "special or exceptional situation". It is further questionable whether IFSA could at all be intimately linked to negotiations in the housing loan sector considering that it represents all registered financial undertakings in Iceland some of which are active in sectors in which the HFF does not operate.

59 ESA submits that banks are not competitors of the HFF, whose role is to promote security and equal rights as regards housing in Iceland by providing loans on manageable terms to the general public. Thus, the aid cannot be considered to benefit one competitor over others active on the same market.

60 In relation to the alleged standing of the applicant as a representative of its member banks which themselves have *locus standi*, ESA notes that the graph relied on as evidence of the HFF's alleged market dominance shows outstanding mortgage credits, which cannot establish a meaningful picture of the market as it currently stands.

61 ESA further contests IFSA's reasoning that commercial banks lost opportunities to make profits and increase their activities in the mortgage loan market due to the HFF's alleged undercutting of interest rates, its operational structure and its regulatory competitive advantages. The lending rates of the HFF are calculated on the basis of its funding costs, with an added margin set by the Ministry of Social Affairs, and are thus not aligned with those of the commercial banks. The other measures may not be considered advantages, but, instead, measures aimed at compensating the HFF for the provision of a service of general economic interest. The commercial banks' loss of opportunities may also be due to the financial crisis.

Government of Iceland

62 The Government of Iceland submits that nothing in IFSA's submissions indicates that the applicant's situation falls within any of the three grounds required by case law for instituting proceedings. It is for IFSA to establish both the extent to which the aid has been detrimental to its market position and a link between the measure, which is the subject of the contested decision, and the alleged substantial effect on its position on the relevant market. IFSA needs to demonstrate a loss of opportunity to make a profit or less favourable development than would have been the case without such aid. The evidence submitted by IFSA concerning the market relates primarily to the period before changes based on the appropriate measures proposed by ESA were made and is, thus, not relevant.

63 The Government of Iceland contends that, according to data from the Central Bank of Iceland, commercial banks secure most of the market. The Icelandic Competition Authority considers the three major banks to be collectively dominant on the financial market in Iceland and that the HFF's operations have not limited competition

in the market. In contrast to banks, the HFF is under the universal obligation to promote security and equal rights and has to offer the same interest rates throughout the country even though loan impairments have been considerably higher in the rural areas. Therefore, it has not competed and does not compete on price.

64 The Government of Iceland adds that the HFF's status as the only mortgage provider in Iceland that is required to finance mortgages for their full term together with its universal service obligation puts it at a considerable disadvantage. Interest rates for indexed housing loans offered by the HFF have been higher than those offered by commercial banks since 2012.

European Commission

65 The Commission submits that, in the context of annulment actions directed against State aid decisions, to be considered individually concerned it suffices for an applicant to show that it is an "interested party" pursuant to Article 1(h) of Part II of Protocol 3 SCA if that applicant is seeking to vindicate its procedural rights arising when interested parties are invited to participate in a formal investigation procedure. However, unlike the situation in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, there is no possibility under Protocol 3 SCA for ESA to open a formal investigation procedure once the EFTA State concerned accepts the appropriate measures proposed by ESA to modify the existing aid scheme.

66 It is for the applicant to demonstrate individual concern by showing that the decision it challenges affects them by reason of certain attributes which are peculiar to them or by reason of a circumstance in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed. There must be a real competitive relationship

between the applicant and the beneficiary, and the market position of the applicant must be substantially affected by the measures. It is for the applicant to show a causal link between the factual elements it invokes and the prejudice to its market position by reference to a number of concrete factors and not simply speculation. Moreover, participation in the administrative proceedings leading to the adoption of a decision after a formal investigation procedure is neither necessary nor sufficient to be individually concerned, as only a significant effect on its market position will suffice.

67 According to the Commission, associations of undertakings can be individually concerned, for *Plaumann* purposes, by State aid decisions on two main grounds: either because the decision affects directly and individually the association in its own rights or because its members are directly and individually concerned. Whereas the latter situation does not apply here, had the association shown that it had a role as a negotiator with the Commission or ESA that is affected by the contested decision, this could have demonstrated individual concern.

FINDINGS OF THE COURT

68 IFSA seeks the annulment of the contested decision "to close the case concerning existing aid to the Icelandic Housing Financing Fund (*Íbúðalánasjóður*)".

69 Paragraph three of the contested decision lays out ESA's proposals made in its 2011 Decision; a decision taken pursuant to Article 18 of Part II of Protocol 3 SCA. The contested decision then sets out that "[t]he Icelandic authorities informed the Authority of their acceptance of the appropriate measures in a letter dated 6 October 2011 (Event No. 610792), completed by further information submitted in particular on 5 June 2012 (Event No. 637062), 7 October 2012 (Event No. 648980), 7 January 2013 (Event No. 658858) and 22 May

2014 (Event No. 709426)”. ESA also noted that it had “consulted with the complainant, the Icelandic Financial Services Association, who provided extensive comments on the proposed Icelandic measures, notably on 11 November 2011 (Event No. 713194), 1 June 2012 (Event No. 639998) and 27 May 2013 (Event No. 673674), as well as in various meetings”.

70 In paragraphs 24 and 25 of the contested decision, ESA found that “the Icelandic authorities have accepted the appropriate measures set out in Decision No. 247/11/COL” and recorded that finding. Further, ESA recorded that “pursuant to Article 19(1) of Part II of Protocol 3, Iceland is bound by its acceptance to fully implement the appropriate measures”. Finally, ESA reminded the Icelandic authorities of its obligation to keep all systems of existing aid under constant review, in cooperation with the EFTA State concerned and that the Icelandic authorities should therefore provide ESA with detailed information on any changes in the definition of public service entrusted to the HFF, including with regard to the operation of the review mechanism.

71 The present case concerns existing aid. Article 62(1) EEA provides that all existing systems of State aid in the EEA/EFTA States shall be subject to constant review by ESA as to their compatibility with Article 61 EEA in accordance with the rules set out in Protocol 26 to the EEA Agreement on the powers and functions of the EFTA Surveillance Authority in the field of State aid.

72 Article 1 of Part I of Protocol 3 SCA provides that ESA shall, in cooperation with the EFTA States, keep all systems of aid under constant review. As part of that review, ESA is to propose to the EFTA 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, after giving notice to the parties concerned to submit their comments, ESA finds that aid is not compatible with the EEA Agreement having regard to Article 61

EEA, or that such aid is being misused, it shall decide that the EFTA State concerned must abolish or alter such aid within a period of time to be determined by ESA (compare judgments in *Italy* v *Commission*, C47/91, EU:C:1994:358, paragraph 23; *Namur-Les assurances du credit*, C44/93, EU:C:1994:311, paragraph 11; and *TF1* v *Commission*, T354/05, EU:T:2009:66, paragraph 63 and case law cited).

73 According to Article 17(2) of Part II of Protocol 3 SCA, if ESA considers that an existing aid scheme is not, or is no longer, compatible with the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give it the opportunity to submit its comments within a period of one month. Only in duly justified cases may ESA extend this period.

74 According to Article 18 of Part II of Protocol 3 SCA, if, in the light of the information submitted by the EFTA State under Article 17, ESA concludes that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it is to issue a recommendation proposing appropriate measures to the EFTA State concerned. It is incontestable that such a recommendation, which is no more than a proposal, is not, taken in isolation, a challengeable act (compare *TF1* v *Commission*, cited above, paragraph 65 and case law cited).

75 According to Article 19(2) of Part II of Protocol 3 SCA, where the EFTA State concerned does not accept the proposed measures and ESA, 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 Part II of Protocol 3 SCA, with Articles 6, 7 and 9 of that Chapter applying *mutatis mutandis*.

76 According to Article 19(1) of Part II of Protocol 3 SCA, where the EFTA State concerned accepts the proposed measures and informs

ESA thereof, ESA shall record that finding and inform the Member State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures (in addition, compare judgment in *Commission* v *Council*, C118/10, EU:C:2013:787, paragraph 55 and case law cited).

77 The present case concerns Article 19(1) of Part II of Protocol 3 SCA. In such a case, ESA and the EFTA State may discuss the proposed appropriate measures. But it is only where ESA decides, in the exercise of its exclusive power to assess the compatibility of State aid with the functioning of the EEA Agreement, to accept the EFTA State's commitments as answering its concerns that the investigation procedure is brought to an end by the decision of ESA. The procedure under Article 19(1) of Part II of Protocol 3 SCA is not a quasi-contractual procedure (compare *TF1* v *Commission*, cited above, paragraphs 68 to 70).

78 In the context of the constant review of existing aid, and where the EFTA State continues to fulfil its commitments, ESA no longer has to adopt a further decision after its Article 19(1) decision is published in accordance with Article 26(1) of Part II of Protocol 3 SCA. The only measure then available to interested third parties – in this case the applicant – to challenge is the Article 19(1) decision, a decision which has binding legal effect (compare *TF1* v *Commission*, cited above, paragraphs 73 and 76). Thus, the contested decision is challengeable.

79 The applicant is the trade association of registered financial undertakings in Iceland including universal, investment and savings banks as well as insurance, leasing, securities and card companies.

80 Pursuant to the second paragraph of Article 36 SCA, a natural or legal person may institute proceedings against a decision addressed to another person only if the decision is of direct and individual concern to them. Since the contested decision was addressed to

Iceland, it must be considered whether it is of individual and direct concern to the applicant (see, *inter alia*, order of the Court of 20 March 2015 in Case E-19/13 *Konkurrenten* v *ESA*, not yet reported, paragraph 93 and case law cited).

81 Persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the second paragraph of Article 36 SCA only if the decision affects them by reason of certain attributes that are peculiar to them or if they are differentiated by circumstances from all other persons and those circumstances distinguish them individually just as the person addressed by the decision (see, *inter alia*, *Konkurrenten* v *ESA*, cited above, paragraph 94 and case law cited).

82 IFSA contends that it has *locus standi* on the basis of three alternatives. First, that its predecessor, the Bankers' and Securities Dealers' Association of Iceland, had *locus standi* in the Case *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above. Second, that IFSA has *locus standi* as a trade association as some of the undertakings that it represents have *locus standi*. Third, IFSA contends that that it has *locus standi* having played not only a decisive role, at ESA's express invitation, throughout the administrative proceedings but also a significant role in the legislative processes relating to the reform of the HFF. IFSA maintains that its role as an originator of the complaint leading to the opening of the formal examination procedure as well as its subsequent active role throughout the proceedings is relevant.

83 That IFSA's predecessor, the Bankers' and Securities Dealers' Association of Iceland, had *locus standi* in Case E9/04 is immaterial to the determination of standing in the present case.

84 The Court recalls that actions brought by an association of undertakings may be admissible in three situations where that association is not the addressee of the contested measure at issue:

first, where the association acts in place of one or more of its members who could themselves have brought an admissible action (see Case E-8/13 *Abelia* v *ESA* [2014] EFTA Ct. Rep. 638, paragraph 86; compare also the judgment in *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 39); second, if the association can prove an interest of its own, in altogether special or indeed exceptional circumstances because its position as a negotiator has been affected by the measure of which annulment is sought (compare the judgment in *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraphs 87 to 95 and case law cited); and, third, where a legal provision expressly confers on professional associations a number of procedural rights (compare the order in *Sdružení nájemníků BytyOKD.cz* v *Commission*, T559/11, EU:T:2013:255, paragraph 29 and case law cited).

85 With regard to the first of the possibilities detailed in the previous paragraph, Article 2 of IFSA's Articles of Association provides that the association is empowered to represent its members' interests in proceedings before the Court. It must thus be ascertained whether one or more of IFSA's members could have brought an admissible action themselves.

86 The Court notes that IFSA's member financial institutions, "comprising the commercial banks and savings banks", are described as "commercial banks" in the application.

87 IFSA contends that the commercial banks that form part of its membership are directly and individually concerned by the contested decision because those banks' market position is significantly adversely affected by the contested decision. IFSA states that "[t]his widespread availability of subsidized HFF loans continues to constrain the commercial banks' mortgage loan business in Iceland. It deprives the commercial banks' chances to earn risk-adequate margins." IFSA summarises its position in the application stating that "[i]t follows from these observations that the benefits enjoyed by

the HFF significantly reduce its refinancing costs, and, at least in the past, enabled the HFF to offer housing loans at a lower price than the commercial banks".

88 IFSA seeks to evidence harm suffered by way of figures 4 and 5 included in the application. Figure 4 is a graph showing "interest rate on indexed mortgage loans 'Banks and HFF'" from 1 January 2004 to 1 July 2014. The graph shows that the interest rate of "banks" was higher than the "mortgage rate of HFF" between spring 2006 and spring 2011. Figure 5, which is also a graph, shows the "interest rate margin on mortgages loans based on HFF44 bond yield, %" from 1 January 2004 to 1 July 2014. This graph shows that between late spring 2006 and late spring 2011 the "banks margin" was higher than the HFF's margin although the two margins were virtually identical at two points in late spring and early summer 2010. No evidence has been submitted indicating the bank or banks referred to in the graphs.

89 Annex 23 to the Application which is an "Overview of Financial Accounts of Financial Institutions for 2013" published by the Icelandic Financial Supervisory Authority notes that, as of 31 December 2013, there were four commercial banks and eight savings banks operating in Iceland: (commercial banks) Arion banki hf., Íslandsbanki hf., Landsbankinn hf., MP banki hf.; (savings banks) AFL sparisjóður ses., Sparisjóður Bolungarvíkur, Sparisjóður Höfðhverfinga, Sparisjóður Norðfjarðar, Sparisjóður Norðurlands, Sparisjóður Strandamanna, Sparisjóður Suður-Þingeyinga and Sparisjóður Vestmannaeyja.

90 IFSA has provided the Court also with a list of its Members as of 18 June 2015, printed from its website, as Annex 2 to its Reply, and with a detailed list from the Icelandic Financial Supervisory Authority of "supervised entities" dated 28 May 2015, as Annex 3 to its Reply. Annex 3 lists the commercial banks supervised by the Icelandic Financial Supervisory Authority as Landsbankinn hf.,

Íslandsbanki hf., Arion banki hf., and MP banki hf. The savings banks listed are: AFL – sparisjóður ses., Sparisjóður Austurlands hf., Sparisjóður Höfðhverfinga ses., Sparisjóður Norðurlands ses., Sparisjóður Strandamanna ses., and Sparisjóður Suður-Þingeyinga ses.

91 However, IFSA has failed to provide the Court with evidence of which of its members were allegedly deprived of the chance "to earn risk-adequate margins" at the material times alleged between spring 2006 and spring 2011.

92 Moreover, during the 2008 financial crisis, Kaupþing, Glitnir and Landsbanki, the three largest banks in Iceland, collapsed with their assets being transferred to newly established banks: Arion banki hf., Íslandsbanki hf., and Landsbankinn hf. respectively (see Cases E-16/11 *ESA* v *Iceland* ("*Icesave*") [2013] EFTA Ct. Rep. 4, paragraphs 38 and 211; and E-18/11 *Irish Bank Resolution Corporation Ltd* v *Kaupþing hf* [2012] EFTA Ct. Rep. 592). As confirmed by IFSA's attorney at the hearing, Kaupþing, Glitnir and Landsbanki could therefore no longer be members of IFSA. Nevertheless, in its Reply, IFSA submitted that Arion banki hf., Íslandsbanki hf., and Landsbankinn hf. "provid[e] jointly approx. 99% of all mortgage loans within the commercial banks [and] have been active on the market for mortgage loans for many years". This renders IFSA's submissions concerning admissibility inconsistent and unclear.

93 The main body of evidence to which IFSA refers, relating to the period between spring 2006 and spring 2011, pre-dates ESA's 2011 Decision. The 2011 Decision laid down a deadline of 1 January 2012 for the Icelandic authorities to take the recommended legislative, administrative and other relevant actions. An annulment of the contested decision would require ESA to reconsider whether Iceland's substantive amendments of the aid scheme, or the introduction of procedural requirements, or the abolition of the aid scheme satisfy the requirements of the appropriate measures proposed by ESA in its

Article 18 decision – here the 2011 Decision, taking into account any additional relevant facts that may have occurred and impacted upon the relevant market following the deadline in the Article 18 decision, including whether it is appropriate to propose other appropriate measures for the future or to initiate the formal investigation procedure under Article 19(2) of Part II of Protocol 3 SCA (see paragraph 75 above, and compare, to that effect, *TF1* v *Commission*, cited above, paragraphs 72 and 91).

94 Therefore, irrespective of the source of the data displayed in figures 4 and 5, as well as its reliability, and the insufficient clarity of the applicant's submissions and evidence as to which of its members it seeks to represent, which are alternatively described as "banks", "commercial banks", defined in the application as comprising both "commercial banks and savings banks", and "commercial and savings banks", as well as the manifestly inadequate information provided as to the applicant's membership, the present action is devoid of purpose in so far as it relates to the situation prior to the deadline in the 2011 Decision.

95 As regards the circumstances subsequent to the deadline in the 2011 Decision, IFSA may claim to be individually concerned, on behalf of its members, within the meaning of the second paragraph of Article 36 SCA only if the decision affects them by reason of certain attributes that are peculiar to them or if they are differentiated by circumstances from all other persons and those circumstances distinguish them individually just as the person addressed by the decision (see paragraph 80 above).

96 In State aid law, an applicant who challenges the merits of a decision appraising aid taken on the basis of Article 1(3) of Part I of Protocol 3 SCA or at the end of the formal investigation procedure is considered to be individually concerned by that decision if its market position is substantially affected by the aid, or, as in the present circumstances, in the context of a challenge to an Article 19(1) decision, by the

existing aid following implementation of the appropriate measures, to which the contested decision relates (compare *Konkurrenten* v *ESA*, cited above, paragraph 95 and case law cited).

97 Accordingly, IFSA must demonstrate that its members' positions on the market are substantially affected. That the decision at issue may have some influence on competitive relationships on the relevant market and that the undertaking concerned is in some sort of competitive relationship with the beneficiary of the decision cannot suffice for that undertaking to be regarded as individually concerned by that measure. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (see *Konkurrenten* v *ESA*, cited above, paragraph 96 and case law cited).

98 However, the mere fact that the contested decision may have some impact on the competitive relationships existing on the relevant market and that IFSA's members were in a competitive relationship with the HFF does not mean that the applicant's members' competitive position is substantially affected. IFSA must also demonstrate the extent of the detriment to its members' market position (see *Konkurrenten* v *ESA*, cited above, paragraph 99 and case law cited). However, demonstrating a substantial adverse effect on its members' position on the market cannot simply be a matter of the existence of certain factors indicating a decline in its members' commercial or financial performance, but may be made by demonstrating the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid, or, in the context of Article 19(1) of Part II of Protocol 3 SCA, such existing aid following implementation of the appropriate measures, to which the contested decision relates (compare *Konkurrenten* v *ESA*, cited above, paragraph 100 and case law cited).

99 In that regard, IFSA submits in its Application that housing loans "create a long standing relationship with the customer and may be used as a tool to combine them with additional banking services to that respective customer including savings accounts, consumer loans, asset management, etc. Furthermore, mortgage loans constitute the most secure loans in a financial institution's loan portfolio. The HFF securing a major part of this business leads the commercial banks into engaging in more risky commercial loans, resulting in a lower rating and higher cost for re-financing" (see also paragraph 87 above). In its Reply, IFSA elaborates substantially as to why the "commercial banks lost and are still losing opportunities to make profits and increase their activities in the market for mortgage loans in Iceland".

100 On the basis of the findings in paragraph 93 above, it is only necessary to consider the evidence relating to the period following the expiry of the deadline in the 2011 Decision. On that basis, it can be seen from the table provided at paragraph 15 of the Reply that the "banks and sav. Banks" have increased their percentage shares of "outstanding mortgage credit by issuers" annually, from approximately 24% in 2011 to approximately 38% in 2014, while the HFF's percentage share has declined annually from its peak in 2011 of approximately 60% to approximately 49% in 2014. Moreover, the graphs discussed at paragraph 88 above illustrate that, from spring 2011 to 1 July 2014, the "commercial banks'" mortgage rates were lower, i.e. cheaper for the consumer, than those of the HFF. Similarly, figure 5 illustrates that from late spring 2011 onwards until 1 July 2014 the "banks'" interest rate margins "on mortgages loans based on HFF44 bond yield" were lower than the HFF's margin.

101 Without it being necessary to make any further assessment on this point, it follows from all of the foregoing, in particular the inconsistent and unclear information provided by IFSA, that IFSA has not established that its members' market position was

substantially affected by the existing aid following the implementation of the appropriate measures, which is the subject of the contested decision. Consequently, IFSA, on behalf of its members, lacks standing to challenge the contested decision pursuant to the second paragraph of Article 36 SCA.

102 In relation to the second possibility in which an association may be granted standing detailed in paragraph 84 above, IFSA submits that it played a proactive role throughout the entire administrative proceedings before ESA and notes that the contested decision states that it provided "extensive comments on the proposed Icelandic measures, notably on 11 November 2011, 1 June 2012 and 27 May 2013".

103 In its Reply, IFSA adds that it has also played a significant role in the ongoing legislative processes in Iceland relating to the reform of the HFF and that its role as an originator of the complaint leading to the opening of the formal examination procedure as well as its subsequent active role throughout the proceedings are relevant for the determination of its *locus standi*.

104 In assessing an applicant's *locus standi* it is, of course, relevant to take into account the role it has played before ESA during the existing aid scheme procedure (compare *Konkurrenten* v *ESA*, cited above, paragraphs 97 and 98 and case law cited). In the present case, IFSA submitted comments on the 2011 Decision on 11 November 2011, supplying further information at ESA's request on 10 February 2012, participating in two meetings with ESA on 5 June 2012 and 27 April 2013, and submitting further updated information on 27 May 2013. It is clear that IFSA played a significant, active role in the administrative proceedings in this case.

105 However, its role in the administrative proceedings was that of a concerned third party that sought to further the commercial interests of constituent members on the Icelandic mortgage loans

market. Thus, IFSA's position was not comparable to that of one of the applicants, the Landbouwschap, in *Van der Kooy and Others* v *Commission*, 67/85, 68/85 and 70/85, EU:C:1988:38, which had negotiated with the supplier of gas the preferential tariff challenged by the Commission and was also one of the signatories to the agreement establishing that tariff which had been obliged also to engage in new tariff negotiations with the supplier and to sign a new agreement in order to put into effect the Commission's decision (compare *3F* v *Commission*, cited above, paragraph 85).

106 Nor did IFSA occupy a clearly circumscribed position as negotiator which was intimately linked to the actual subject-matter of the decision, thus placing it in a factual situation which distinguished it from all other persons (compare the judgment in *Comité d'entreprise de la Société française de production and Others*, C106/98 P, EU:C:2000:277, paragraph 45).

107 Consequently, IFSA cannot prove an interest of its own, namely, that its position as a negotiator has been affected by the contested decision in altogether special or indeed exceptional circumstances (see paragraph 83 above).

108 Finally, as regards the third possibility in which an association may be granted standing detailed in paragraph 84 above, there is, in the present case, no legal provision that expressly confers on professional associations a series of procedural powers.

109 Consequently, it must be held that the action brought against the contested decision is inadmissible.

V COSTS

110 Under Article 66(2) RoP, 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 defendant has requested that the applicant be

ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay its costs and those of the defendant. The intervener shall bear its own costs. The costs incurred by the Commission are not recoverable.

On those grounds,

The Court

Hereby orders:

1. **The application is dismissed as inadmissible;**
2. **Icelandic Financial Services Association is to bear its own costs and the costs incurred by the EFTA Surveillance Authority;**
3. **The Government of Iceland is to bear its own costs.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Luxembourg,
31 March 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Order of the President

13 July 2015

(Intervention – Application by the Government of Iceland)

In Case E-4/15,

Icelandic Financial Services Association, represented by Dr Hans-Jörg Niemeyer, Rechtsanwalt, Brussels, Belgium, and Dr Christian Kovács, Rechtsanwalt, Brussels, Belgium, acting as Counsel,

— applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Clémence Perrin and Maria Moustakali, Officers, and subsequently by Markus Schneider, Acting Director, Clémence Perrin and Maria Moustakali, Officers, Department of Legal & Executive Affairs, acting as Agents,

— defendant,

APPLICATION seeking the annulment of EFTA Surveillance Authority ("ESA") Decision No 298/14/COL of 16 July 2014 (notified: OJ 2014 C 400, p. 13) to close the case concerning existing aid to the Icelandic Housing Financing Fund (Íbtrðahnasjóður) ("HFF"),

The President

makes the following

Order

I MAIN PROCEEDINGS

1 The applicant, Icelandic Financial Services Association ("IFSA" or "SFF"), is an association governed by Icelandic law which represents all registered financial undertakings in Iceland. These include universal, investment and savings banks as well as insurance, leasing, securities and card companies.

2 For the past 60 years, public intervention in the Icelandic housing market has been aimed at encouraging private home ownership. In 1955, a basis for a systematic State involvement, both as regards policy making in the field of housing affairs and the provision of loans for private housing, was laid. The State Housing Agency (*Húsnæðisstofnun ríkisins*) was established by Act No 51/1980 and provided, *inter alia*, loans to the general public of Iceland, thereby fostering private home ownership.

3 The Act on Housing Affairs No 44/1998 (the "Housing Act") entered into force on 1 January 1999 and established the Housing Financing Fund ("HFF") (Íbúðalánasjóður). It took over all assets and obligations of the State Housing Agency, including the tasks of issuing housing bonds and providing housing loans through a bond-swap system. The HFF is an independent State-owned institution.

4 The Housing Act was amended by Act No 57/2004, which entered into force on 1 July 2004. A number of changes were made to the housing loan system but the general purpose and structure of the system remained the same.

5 HFF's activities have been scrutinised by ESA on six separate occasions in the years 2004 to 2012.

6 On 11 August 2004, by Decision No 213/04/COL (notified: OJ 2005 C 112, p. 8; EEA Supplement 2005 No 23, p. 3) ("2004 Decision"), ESA declared the HFF's house financing mechanisms compatible with the EEA Agreement. At the time of the 2004 Decision the HFF provided three categories of loans. First, it provided *general loans* to individuals for the purchase, renovation or construction of residential housing. Second, the HFF provided *supplementary loans* awarded to individuals with low income and limited assets upon referral from the housing committee of a municipality. Finally, the HFF provided *loans for rental housing* to municipalities, associations and companies for the construction or purchase of residential housing for rent. The supplementary loans were later abolished by Act No 120/2004, which entered into force on 3 December 2004 (see Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* [2006] EFTA Ct. Rep. 42, paragraph 8).

7 On 7 April 2006, following an application by the Bankers' and Securities' Dealers Association, the predecessor of IFSA, the 2004 Decision was annulled by the EFTA Court in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above.

8 On 21 June 2006, in response to the Court's judgment in Case E-9/04, by Decision No 185/06/COL (OJ 2006 C 314, p. 90; EEA Supplement 2006 No 63, p. 3), ESA decided to initiate a formal investigation into HFF, considering the aid scheme to be new aid.

9 On 28 February 2007, HFF submitted comments on ESA Decision No 185/06/COL.

10 On 27 June 2008, by Decision No 405/08/COL (OJ 2010 L 79, p. 40; EEA Supplement 2010 No 14, p. 20), ESA decided to close the formal investigation procedure applicable to new aid. On the same day, ESA

opened new proceedings under Article 1(1) of Part I and Articles 17 to 19 of Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") regarding existing aid. Following this reconsideration, also on 27 June 2008, ESA sent a letter to the Icelandic Government pursuant to Article 17(2) of Part II of Protocol 3 SCA.

11 On 1 September 2008, IFSA submitted comments on ESA's letter of 27 June 2008.

12 On 8 September 2008, the Icelandic Government replied to ESA's letter of 27 June 2008.

13 On 18 July 2011, by Decision No 247/11/COL ("the 2011 Decision"), ESA decided that the HFF scheme in the form of state guarantee, income tax exemption, interest support and lack of adequate rate of return/lack of dividend payments constituted existing aid incompatible with the EEA Agreement, and proposed appropriate measures for the financing of the HFF.

14 On 6 October 2011, the Icelandic Government replied, stating that it was willing to accept ESA's proposal for appropriate measures.

15 On 11 November 2011, IFSA submitted comments on the 2011 Decision, maintaining the position that the response of the Icelandic Government did not constitute proper acceptance of that Decision.

16 On 10 February 2012, ESA requested further information from IFSA regarding its previous submissions.

17 On 1 June 2012, IFSA replied and supplied further information.

18 On 5 June 2012 and 27 April 2013, IFSA participated in two meetings with ESA.

19 On 27 May 2013, IFSA submitted further updated information regarding the Icelandic banking sector and the problems faced by HFF.

20 On 16 July 2014, by Decision No 298/14/COL ("the Contested Decision"), ESA recorded Iceland's acceptance of the appropriate measures proposed in the 2011 Decision and noted further commitments entered into by Iceland. ESA then closed the case concerning the review of existing aid to HFF. The contested decision was notified in the Official Journal of the European Union on 13 November 2014.

21 By an application lodged at the Court on 28 January 2015, IFSA brought an action under the second paragraph of Article 36 SCA seeking the annulment of ESA Decision No 298/14/COL of 16 July 2014, in which ESA declared the housing financing mechanisms provided for by the Icelandic authorities in favour of HFF to be compatible with State aid rules in accordance with the requirements of Article 59(2) EEA. IFSA challenges the contested decision by three main pleas. It contends that the support for HFF must be qualified as new aid, that the contested decision is insufficiently reasoned and that the notion of "services of general economic interest" specified in Article 59(2) EEA has been incorrectly interpreted.

22 On 26 February 2015, ESA requested an extension of the period in which to submit its defence. That request was granted by the President on 27 February 2015 pursuant to Article 35(2) of the Court's Rules of Procedure ("RoP"), setting a time limit for the submission of a defence of 27 April 2015.

23 In its defence, lodged at the Court's Registry on 27 April 2015, ESA submits that the Court should dismiss the application or, in the alternative, declare the application inadmissible in whole or in part, and order the applicant to pay the costs.

24 On 8 May 2015, IFSA requested an extension of the period in which to submit its reply. That request was granted by the President on 11 May 2015 pursuant to Article 78 RoP, setting a time limit for the submission of a reply of 19 June 2015.

25 On 19 June 2015, IFSA's reply was received at the Court Registry.

26 On 3 July 2015, the Court Registry received written observations from the European Commission.

II APPLICATION TO INTERVENE

27 By a document lodged at the Court's Registry on 10 June 2015, the Government of Iceland seeks leave to intervene pursuant to Article 36 SCA in support of the form of order sought by ESA. The application to intervene was served on the parties in accordance with Article 89(2) RoP.

28 In written observations on the application to intervene, lodged at the Court's Registry on 25 June 2015, ESA asserts that the Government of Iceland's application was timely and is admissible under the first paragraph of Article 36 of the Court's Statute.

29 ESA submits that, although the Government of Iceland is not required to show any specific interest under the first paragraph of Article 36 of the Court's Statute, the fact that the Government of Iceland has been supporting private home ownership through public intervention means that the outcome of the application for annulment is of significant importance to the applicant intervener.

30 ESA contends that the facts of this case are complex and, as the addressee of the contested decision, the Government of Iceland should be in a position to assist the Court in understanding the relevance of those facts for the proceedings.

31 ESA further notes that the Government of Iceland was granted leave to intervene in support of ESA in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, brought by the predecessor of the applicant and concerning an earlier ESA decision regarding the Icelandic Housing Financing Fund.

32 By a document lodged at the Court's Registry on 26 June 2015, IFSA stated that it takes notice of the Government of Iceland's application to intervene. IFSA further requested, pursuant to Article 89(3) RoP, that the EFTA Court grant it ample time to omit secret and confidential information from the application and the reply.

III LAW

33 Pursuant to the first paragraph of Article 36 of the Court's Statute, any EFTA State, ESA, the European Union and the Commission may intervene in cases before the Court.

34 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was given, pursuant to Article 14(6) RoP, in the EEA Section of the Official Journal of the European Union on 30 April 2015. Accordingly, the time limit for submission of an application to intervene was 11 June 2015.

35 The present application to intervene was lodged at the Court's Registry on 10 June 2015, and is therefore timely.

36 In light of the above, Iceland is granted leave to intervene in the case in support of the form of order sought by ESA.

On those grounds,

The President

Hereby orders:

1. **Iceland is granted leave to intervene in Case E-4/15 in support of the form of order sought by ESA and shall receive a copy of every document served on the parties subject to any decision of the President following an application by one of the parties to omit secret or confidential information.**
2. **Costs are reserved.**

Luxembourg,
***13 July 2015*.**

Gunnar Selvik	**Carl Baudenbacher**
Registrar	*President*

Report for the Hearing

in Case E-4/15

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 case between

Icelandic Financial Services Association

and

EFTA Surveillance Authority,

supported by **the Government of Iceland**,

seeking the annulment of EFTA Surveillance Authority Decision No 298/14/COL of 16 July 2014, notified in OJ 2014 C 400, p. 13, (the "contested decision"), to close the case concerning existing aid to the Icelandic Housing Financing Fund (Íbuðalánasjóður).

I INTRODUCTION

1 This case concerns Decision No 298/14/COL of the EFTA Surveillance Authority ("ESA") of 16 July 2014. The contested decision records Iceland's acceptance of the appropriate measures proposed, pursuant to Article 18 of Part II of Protocol 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), by ESA in its Decision of 18 July 2011 and that the case concerning existing aid to the Icelandic Housing Financing Fund ("HFF") was therefore closed.

2 The applicant, Icelandic Financial Services Association (*Samtök fjármálafyrirtækja*, or "IFSA"), contends that ESA wrongly qualified

the support granted to HFF as existing aid and that it should have been qualified as new aid; that ESA failed to provide adequate reasons as regards the existence of a service of general economic interest ("SGEI"); and that ESA made an error of assessment as regards the existence of an SGEI, the presence of a market failure, the proportionality of the aid, and the effect of the aid on trade within the EEA.

II LEGAL BACKGROUND

EEA LAW

3 Article 59 EEA reads:

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

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

…

4 Article 61(1) 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 62(1) EEA reads:

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. …

6 Article 16 SCA reads:

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

7 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.

…

8 Article 1(1) of Part I of Protocol 3 SCA reads:

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.

9 Article 18 of Part II of Protocol 3 SCA reads:

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 not longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendations may propose, in particular

(a) substantive amendments of the aid scheme,

or

(b) introduction of procedural requirements,

or

(c) abolition of the aid scheme.

10 Article 19(1) of Part II of Protocol 3 SCA reads:

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.

III FACTUAL BACKGROUND AND PRE-LITIGATION PROCEDURE

11 The applicant is an association, governed by Icelandic law, that represents all registered financial undertakings in Iceland including universal, investment, and savings banks, as well as insurance, leasing, securities, and credit card companies.

12 In 1955 the Icelandic State began to provide loans for private housing. The State Housing Agency (*Húsnæðisstofnun ríkisins*) was established by Act No 51/1980 and provided, *inter alia*, loans to the general public of Iceland, intended to foster private home ownership. The Act on Housing Affairs No 44/1998 (the "Housing Act") entered into force on 1 January 1999 and established the HFF. It took over all assets and obligations of the State Housing Agency, including the tasks of issuing housing bonds and providing housing loans through a bond-swap system. The HFF is an independent State-owned institution. The Housing Act was amended by Act No 57/2004, which entered into force on 1 July 2004. A number of changes were made to the housing loan system but the general purpose and structure of the system remained the same.

13 The HFF's activities have been scrutinised by ESA on six separate occasions in the years 2004 to 2012.

14 On 11 August 2004, by Decision No 213/04/COL (the "2004 Decision"), ESA declared the HFF's house financing mechanisms compatible with the EEA Agreement. At the time of the 2004 Decision the HFF provided three categories of loans. First, it provided *general loans* to individuals for the purchase, renovation or construction of residential housing. Second, the HFF provided *supplementary loans* awarded, upon referral from the housing committee of a municipality, to individuals with a low income and limited assets. Finally, the HFF provided *loans for rental housing* to municipalities, associations, and companies for the construction or purchase of residential housing for rent. The supplementary loans

were later abolished by Act No 120/2004, which entered into force on 3 December 2004.

15 On 7 April 2006, following an application by the Bankers' and Securities Dealers' Association, the predecessor of IFSA, the 2004 Decision was annulled by the EFTA Court in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* [2006] EFTA Ct. Rep. 42. On 21 June 2006, in response to the Court's judgment in Case E-9/04, by Decision No 185/06/COL (the "2006 Decision"), ESA decided to initiate a formal investigation into the HFF, considering the aid scheme to be new aid. On 28 February 2007, the HFF submitted comments on ESA's 2006 Decision.

16 On 27 June 2008, by Decision No 405/08/COL (the "2008 Decision"), ESA decided to close the formal investigation procedure applicable to new aid. On the same day, ESA opened new proceedings under Article 1(1) of Part I and Articles 17 to 19 of Part II of Protocol 3 SCA and sent Iceland a letter pursuant to Article 17(2) of Part II of Protocol 3 SCA.

17 On 1 September 2008, IFSA submitted comments on ESA's letter of 27 June 2008. On 8 September 2008, the Icelandic Government replied to ESA's letter of 27 June 2008.

18 On 18 July 2011, by Decision No 247/11/COL (the "2011 Decision"), ESA decided that the HFF scheme was incompatible with the EEA Agreement, and proposed appropriate measures for the financing of the HFF. On 6 October 2011, the Icelandic Government replied, stating that it was willing to accept ESA's proposal for appropriate measures. On 11 November 2011, IFSA submitted comments on the 2011 Decision, maintaining the position that the response of the Icelandic Government did not constitute proper acceptance of that Decision.

19 On 10 February 2012, ESA requested further information from IFSA. On 1 June 2012, IFSA replied and supplied further information. On

5 June 2012 and 27 April 2013, IFSA participated in two meetings with ESA. On 18 June 2012, the Housing Act was amended by Act No 84/2012, which entered into force on 5 July 2012. In particular, the Act limited the grant of loans to finance the purchase, construction or renovation of residential housing to individuals, increased the maximum allowed loan amount to ISK 24 million and the minimum loan-to-value ratio to 60%, introduced a review system in order to annually assess whether, and, if so, to what extent, a market failure still exists, limited loans in the field of rental housing, and made the operation of the HFF subject to accounting and supervision rules similar to financial undertakings.

20 On 27 May 2013, IFSA submitted further updated information regarding the Icelandic banking sector and the problems faced by the HFF.

IV THE CONTESTED DECISION

21 On 16 July 2014, ESA adopted Decision No 298/14/COL. ESA recorded, pursuant to Article 19(1) of Part II of Protocol 3 SCA, Iceland's acceptance of the appropriate measures proposed in the 2011 Decision on the financing of the HFF, noted further commitments entered into by Iceland, and closed the case concerning the review of existing aid to the HFF. The contested decision was notified in the Official Journal of the European Union on 13 November 2014.

V PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

22 On 28 January 2015, IFSA lodged an application pursuant to the second paragraph of Article 36 SCA seeking the annulment of ESA Decision No 289/14/COL of 16 July 2014 closing the case concerning existing aid to the HFF.

23 The Applicant requests the Court to:

(i) annul the EFTA Surveillance Authority's decision 298/14/COL of 16 July 2014 (OJ 2014 of 13 November 2014, No C 400, p. 13) to close the case concerning existing aid to the Icelandic Housing Financing Fund (Íbuðalánasjóður), and

(ii) order the EFTA Surveillance Authority to bear the costs of the proceedings.

24 On 26 February 2015, ESA requested an extension of the deadline to lodge a defence. On 27 February 2015, the President, pursuant to Article 35(2) of the Rules of Procedure ("RoP"), granted ESA's request and set the deadline for the defence to 27 April 2015.

25 On 27 April 2015, ESA submitted its defence, pursuant to Article 35 RoP. The defendant, the EFTA Surveillance Authority, requests the Court to:

(i) dismiss the application, or, in the alternative, declare the application inadmissible in whole or in part;

(ii) order the applicant to bear the costs.

26 On 8 May 2015, IFSA requested an extension of the deadline to lodge a reply to the defence. On 11 May 2015, the President, pursuant to Article 78 RoP, granted IFSA's request and set the deadline for the reply to 19 June 2015.

27 On 10 June 2015, the Government of Iceland sought leave to intervene, pursuant to Article 36(1) of the Statute and Article 89 RoP, in support of the form of order sought by ESA. On 19 June 2015, IFSA submitted its reply. On 25 and 26 June 2015, ESA and IFSA, respectively, lodged their written observations on the application to intervene.

28 On 3 July 2015, the European Commission ("Commission") submitted written observations. On 8 July 2015, ESA requested an extension of

the deadline to submit its rejoinder. On 9 July 2015, the President, pursuant to Article 78 RoP, granted an extension until 17 August 2015. On 13 July 2015, the President by order, pursuant to Article 89(3) RoP, granted the Government of Iceland leave to intervene.

29 On 4 August 2015, the Government of Iceland requested an extension of the deadline to submit its statement in intervention. On 5 August 2015, the President, pursuant to Article 78 RoP, granted an extension until 1 September 2015. On 17 August 2015, ESA submitted its rejoinder.

30 On 1 September 2015, the Government of Iceland lodged its statement in intervention at the Court's Registry.

31 The intervener, the Government of Iceland, requests the Court to:

(i) dismiss the application, or, in the alternative, declare the application inadmissible in whole or in part,

(ii) order the applicant to bear the costs of the intervener.

32 On 8 September 2015, IFSA requested an extension of the deadline to submit its comments on the statement in intervention. On 9 September 2015, the President, pursuant to Article 78 RoP, granted an extension until 25 September 2015. On 9 September 2015, ESA requested an extension of the deadline to submit comments on Iceland's statement in intervention. On 10 September 2015, the President, pursuant to Article 78 RoP, granted an extension until 25 September 2015. On 25 September 2015, both IFSA and ESA submitted comments on the statement in intervention.

VI WRITTEN OBSERVATIONS

33 Pleadings have been received from:

– the applicant, represented by Dr Hans-Jörg Niemeyer, Rechtsanwalt, and Dr Christian Kovács, Rechtsanwalt;

– the defendant, represented by Xavier Lewis, Director, Maria Moustakali and Clémence Perrin, Officers, subsequently by Markus Schneider, Deputy Director, Maria Moustakali and Clémence Perrin, Officers, Department of Legal & Executive Affairs, acting as Agents, and subsequently by Carsten Zatschler, Director, Markus Schneider, Deputy Director, Maria Moustakali, and Clémence Perrin, Senior Officers, Department of Legal & Executive Affairs, acting as Agents;

– the intervener, represented by Ambassador Kristján Andri Stefánsson, Director General at the Ministry for Foreign Affairs, acting as Agent, Supreme Court Attorney Jóhannes Karl Sveinsson, acting as Counsel, and District Court Attorney Bjarnveig Eiríksdóttir, acting as Co-Counsel.

34 Pursuant to Article 20 of the Statute of the Court, written observations have been received from:

– the European Commission (the "Commission"), represented by Leo Flynn, Legal Adviser, and Lorna Armati and Paul-John Loewenthal, Members of its Legal Service, acting as Agents.

ICELANDIC FINANCIAL SERVICES ASSOCIATION

ADMISSIBILITY

35 IFSA submits that it has standing to challenge the contested decision pursuant to the second paragraph of Article 36 SCA, as the contested decision is of legally binding effect capable of affecting the interests of IFSA. Further, IFSA has *locus standi* as it is directly and individually concerned by the contested decision.

36 IFSA contends, first, that the contested decision entails binding legal effects by terminating a "decision making procedure" under Article 19(1) of Part II of Protocol 3 SCA. Iceland is be bound by its acceptance to implement the appropriate measures and neither ESA nor Iceland can release themselves from the content of the contested decision. As long as Iceland fulfils the measures agreed upon, ESA cannot adopt a further decision on the same subject matter.[1]

37 Second, it notes that the standing of IFSA's predecessor, the Bankers' and Securities Dealers' Association of Iceland, was recognised by the Court in Case E9/04, which, in substance, assessed the same aid scheme addressed by the contested decision.[2]

38 In the alternative, IFSA maintains that it has standing in its own right as an association representing the interests of undertakings, which themselves have *locus standi*.[3] According to Article 2 of its Articles of Association, IFSA is entitled to "promote the interests of companies providing financial services" and "to redound the competitiveness of the environment that Icelandic financial companies participate in" which includes the representation of the Icelandic financial institutions' interests in proceedings before the Court. Moreover, IFSA played a proactive role throughout the administrative proceedings.

39 According to IFSA, the commercial banks would be entitled to bring an action for annulment individually, as they are directly and

1 Reference is made to Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paragraph 73 et seq., Case C-311/94 *Ijssel Vliet Combinatie BV* v *Commission* [1996] ECR I-5023, paragraph 41 et seq., and Case C-117/10 *Commission* v *Council*, judgment of 4 December 2013, reported electronically, paragraph 63.

2 Reference is made to Case E-9/04 *Bankers' and Securities Dealers' Association of Iceland* v *EFTA Surveillance Authority* [2006] EFTA Ct. Rep. 42, paragraph 52.

3 Reference is made to Case T-292/02 *Confederazione nazionale del Servizi* v *Commission* [2009] ECR II1659, paragraph 52 with further references, and Case E-4/97 *Norwegian Bankers' Association* v *EFTA Surveillance Authority* [1998] EFTA Ct. Rep. 38, paragraph 27 et seq.

individually concerned by the contested decision. Individual concern may arise from the beneficiary's important and substantial position on the relevant market and the fact that the State aid enables the beneficiary to sell its products in the EU at prices below competitors' average prices.[4] The commercial banks and the HFF are competitors on the housing loan market in Iceland, on which the HFF has a dominant market position that is explicitly recognised by ESA. Due to benefits from manifold aid measures, in particular the state guarantee ruling out the bankruptcy of the HFF, the company's income tax exemption, the lack of a requirement for the HFF to pay dividends, and the interest support mechanism, the HFF's refinancing costs are significantly reduced, enabling it to offer housing loans at a lower price than commercial banks. In its reply, IFSA submits that direct and individual concern must not only be inferred from factors such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question, but could be established by other factors, such as the loss of an opportunity to make a profit or a less favourable development of a company's market share than would have been the case without such aid.[5]

40 In its reply, IFSA submits that ESA oversimplifies the role of IFSA as the representative of its member institutions and its role in the proceedings.[6] The *locus standi* of an association has to be assumed if the association's membership accounts for a significant share in a tight market, which is significantly disturbed by the state measure in

4 Reference is made to Case T-36/99 *Lenzing AG* v *Commission* [2004] ECR II-3597, paragraph 81 et seq., Case C-525/04 P *Spain* v *Commission* [2007] ECR I-9947, paragraph 37, and Case C487/06 P *British Aggregates Association* v *Commission* [2008] ECR I-10515, paragraph 53.

5 Reference is made to *British Aggregates* v *Commission*, cited above, paragraph 53, *Spain* v *Commission*, cited above, paragraph 34 et seq., and Case E19/13 *Konkurrenten.no* v *EFTA Surveillance Authority*, order of 20 March 2015, not yet reported, paragraph 100.

6 Reference is made to paragraph 38 et seq. of the defence.

question.[7] Consequently, this principle is applicable *a fortiori* where IFSA's members account for the overwhelming majority of the market share held by commercial banks in the market for mortgage loans for residential housing in Iceland.

41 Moreover, IFSA emphasises that it has played not only a decisive role, at ESA's express invitation, throughout the administrative proceedings; IFSA and its predecessor have assisted for over ten years. It has also played a significant role in the legislative processes relating to the reform of the HFF. IFSA maintains that its role as an originator of the complaint leading to the opening of the formal examination procedure as well as its subsequent active role throughout the proceedings are relevant.[8]

42 In IFSA's view, commercial banks offer mortgage loans on the basis of regular market conditions, whereas the conditions offered by the HFF are distorted by State aid and the HFF has used its State funding to deliberately undercut the interest rates at market conditions between 2006 and 2011 by approximately 1%, even as far as operating at a loss. This led to a loss of business opportunities.[9] The increase in the market share held by commercial banks since 2010 does not contradict these adverse effects. Rather, it demonstrates their ability to regain market shares lost during the financial crisis. Moreover, the requirement of a first priority collateral for maximum HFF funding automatically leaves commercial banks' mortgage loans secured with second priority with higher borrowing costs and puts them at a further competitive disadvantage. The resulting dominance of the HFF becomes particularly apparent when it is compared to similarly structured housing funds in Scandinavia.

7 Reference is made to Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 64 et seq.
8 Reference is made to *Konkurrenten.no* v *ESA*, cited above, paragraph 97.
9 Reference is made to paragraph 188 et seq. of the application.

43 IFSA submits further that, contrary to ESA's claim, the commercial banks are a limited class of traders identifiable prior to the adoption of the contested decision.[10] While the three major banks, Íslandsbanki, Landbankinn, and Arion Bank, were restructured in the aftermath of the financial crisis, they remain identical to their predecessors as regards the provision of mortgage loans. In IFSA's view, the question whether a group's members can be identified at a given moment in time is in no way linked to the fact that the composition of a specific group of individual companies may have not remained stable for more than a decade. IFSA disagrees with ESA's reading of Case C-132/12 P *Stichting Woonpunt and Others* as requiring the contested decision to mark a turning point entailing a "before and after" scenario. Instead, the conditions for the applicant must be "less favourable" than they would have been without the contested decision.[11]

44 In its comments on Iceland's statement in intervention, IFSA contests Iceland's allegation that the data it relies on were outdated. Whilst it accepts that commercial banks do not finance their mortgage operations through HFF bonds, those bonds are a benchmark in the bond market and a fairly stable ratio exists between HFF bond yields and yields on covered bonds making them a good reference value. It notes that the HFF alone has a market share of approximately 50% in the relevant market for mortgage loans and thus is automatically presumed to be dominant.[12] IFSA contests Iceland's allegation that the HFF is not and has never

10 Reference is made to Case C-132/12 P *Stichting Woonpunt and Others* v *Commission*, judgment of 27 February 2014, published electronically, paragraph 59 et seq., and Case C-133/12 P *Stichting Woonlinie and Others* v *Commission*, judgment of 27 February 2014, published electronically, paragraph 46 et seq.

11 Reference is made to *Stichting Woonpunt and Others* v *Commission*, cited above, paragraph 69.

12 Reference is made to Case C62/86 *AKZO Chemie BV* v *Commission* [1991] ECR I-3359, paragraph 60.

competed on price with commercial banks and maintains that, in any event, the HFF should have been able to cover its own costs by its funding activities, which it did not.

SUBSTANCE

First plea: support for the HFF must be qualified as new aid

45 IFSA contends that the HFF aid scheme should be qualified as new and not existing aid. ESA noted in its 2008 Decision that specific changes introduced by the 2004 amendments to the Housing Act led to an expansion of potential new beneficiaries of HFF mortgage loans but concluded that this alteration was not significant.[13] In contrast, IFSA alleges that the raising of the ceiling for HFF funding from 70% to 90% of the appraised value of real estate was significant, as it allowed the HFF to access a completely new group of customers who were previously not able to enter the property market because of the cost of bridge financing for the amount in excess of 70%. In its view, such changes, which are severable from the initial measure, must be treated as new aid within the meaning of Article 1(c) of Part II of Protocol 3 SCA.[14] This holds in particular for an increase in the number of potential beneficiaries under an existing aid scheme.[15]

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13 Reference is made to page 28 of the 2008 Decision and Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, cited therein.

14 Reference is made to Joined Cases T-254/00, T-272/00 and T-277/00 *Hotel Cipriani* v *Commission* [2008] ECR II-3269, paragraphs 358 and 362, and Joined Cases T-195/01 and T-207/01 *Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111.

15 Reference is made to Case T-301/02 *AEM* v *Commission* [2009] ECR II-1757, paragraph 126, and Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava* [2009] ECR II-3029, paragraph 232 et seq.

Second plea: Insufficient reasoning

46 By its second plea, IFSA alleges that ESA infringed essential procedural requirements by not providing adequate reasons as required by Article 16 SCA. A decision by ESA must disclose in a clear and unequivocal fashion the principal issues of law and fact upon which it is based, so that the reasoning which led ESA to its decision may be understood and that the Court is able to exercise its power of review.[16]

47 IFSA submits that ESA's reasoning does not satisfy those requirements, as the actual reasoning of the contested decision, which seeks to end a legal dispute spanning more than ten years, consists of a mere eight paragraphs.[17] In addition, the modest reasoning fails to assess why the general loans system of the HFF has to be considered an SGEI (first branch) and why it must be regarded as proportionate (second branch).

48 In its reply, IFSA contests ESA's argument that the contested decision has to be read in the light of the 2011 Decision. First, the 2011 Decision is largely critical of the HFF and its compatibility with State aid law, whereas the contested decision argues exactly the opposite. Against such a highly contradictory background, IFSA maintains that ESA was under an obligation to set out the facts and the legal considerations which had decisive importance in the context of the decision, identifying why ESA's critical assessment in the 2011 Decision had changed. The reasoning has to be of sufficient detail as to allow IFSA to examine whether an infringement of its

16 Reference is made to Case E-2/94 *Scottish Salmon Growers Association* v *ESA* [1994-1995] EFTA Ct. Rep. 59, paragraph 26.
17 Reference is made to paragraphs 16 to 24 of the contested decision.

rights has occurred.[18] It notes that since 2011 the market itself and market shares have changed, the HFF had to be restructured and IFSA made three major submissions. Therefore, ESA was under a legal obligation to base the contested decision on the facts of the case and the law as it stood at the time of the decision.[19] While EFTA States have a wide margin of appreciation in defining the scope of an SGEI, this scope is unrelated to ESA's legal obligation to provide sufficient reasoning.

First branch of the second plea: Insufficient reasoning on the classification as an SGEI

49 IFSA contends that ESA confines itself to the assertion that the Member State claiming the existence of an SGEI has a wide margin of discretion. Whereas in the 2011 Decision ESA expressly stated that the qualification of the HFF loan system as an SGEI was highly doubtful, the contested decision does not provide any justification why these doubts have been removed by Iceland's acceptance of the appropriate measures.[20]

50 IFSA submits that ESA simply assumed that there is an "alleged market failure". Further, ESA provides no reasoning for its assertion that the amended maximum value cap "has the effect of excluding the higher price segment of the housing market".[21] Moreover, ESA simply adopts Iceland's definition of an SGEI, assuming that the HFF's objective as an SGEI is in "assisting an average citizen in financing his or her housing".[22] None of IFSA's arguments on this

18 Reference is made to Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 173 and the case-law cited, and Case C367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1752, paragraph 63.

19 Reference is made to Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraph 50 and the case-law cited.

20 Reference is made to page 17 of the 2011 Decision.

21 Reference is made to paragraph 18 of the contested decision.

22 Reference is made to paragraph 19 of the contested decision.

issue have been addressed nor has ESA given any reasoning for sharing Iceland's view. Furthermore, the contested decision lacks any assessment whether the changes to the HFF system meet the requirements set out in the 2011 Decision as it only lists the various amendments to the Housing Act, asserting that the measures suffice to restrict the HFF's activities as required in the 2011 Decision. The question why the requirements for loans in the field of residential housing differ from those set out for rental housing is not addressed.[23]

51 In its reply, IFSA challenges ESA's allegation that it was bound by the Court's analysis in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* with regard to the qualification of the HFF as an SGEI. The Court conducted merely a *prima facie* examination of the contested aid.[24] The obligation on ESA flowing from that judgment was thus limited to a re-examination of the conditions for opening the formal investigations procedure. Moreover, in relation to ESA's explanations in the defence concerning the introduction of the cost limitation, together with the absence of a size limitation, and the eligibility of certain rental housing projects, IFSA submits that reasoning cannot be introduced retroactively in the proceedings before the Court.[25]

Second branch of the second plea: Insufficient reasoning on the proportionality of the aid scheme

52 IFSA submits that the contested decision does not assess whether the amount of compensation is limited to what is necessary. ESA merely

23 In addition reference is made to *Liechtenstein and Others* v *ESA*, cited above, paragraph 173.

24 Reference is made to *Norwegian Bankers Association* v *ESA*, cited above, paragraph 47.

25 Reference is made to Case 195/80 *Michel* v *Commission* [1981] ECR 2861, paragraph 21 et seq., and Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 149 and the case-law cited.

confines itself to a general remark that "the HFF operates efficiently and that there is no overcompensation",[26] in referring generally to the HFF's business plan. Such a short explanation is insufficient, considering the doubts concerning proportionality raised in the 2011 Decision.[27]

53 Article 59(2) EEA requires the balancing of the two competing objectives: the performance of the SGEI on the one hand and the requirement to protect the interest of the Contracting Parties in open markets on the other. Such balancing calls for complex analyses and assessments.[28] However, the contested decision lacks any definition of the relevant market and of what is meant by "manageable terms" and "average resident" within the SGEI's objective of "assistance to the average resident of Iceland in buying a property on manageable terms while at the same time gradually withdrawing HFF lending in order not to hinder the entry of other mortgage providers into the market".[29] In its reply, IFSA submits that ESA attempts to correct the omission to provide adequate reasoning for the concepts of "manageable terms" and "average citizen" by providing an explanation retroactively.

Third plea: Wrongful interpretation of the notion of an SGEI pursuant to Article 59(2) EEA

54 By its third plea, IFSA alleges that ESA wrongfully interpreted Article 59(2) EEA in assuming that the HFF's general loans scheme constitutes an SGEI. First, the HFF's general loans scheme is not restricted to social housing as required by the SGEI decision. Second,

26 Reference is made to paragraph 22 of the contested decision.
27 Reference is made to page 24 of the 2011 Decision.
28 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 81.
29 Reference is made to paragraph 7 of the contested decision.

ESA was barred from applying Article 59(2) EEA since the Icelandic market for mortgage loans for residential housing has not suffered and does not suffer from market failure. Further, ESA failed to take account of the fact that the compensation of the HFF is disproportionate and has an adverse effect on trade between EEA Contracting Parties.

First branch of the third plea: no service of general economic interest

55 IFSA submits that the concept of SGEI in Article 59(2) EEA must be interpreted narrowly. However, ESA failed to apply such an interpretation.

56 According to IFSA, an authoritative interpretation of the term SGEI exists. Recital 11 of Commission Decision 2012/12/EU (the "SGEI Decision") on State aid, rendered applicable by the EEA Joint Committee's Decision No 66/2012 of 30 March 2012 amending Annex XV to the EEA, defines social housing as a social service for "disadvantaged citizens or socially less advantaged groups, who due to solvency constraints are unable to obtain housing at market conditions". This interpretation is authoritative and has become binding for ESA and Iceland.[30]

57 IFSA submits that this binding interpretation with regard to social housing can be reconciled with the judgment in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, in which the Court limited the scope of the HFF's operations to the provision of housing finance that "goes beyond the normal economic interest

30 In addition reference is made to Commission Decision of 3 July 2001 – *Ireland*, N 209/2001, OJ 2002 C 67, p. 33, paragraphs 2 and 3; Commission Decision of 15 December 2009 – *The Netherlands*, E 2/2005 and N 642/2009, OJ 2010 C 31, p. 6, paragraphs 54 et seq.; Commission Decision of 13 July 2009 – *Hungary*, N 358/2009, OJ 2009 C 174, p. 4, paragraph 42; and a letter of 5 July 2012 from the Commission to France (submitted as Annex 14).

of operators in the financial sector".[31] The SGEI, for which the HFF may receive compensation, must therefore be limited to the financing of social housing within the meaning of the SGEI Decision. It is for ESA to ensure in this context that the measures adopted by Iceland do not "pursue other goals than those defined by Icelandic law or exceed what is necessary to achieve the defined goal".[32]

58 IFSA alleges that the HFF's general loans scheme does not meet the required standard and that ESA committed a manifest error of assessment in qualifying the HFF as an SGEI.[33] Prior to the contested decision, ESA consistently expressed serious doubts with regard to the qualification of the HFF's general loans scheme as an SGEI.[34]

59 According to IFSA, the changes to the scheme introduced by Iceland by July 2014 are insufficient to alleviate the concerns raised concerning the qualification of the scheme as an SGEI. First, the maximum allowed loan amount of ISK 24 million as well as the maximum value cap of ISK 40 million must both be deemed excessive, as they imply that a total of 86.9% of all residential properties in Iceland are eligible for funding under the HFF's general loans scheme. In rural areas, it covers between 98.8% to 100% of all residential properties and in the capital area over 80%. Such a scheme can hardly be qualified as having the effect of excluding the higher price segment of the housing market. Second, the ratio of residential property eligible for funding by HFF is, in reality, even higher, as the cost limitation on eligible dwellings is calculated on

31 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 68.

32 Ibid, paragraph 76.

33 Reference is made to Case C-179/90 *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli* [1991] ECR I-5889, paragraph 27, and *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 67.

34 Reference is made to ESA's Article 17(2) letter of 27 June 2008, p. 11 et seq., ESA Decision No 69/11/COL of 16 March 2011 authorizing rescue aid to the HFF, p. 15, and the 2011 Decision, p. 17.

the basis of the taxation value of the respective property, which does not reveal the actual property value. The taxation value of a property effective from 1 December of a given year reflects the market price of a property discounted to the present value in February of that year and, thus, lags behind actual market developments. In rural areas, the value of a property is estimated based on factors such as the income from the property, building costs, age, and location. These estimations tend to be conservative and significantly lower than the actual market value. Third, the HFF's general loans scheme is open to a much wider range of potential beneficiaries than the average resident of Iceland. Despite the EEA States' margin of interpretation to define an SGEI, this must not be exercised arbitrarily to remove a particular sector from the application of the competition rules.[35] The margin of appreciation has to stay within the limits of Article 59(2) EEA drawn by the SGEI Decision and its interpretation of the notion of social housing. However, ESA failed to scrutinise carefully the group of citizens that are eligible for HFF funding.

60 IFSA adds, moreover, that two major criticisms of the HFF's general loans scheme[36] have not been remedied by Iceland. First, it did not introduce changes to ensure compliance with the "one person, one property" rule set out by ESA, even though the Court expressly criticised the possibility to acquire HFF funded property for investment purposes.[37] Existing exemptions under the "one person, one property" rule include the acquisition of residential property for children studying away from their parents' home. As the studies are, by definition, of limited duration, the property funded by HFF will, at some point, be vacated and remain at the disposal of the acquirer

35 Reference is made to Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 168.

36 Reference is made to ESA's Article 17(2) letter of 27 June 2008, p. 11.

37 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 78 et seq.

for genuine investment purposes. In its reply, IFSA stresses that such an exemption is not needed since there are approximately 1 600 apartments in Reykjavik offered at special rental conditions and students are entitled to student loans, which include an amount for housing costs. Second, no specific qualifications relating to the group eligible under the HFF's general loans scheme have been introduced, as the only restriction on an application for funding by HFF is residency in Iceland. Moreover, Iceland did not introduce any limitation on the size of the property eligible for funding by the HFF.[38]

61 IFSA contends that even if the substance of the changes to the HFF's general loans scheme were sufficient to make it an SGEI, which is denied, the procedural implementation of these changes is inadequate. ESA provides no information on the deadline by which the appropriate measures will have to be implemented and on how it intends to verify the actual status of the implementation, which is in stark contrast to its decisional practice. Whereas Iceland has given a commitment that an independent institution such as Statistics Iceland will carry out a yearly review to assess the developments on the property market, no amendment has yet been made to the Housing Act to replace the biannual survey by an annual assessment. Further, Iceland's commitment to entrust the National Audit Office with the task of carrying out regular cost analyses with regard to the HFF cannot be properly implemented, since such an assessment is the traditional domain of the Competition Authority and, in addition, the credibility and objectivity of the annual audits of the HFF would be at risk were the same body to be responsible for both these analyses and the audits.

38 Reference is made to the 2011 Decision, p. 25, point 5, paragraph 1; *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 77, and *Norwegian Bankers' Association* v *ESA*, cited above, paragraph 49.

62 In its reply, IFSA submits that it cannot be inferred that the HFF is entrusted with an SGEI.[39] Rather, as is conceded in the defence, the Court only stated that it did not rule out that such a service could, in principle, legitimately qualify as an SGEI.[40] Moreover, IFSA contests ESA's argument that the HFF's loan scheme qualified as an SGEI as "an activity in the extended field of social housing". Such a distinction has not been made previously and is inconsistent with ESA's statement that the task of the HFF is to provide loans for low income families facing social difficulties.[41] In fact, SGEIs as defined in Article 59(2) EEA are designed to be an exception to the general prohibition of Article 59(1) EEA and must be interpreted narrowly.[42]

63 IFSA submits that the HFF is in a position to provide funding for nearly all the residential property market in Iceland.[43] ESA's contention to the contrary, illustrated by the market for single family homes in Reykjavik, where funding is available for only 46.7% of the market, must be contrasted with the fact that 80.2 % of all residential properties in the capital area can be financed by HFF loans. In fact, only the top end segment of the market, in the form of single family homes in Reykjavik, is partly excluded from the HFF funding.[44] Further, IFSA contests ESA's allegation that the possibility of providing "top up" loans is a welcome opportunity to the banks. This is hardly the case, since these loans run a higher risk of loss in the event of default. The fact that the commercial banks nonetheless provide "top up" loans shows that they would be willing *a fortiori* to

39 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 68.
40 Reference is made to paragraph 124 of the defence.
41 Reference is made to paragraph 195 of the defence.
42 Reference is made to Case 127/73 *Belgische Radio en Televisie* v *SABAM* [1974] ECR 313, paragraph 19.
43 Reference is made to paragraph 17 of the contested decision.
44 Reference is made to average prices in real estate transactions in 2014, provided by Þjóðskrá Íslands, Registers Iceland, shown in Figure 2 of the reply.

provide regular mortgage loans, in particular with a first priority mortgage.

64 With regard to its criticism that the scheme cap is based on the taxation value of the property, IFSA notes that in relation to dwellings in the capital market prices are on average 27% higher than the property's taxation value. Further, it rejects ESA's argument that the taxation value is not open to manipulation, as it follows the market value. If the latter is open to manipulation then so too is the former. As to the notion of the scheme beneficiary as the average resident of Iceland, IFSA contends that this term has to be interpreted narrowly. Consequently, ESA has committed a manifest error in accepting an SGEI where high income families receive subsidized assistance in acquiring real estate. There is no need for an SGEI if the market itself can cater to the demands for a particular service,[45] which is the case in Iceland, as any citizen is, in principle, eligible for a mortgage loan from commercial banks on the same terms as from the HFF.

65 IFSA submits that ESA did not provide any meaningful explanation of why it did not introduce any limitations relating to the size of property eligible for funding.

66 In its comments on Iceland's statement in intervention, IFSA submits that Iceland appears to focus on the authoritative nature of the Court's judgment in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* even though the Court did not provide any sort of binding qualification of the HFF as an SGEI.[46] As to Iceland's allegation that the HFF can only offer one kind of product, IFSA submits that initially HFF mortgage loans could be provided for

45 Reference is made to Case T-79/10 *Colt Télécommunications France* v *Commission*, judgment of 16 September 2013, published electronically, paragraph 154.

46 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 68.

20, 30 or 40 years. However, the pertinent provisions were changed in July 2015 and now provide that new mortgage loans can be granted with a maturity of anywhere between five and 35 years. That fact and the possibility to introduce non-indexed loans strengthen the HFF in its competition for new mortgage loans. In this connection, IFSA stresses that loans provided by the commercial banks are not exclusively deposit funded. In addition, banks also offer fixed-rate mortgage loans with a maturity of usually three to five but even up to 40 years.

67 IFSA submits that, contrary to Iceland's allegation, legislative change in 2012 led to an increase in properties eligible for funding by the HFF. Moreover, IFSA stresses that the examples provided in the application regarding rural mortgage lending should serve as an example to demonstrate that the commercial banks have remained active in providing mortgage loans in rural areas during the financial crisis. It cannot be inferred, however, that they were only active in the areas for which examples were provided. Further, as regards the suitability of the taxation value as a reliable reference value, IFSA observes that Iceland refers to a case in which Iceland itself argued against the use of the taxation value.[47]

Second branch of the third plea: inapplicability due to lack of market failure

68 IFSA submits that there is only room for an SGEI in the case of market failure and, thus, possible market failure has to be analysed as a preliminary question.[48] EFTA States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service,

47 Reference is made to Case E-9/12 *Iceland* v *ESA* [2013] EFTA Ct. Rep. 49, paragraph 75.

48 Reference is made to *Colt Télécommunications France* v *Commission*, cited above, paragraph 154.

consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions.[49] This was reiterated by ESA in its letter of 27 June 2008. ESA has merely assumed a market failure on the Icelandic market for housing loans and referred only to an "alleged" market failure in rural areas.[50] Hence, ESA did not carry out a proper assessment of a possible market failure at the time of the contested decision in July 2014.[51]

69 First, IFSA alleges that the commercial banks have been consistently providing mortgage loans that compete with the HFF's loans and thus no shortage of mortgage loan supply to the average resident in Iceland would occur if the HFF withdrew from the market. Data on the number of housing transactions and mortgage loans issued by the HFF and the three major banks between 2004 and 2014 reveals that the commercial banks have constantly been active in the market for new mortgage loans. The commercial banks also maintained an ever-increasing market share, never falling below 20%, in the market for existing and new mortgage loans. From 2004 to mid-2007, banks increased their market share in new mortgages sharply, as the difference in interest rates between the commercial banks and the HFF was slight. No market failure occurred during the financial crisis as the three large banks that experienced difficulty were taken over by three new banks, which were operational within a few days. The sharp decline in new mortgage loans by commercial banks between 2008 and 2009 is not related to any withdrawal from the market for mortgage lending, but due to the sharp decline in the number of housing transactions and the fact that property sales during the financial crisis were limited to low-value real property. After the

49 Reference is made to paragraph 13 of the 2012 Framework for State aid in the form of public service compensation, published as Annex II to ESA Decision No 12/12/COL, OJ 2013 L 161, p. 12.

50 Reference is made to paragraphs 7 and 18 of the contested decision.

51 Reference is made to *Colt Télécommunications France* v *Commission*, cited above, paragraph 158.

crisis, the commercial banks' overall market share in the mortgage loan lending market almost doubled from 2010 until 2014, a trend which has been fuelled by the introduction of non-indexed loans, interest rates for mortgage loans slightly lower than the HFF's, and a general market recovery. The HFF was not permitted to issue non-indexed loans until a legislative amendment in September 2011.

70 Second, IFSA submits that the mortgage loans offered by the commercial banks are offered on regular market conditions.[52] Analysing the interest rates for mortgage loans at 1 July 2014 reveals that not only do the three major banks offer a much wider range of mortgage loan products than the HFF but also some banks charge rates of interest for directly comparable products that are even lower than the HFF's.

71 Third, IFSA highlights the fact that the commercial banks provide their entire portfolio of mortgage loans products on the basis of the same criteria in every region of the country. While the HFF has a physical branch only in Reykjavik, the commercial banks' branches are present in all geographic regions of the country. The capital area accounts for slightly more than 70% of the three major commercial banks' loan portfolio, which is due to the low population density in other parts of the country and the higher costs of residential property in the capital area. This must not be mistaken as a sign of market failure. IFSA adds that, just like the HFF, the commercial banks decide each individual case, independently of the location of a property, on its merits. Moreover, in its reply, IFSA criticises the fact that ESA did not base any of its assessment on the information provided by IFSA and contends that ESA erred in its view that case

52 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 74.

law entitled it to base its assessment exclusively on information from the Icelandic Government.[53]

72 In its reply, IFSA contends that ESA largely confines itself to reiterating the views of the Icelandic Government. IFSA further affirms, contrary to suggestions in the defence, that commercial banks have indeed offered mortgage loans for over a hundred years but, due to legal restraints and the introduction of the HFF's predecessor in 1955, the commercial sector was unable provide competitive offers for mortgage loans as an alternative to the HFF. The process of liberalising the financial markets, which started in 1987, made it possible for the commercial banks in 2004 to offer first priority mortgages on similar terms to the HFF. IFSA notes further that, prior to 2004, two of the three major banks were State-owned and thus reluctant to compete with the HFF. Therefore, the data provided for the period from 2004 until today should be sufficient proof of the uninterrupted service of mortgage loans by commercial banks.

73 As to the sudden drop in market shares in new mortgage lending by the end of 2007 highlighted by ESA, IFSA notes that this does not serve as a proof of a market failure during the financial crisis, as it can easily be explained by the drop of transactions in the housing market during the financial crisis, which declined by over 60% between 2007 and 2008 and consequently had an immediate effect on the mortgage loan market. Moreover, the decline of market share between 2008 and 2011 was caused by the HFF's aggressive interest rate policy, which remained unresponsive to the increase in bond market interest rates in 2008. As the latter's interest rates were 1% lower than those of the commercial banks, customers, being price-sensitive, resorted to the HFF. IFSA further contests ESA's assertion

53 Reference is made to T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179, paragraphs 73 to 90.

that the State interventions in the financial sector have created a sheltered environment. Capital controls have not had any impact on the supply of mortgage loans by commercial banks (though their lifting may improve the access to international funding), nor has the guarantee on banking deposits, which, in fact, has never been enacted into law. IFSA stresses that mortgage loans provided by commercial banks are exclusively for the purpose of financing or refinancing mortgages. As regards the HFF's possibility to grant non-indexed loans, IFSA concedes that the implementing regulation has not yet been amended. However, such an amendment does not require consultation or parliamentary approval and the HFF has already expressed interest in offering such products.

74 In relation to the letter from the Icelandic Government on which ESA relies, IFSA observes that this letter simply notes that a certain fraction of housing was paid with capital in 2012 and 2013. According to IFSA, this high capital ratio can easily be explained by the capital controls, leading to high cash deposits and subsequently to a higher fraction of a real estate purchase price being paid in cash.

Third branch of the third plea: disproportionality of the aid scheme

75 IFSA submits that the State aid granted to the HFF to ensure an average resident of Iceland the stability and assistance to acquire a property on "manageable terms" is not proportionate even if the HFF general loan scheme constitutes an SGEI. This test of proportionality entails an assessment of whether the public intervention does not exceed what is necessary to achieve the defined goals.[54]

76 First, IFSA contends that the HFF general loan scheme is not the least intrusive way to provide for these manageable terms and

54 Reference is made to *Bankers and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 76.

exceeds what is necessary to achieve its goal. According to decisional practice of the Commission, an SGEI must not compete with the commercial market if the latter is able to provide "normal" financing at market terms.[55] While the commercial banks have continuously been able to compete with the HFF, they are still placed at a disadvantage, as HFF's funding costs remain artificially reduced. The HFF's refinancing entails an implicit government guarantee which allows it to borrow at conditions close to Icelandic government debt, it is exempted from income tax and the special tax levied on financial institutions, and its capital adequacy ratio is specified at a lower level than that for commercial banks. These benefits result in a reduction of the HFF's funding costs of approximately 1.339 to 1.421%. Moreover, the HFF general loan scheme is not needed as Icelandic tax law provides a tax rebate for mortgage interest payments to ensure that all sections of the population can manage their interest rate payment. This system is means tested by income, family type, and net wealth and open to mortgages loans of both the HFF and the commercial banks. Therefore, it would in itself be sufficient to cater for the demands of disadvantaged citizens were the commercial banks unable to do so.

77 Second, IFSA alleges that the State aid in question led to the HFF's aggressive interest rate policy. The HFF lowered the spread on its funding, resulting in periods of operating losses. While the HFF has maintained a stable interest rate irrespective of market developments since 2012, the threat remains that once the HFF is allowed to offer non-indexed loans it would again be in the position to undercut the offers by commercial banks. IFSA asserts that in several instances in 2004, the HFF responded to the lowering of interests rates by the commercial banks by successively undercutting

55 Reference is made to Commission Decision of 16 June 2004 N 179/2004 – *Finnish municipal guarantees*, OJ 2005 C 131, p. 10, paragraph 21.

their offers, in an attempt to push the commercial banks out of the market.

78 Third, IFSA submits that the HFF has received capital injections of more than ISK 50 billion which amounted to additional compensation not necessary to finance the HFF's SGEI objective. As regards the first capital injection of ISK 33 billion in 2011, IFSA notes that ESA had doubted whether the HFF had a viable business plan and had called for a clear definition of the SGEI in order to avoid overcompensation.[56] However, no restructuring plan has ever been submitted by Iceland and several further capital injections have been made. Further, the HFF has struggled with a high ratio of loans in default leaving it with a weak financial structure. Experts have concluded that its current model is unsustainable and the Icelandic Government has estimated that further injections of ISK 9 billion may be required through 2015.

79 In response to ESA's assertion that it assessed the three measures which are said to benefit the HFF, IFSA observes that the section of the 2011 Decision to which ESA refers is headed "Description of the state measures under investigation" and does not contain any form of assessment. Further, IFSA continues, ESA fails to provide any evidence for the alleged high volatility of the Icelandic housing market, used to justify the HFF, and the claim that, notwithstanding the tax rebate scheme for mortgage interest introduced in 1989, the rationale for a body such as the HFF continues to exist.

80 IFSA contends that ESA's description of how the interest rates of the HFF are set is partially incorrect. Although they are determined by the Minister of Social Affairs on the basis of a recommendation by the HFF itself, this is, in reality, a rubber-stamp decision. ESA fails further to provide evidence for its hypothetical scenarios under

56 Reference is made to ESA Decision No 69/11/COL, p. 13, and the 2011 Decision, p. 5.

which the HFF would lower its interest rate and errs in stating that the rate of interest offered on HFF loans during the financial crisis was lower than that of the commercial banks because of the difficulties the latter faced in accessing the capital markets.

81 IFSA contends that losses which exceed the amount necessary to offset any losses which may be incurred in the operation of the SGEI fall outside the scope of Article 59(2) EEA.[57]

82 IFSA notes further that the International Monetary Fund has clearly stated the unviability of the HFF model and required a new housing strategy. ESA cannot simply resort to the statement that all losses of the HFF, no matter to what extent and for what reason occurred, are automatically covered by the HFF's alleged SGEI objective.

Fourth branch of the third plea: disproportionate effects on trade by the aid scheme

83 IFSA submits that the SGEI exception requires the right balance to be struck between the interest of the party invoking the exception and the overall effect of the SGEI on the trade between EEA Contracting Parties. These effects depend, to a considerable extent, on the definition of the relevant market.[58] However, the contested decision does not contain any assessment of the relevant market or the scheme's effects on trade. However, the HFF's dominant presence on the market for mortgage loans means that potential market players from other EEA States refrain from penetrating the Icelandic market and that the domestic commercial banks are restricted from diversifying their lending portfolios as they become less attractive to foreign investors.

57 Reference is made to Case C-340/99 *TNT Traco* v *Poste Italiane* [2001] ECR I-4109, paragraph 57, and Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14.

58 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraphs 70 and 81.

ESA

ADMISSIBILITY

84 ESA submits that IFSA has not established that it has sufficient standing to challenge the contested decision, which is addressed to Iceland, is legally binding, and constitutes a final decision. IFSA must establish that its market position or that of its members (or a group of its members) is substantially affected by the alleged aid scheme in question.

85 The second paragraph of Article 36 SCA contains the same provisions on standing as those set out in the fourth paragraph of Article 263 TFEU. In ESA's view, to the extent that the provisions governing *locus standi* are substantively the same, the principle of homogeneity applies. In State aid law, the *Plaumann* test[59] has been specifically applied with regard to *locus standi* and applicants who challenge the merits of a decision appraising aid are considered to be individually concerned by that decision if their market position is substantially affected by the aid to which the contested decision relates.[60]

86 ESA maintains that a professional association which is responsible for protecting the collective interest of its members is entitled to bring an action for the annulment of a final decision on State aid only in two sets of circumstances. First, where the undertakings which it represents or some of those undertakings themselves are sufficiently affected (and are themselves in a position to bring an

59 Reference is made to Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, p. 107, and Case E1/13 *Míla ehf.* v *EFTA Surveillance Authority* [2014] EFTA Ct. Rep. 4, paragraph 40 and case law cited.

60 Reference is made to Case T-206/10 *Vesteda Groep BV* v *Commission* [2011] ECR I-3573, paragraph 35, which concerned an action for annulment of a Commission decision recording the acceptance by the State of the proposed appropriate measures, and *Konkurrenten.no* v *ESA*, cited above, paragraph 96 and case-law cited.

admissible action). Second, if the association can prove interest of its own, in particular because its position as a negotiator has been affected by the measure, the annulment of which is sought.[61]

87 In relation to the first limb of the test, ESA contends that IFSA's reference[62] to the fact that it was found to have *locus standi* in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* and that the judgment and the contested decision concern the same aid scheme are insufficient to meet the test. In Case E-9/04, IFSA's predecessor sought to safeguard its procedural rights.[63] However, in the current proceedings, IFSA is not making any procedural plea but calls into question the merits of the decision appraising the aid scheme. For this purpose, IFSA must demonstrate that it has a particular status within the meaning of the *Plaumann* test.

88 According to ESA, in the context of actions brought by associations, an applicant can be individually concerned as a result of it having played a significant role in the procedure leading to the adoption of the challenged decision, if it occupied a clearly circumscribed position as negotiator which was intimately linked to the actual subject matter of the decision, thus placing it in a factual situation which distinguishes it from all other persons.[64] It thus has to prove that it is directly and individually concerned.[65] IFSA cannot be

61 Reference is made to Case C-409/96 *Sveriges Betodlares Centralförening and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 45.

62 Reference is made to paragraph 35 of the application.

63 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 52, and Case E-1/12 *Den norske forleggerforening* v *ESA* [2012] EFTA Ct. Rep. 1040, paragraph 66.

64 Reference is made to Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, paragraphs 85 to 95 and case-law cited.

65 Reference is made to Case C-78/03 P *Aktionsgemeinschaft Recht und Eigentum* v *Commission* [2005] ECR I-10737, paragraphs 56 to 57, and Case T-117/04 *Werkgroep Commerciële Jachtshaven Zuidelijke Randmeren and Others* v *Commission* [2006] ECR II-3861, paragraph 69.

considered to have played any role which could have intimately linked it to the subject matter of the decision considering that it had no procedural right to submit comments in the context of a procedure pursuant to Article 19(1) of Part II of Protocol 3 SCA. It only did so at ESA's invitation and its role did not go further than providing comments on behalf of its members.

89 In relation to the second limb of the test, ESA contends that IFSA's statements[66] are, as general statements, insufficient to demonstrate the substantial adverse effect the aid scheme allegedly has on the market position of the commercial banks. IFSA must demonstrate the extent of the detriment the aid has on its market position and must establish a link between the measure which was the subject of the contested decision and the alleged substantial effect on its position on the market concerned.[67] IFSA has not demonstrated the extent of the impact of the aid scheme on the economic situation of its members. It has also failed to demonstrate that the market position of any of its members was affected more than that of any competitor in the market and its arguments do not distinguish the situation of one or more of its members.

90 Moreover, ESA continues, the allegation concerning the dominance of the HFF should be rejected as completely unfounded, as IFSA neither defined the relevant market nor provided relevant evidence in that regard. Nor did IFSA show, on the basis of such a market definition, how the HFF is allegedly dominant. ESA submits that that the figures provided by IFSA cannot stand as evidence for the proposition that the HFF has a dominant position on the Icelandic housing loan market. This information only corresponds to the potential loads the HFF could offer bearing in mind that the

66 Reference is made to paragraphs 39 to 43 of the application.
67 Reference is made to *Konkurrenten.no* v *ESA*, cited above, paragraphs 99 to 100 and case-law cited.

commercial banks counld also offer a loan for the purchase of those residential properties. IFSA has also failed to explain how this alleged market dominance is linked to the aid and how it substantially affects the commercial banks' market position. Rather, IFSA's assertion that the commercial banks have regained market share since 2010 contradicts the existence of substantial adverse effects of the aid scheme.[68]

91 For the sake of completeness, ESA maintains that IFSA's members cannot be individually concerned on the basis of the fact that they belong to a group of persons who were identified or identifiable by reason of criteria specific to the members of the group. The contested decision cannot be considered as a turning point for the commercial banks, as it cannot be argued that their situation has been altered further to the adoption of the contested decision.[69] Moreover, the number and identity of the commercial banks on the housing loan market were not precisely determined at any point in time, either through a system of approval by decree or by the fact that those banks were granted any sort of exclusive rights before the aid scheme was adopted. Rather, housing loans were also offered by other financial undertakings such as saving banks, pension funds and mortgage companies and the membership of IFSA changed in the aftermath of the financial crisis due to the winding up of some of its members.[70]

92 In its rejoinder, ESA stresses that, if an action is to be admissible, in order to ensure legal certainty and the sound administration of justice the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated

68 Reference is made to paragraph 139 of the application.
69 Reference is made to *Stichting Woonpunt et al.* v *Commission*, cited above, paragraph 62.
70 Reference is made to Case C-125/06 *Commission* v *Infront WM* [2008] ECR I-1451, paragraphs 73 to 75.

briefly, provided the statement is coherent and comprehensible.[71] It therefore doubts whether the arguments and information provided at paragraphs 8, 9, 15, 16, 17, 20 and 21 of the reply should be taken into account to the extent IFSA has not referred to those elements in the application.

93 In relation to the failure to establish *locus standi* of the applicant as an association, ESA emphasises that the fact that the applicant represents all the commercial and saving banks present on the mortgage market in Iceland does not create a "special or exceptional situation" which could justify granting IFSA *locus standi*.[72] The role of IFSA cannot be described as that of a negotiator which was intimately linked to the actual subject matter.[73] ESA asserts that it merely requested IFSA's comments on the appropriate measures proposed, as the actual negotiations were bilateral between Iceland and ESA.[74] ESA questions further whether IFSA could at all be intimately linked to negotiations in the housing loan sector considering that it represents all registered financial undertakings in Iceland some of which are active in different sectors than the HFF. Moreover, it would be incorrect to argue that IFSA's involvement in the national legislative process relating to the reform of the HFF made it particularly intimately linked to the actual subject matter of the contested decision. Further, the procedure for review of existing

71 Reference is made to Case E-15/10 *Posten Norge AS* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 111, and Case T-87/05 *Energias de Portugal* v *Commission* [2005] ECR II-3745, paragraph 155 and case-law cited.

72 Reference is made to *3F* v *Commission*, cited above, paragraphs 87 and 92 and the case-law cited.

73 Reference is made to *Sveriges Betodlares Centralförening and Others* v *Commission*, cited above, paragraphs 45 and 48. In addition, reference is made to Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, paragraph 23, and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 29.

74 Reference is made to *Sveriges Betodlares Centralförening and Others* v *Commission*, cited above, paragraphs 45 and 48, *Van der Kooy* v *Commission*, cited above, paragraph 23, and *CIRFS and Others* v *Commission*, cited above, paragraph 29.

aid is not challengeable in the same way as it would be if ESA was assessing a new aid scheme.[75]

94 Second, ESA submits that IFSA's argument based on *ASPEC and Others* v *Commission* is incorrect.[76] Banks are not competitors of the HFF, whose role is to promote security and equal rights as regard housing in Iceland by providing loans on manageable terms to the general public. Thus, the aid cannot be considered to benefit one competitor over others active on the same market. Further, the applicant failed to provide evidence that the market already suffered from overcapacity and that the HFF's offer of mortgage loans represents an additional increase of capacity on the market which is capable of directly and seriously affecting the competitive situation of the commercial banks.

95 In relation to the alleged standing of the applicant as a representative of its member banks which themselves have *locus standi*, ESA notes that the graph relied on as evidence of the HFF's alleged market dominance shows outstanding mortgage credits, which cannot establish a meaningful picture of the market as it currently stands. However, taking account of new mortgage loans provided by commercial and saving banks, the HFF, and pension funds, it cannot be concluded that HFF, should it be considered a competitor to commercial banks, has a market share of more than 50% on the mortgage loan market.

96 ESA further contests IFSA's reasoning that commercial banks lost opportunities to make profits and increase their activities in the mortgage loan market due to the HFF's alleged undercutting of interest rates, its operational structure and its regulatory

75 Reference is made to Case E-6/09 *Magasin- og Ukepresseforeningen* v *ESA* [2009-2010] EFTA Ct. Rep. 144, paragraphs 40 to 43.

76 Reference is made to paragraphs 8 and 9 of the reply and to *ASPEC and Others* v *Commission*, cited above.

competitive advantages. The lending rates of the HFF are calculated on the basis of its funding costs, with an added margin set by the Ministry of Social Affairs, and are thus not aligned to those of the commercial banks. The other measures are not to be considered advantages, but, instead, measures aimed at compensating the HFF for the provision of an SGEI. The commercial banks' loss of opportunities may also be due to the financial crisis.

97 In its comments on Iceland's statement in intervention, ESA concurs with Iceland that the application is inadmissible and stresses that the applicant failed to provide pertinent evidence to demonstrate that the market position of its members has been substantially affected and seriously jeopardised by the aid granted to the HFF.

SUBSTANCE

First plea: support for the HFF must be qualified as new aid

98 ESA submits that the first plea is inadmissible. This plea relates to the 2008 Decision, which closed the formal investigation procedure based on Article 1(2) of Part I of Protocol 3 SCA on the basis that the aid scheme did not constitute new aid. Neither the contested decision nor the 2011 Decision deal with the issue of whether the aid should be considered as new aid. They are the procedural consequences of the 2008 Decision.

99 The finding in the 2008 Decision that the aid scheme did not constitute new aid was published in the Official Journal in 2010. The 2008 Decision has, therefore, become definitive and the qualification of the aid scheme as existing aid cannot be challenged in the current proceedings as the applicant did not challenge it within the period provided for by Article 36(3) SCA.

Second plea: Insufficient reasoning

100 ESA submits that the statement of reasons required by Article 16 SCA must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question. However, 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 is adequate 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. Summary reasons may be given when the measure at issue is adopted in a context with which the persons concerned are familiar.[77]

101 The purpose of the contested decision was to record the acceptance by Iceland of the appropriate measures proposed in the 2011 Decision and to close the case. The contested decision should therefore be reviewed in association with the 2011 Decision and its reasoning must be read together with the reasoning provided by ESA in the preparatory measure adopted in the context of the existing aid procedure (the 2011 Decision) and the judgment in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*. ESA adds that its competence with regard to the assessment of the existence of an SGEI is limited to verifying whether the EFTA State has made a manifest error in defining the service as an SGEI.[78]

102 In response to IFSA's submission that ESA cannot link the 2011 Decision to the contested decision, in particular due to the fact that ESA adopted a different position in the two decisions, ESA maintains in its rejoinder that this argument is flawed having regard to the

77 Reference is made to Case E-21/13 *FIFA* v *ESA* [2014] EFTA Ct. Rep. 854, paragraphs 89 and 91, and *Liechtenstein and Others* v *ESA*, cited above, paragraphs 171 and 172.

78 Reference is made to *The Bankers' and Securities Dealers Association of Iceland* v *ESA*, cited above, paragraph 65.

existing aid procedure. In its 2011 Decision, ESA raised doubts as to whether general loans offered by the HFF could qualify as an SGEI and therefore issued a recommendation proposing appropriate measures pursuant to Articles 17 and 18 of Part II of Protocol 3 SCA. There, ESA set out any doubts that it held, at that stage, as to the compatibility of the scheme under the EEA State aid rules. However, in the contested decision, ESA was not required to reassess the compatibility of the aid since Iceland had accepted the measures, which themselves were aimed at remedying such concerns.

103 ESA stresses that the argument that it did not take account of IFSA's submissions following the 2011 Decision should be rejected, as the contested decision was not preceded by a formal investigation. The delay between the two decisions can be explained by the complexity of the case. ESA and Iceland discussed and negotiated the proposed appropriate measures. Furthermore, the new Icelandic Government considered revisiting housing policy in 2012.

104 ESA adds that, as its competence is limited to verifying whether the Icelandic authorities have made any manifest error in defining the scope of the HFF's mission as an SGEI, its duty to provide reasoning is thus limited to the test of manifest error.

First branch of the second plea: Insufficient reasoning on the classification as an SGEI

105 ESA rejects the assertion that it assumed there was a market failure in rural areas and that it should have analysed whether the conditions for the existence of an SGEI are present. ESA was bound by the Court's analysis and the delineation of the SGEI in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*. ESA's task was to ensure that the concerns raised by the Court with regard to the nature of the SGEI were alleviated.

106 With regard to IFSA's assertion that ESA had allegedly accepted the amended maximum value cap as part of the cost limitation without

explaining why this has the effect of excluding the higher price segment of the housing market, ESA submits that this statement is merely a deduction made from the figures provided in the contested decision and therefore did not require any detailed reasoning. ESA has also explained how the annual review of such a cap ensures that the HFF's activities are in line with the SGEI objective with which it has been entrusted.[79]

107 As regards the statement recording the acceptance of the appropriate measures by Iceland, ESA maintains that this does not require any reasoning since it is only a statement of facts. ESA submits that the aim of the procedure at issue in this case was to ensure that the concerns raised by the Court in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* relating to the limitation of eligible dwellings were addressed. ESA therefore assessed the cost limitation adopted by Iceland and whether it would lead to better targeting of the HFF's lending activity.[80] In relation to rental housing, it had proposed a limit on HFF funding in the field of rental housing and has addressed the issue in the contested decision.[81] However, even though there are inherent differences between residential housing and rental housing, the logic behind the HFF funding in both fields is identical, namely the provision of housing on manageable terms.

108 In its rejoinder, ESA submits that its task with regard to the Court's judgment in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* was not to challenge it by re-assessing the existence itself of the SGEI but rather to ensure that the concerns raised by the Court with regard to the nature of the SGEI were alleviated. However, the Court had already made findings on the

79 Reference is made to paragraphs 17 and 19 of the contested decision.
80 Reference is made to paragraphs 7 and 17 of the contested decision.
81 Reference is made to paragraphs 8 and 20 of the contested decision.

nature of the activities of the HFF which provided a sufficiently clear and precise basis for ESA's assessment.

Second branch of the second plea: Insufficient reasoning on the proportionality of the aid scheme

109 ESA argues that its doubts concerning proportionality in the 2011 Decision, principally referred to the importance of operating separate accounts for the services of the HFF that may be classified as an SGEI and for all other commercial lending activities, as the compensation must be limited to the coverage of the costs incurred in discharging the SGEI. Since Iceland notified ESA that the HFF will not engage in any economic activities other than the provision of SGEI, there was no need for a further assessment.[82]

110 As for the issue of ensuring efficiency, ESA submits that it listed the various commitments undertaken by Iceland which all aim at ensuring that the HFF operates efficiently.[83] ESA provided sufficient reasoning with regard to the proportionality of those measures in its 2011 Decision proposing them.[84] In response to the criticism that it had failed to provide reasoning on the notions of "manageable terms" and "average citizen" in the context of the HFF's task, ESA maintains that the notion of manageable terms should be assessed in relation to the capacity for the general public to afford such products, as the HFF's housing loans are not meant to be competitive. Finally, ESA emphasises that it did not breach its duty to provide reasoning in referring only to those arguments having decisive importance in the context of the decision.

82 Reference is made to paragraphs 12 and 23 of the contested decision.
83 Reference is made to paragraphs 12 and 22 of the contested decision.
84 Reference is made to section 4.4 starting on page 23 of the 2011 Decision.

Third plea: Wrongful interpretation of the notion of an SGEI pursuant to Article 59(2) EEA

First branch of the third plea: no service of general economic interest

111 ESA emphasises that the Court did not rule out the possibility that the services provided by the HFF could, in principle, qualify as an SGEI under Article 59(2) EEA.[85] It observes that the SGEI entrusted to the HFF is not that of social housing, as described in Recital 11 of the SGEI Decision ("social housing *stricto sensu*"), but relates to the grant of financing in order to have access to the housing market and might therefore be characterised as an activity in the extended field of social housing. The purpose of the SGEI Decision is not to limit in the abstract the scope of possible SGEIs and, consequently, the discretion of the EEA States to define their SGEIs, but aims to create safe harbours by laying down conditions under which SGEIs shall be exempt from the prior notification. IFSA's reference to the Commission's decision-making practice is not relevant for the assessment of the present case, since, first, they reflect cases of social housing *stricto sensu*, second, ESA is bound neither by its own previous decision-making practice nor by that of the Commission, and, third, the decisions mentioned concern SGEIs in different Member States which made a different use of their wide margin of discretion to define SGEIs. Moreover, the Court did not state that the SGEI provided by the HFF should be limited necessarily to what goes beyond the normal economic interest of operators in the financial sector, but rather, that it does go beyond this interest. The Court recognised the special characteristics of the HFF's general loan system, that is how it provides housing loans at all times, on manageable terms, and throughout the territory of Iceland, which

85 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 68.

distinguish it from the economic activities of the commercial banks.[86] Thus, ESA cannot be reproached for a manifest error of assessment as regards the definition of the SGEI. The proposed appropriate measures aimed at maintaining the SGEI, as recognised in principle by the Court, while making it compatible with the functioning of the EEA. ESA does not deny that it expressed certain doubts with regard to the qualification of the HFF general loans scheme as an SGEI during the administrative procedure. However, those doubts were alleviated by Iceland's acceptance of the measures proposed.

112 ESA submits that IFSA's claim that the maximum loan amount allowed and the maximum value cap are excessive should be dismissed as unfounded. First, merely 46.7% of single-family residential properties are eligible for loans from the HFF. Second, properties in the rural areas of Iceland, up to 98.8% of which can be financed through the HFF, are in principle not as valuable as properties of an equivalent size in the capital area and, thus, do not constitute properties in the higher market segment as such. In addition, the commercial banks have not always been present in the mortgage market in the rural areas. Third, the difference between the maximum amount of the loan and the maximum value cap is of importance as this funding gap still has to be financed through other means, frequently via a loan from a commercial bank.

113 ESA acknowledges that the taxation value of a property does not necessarily reflect its current market value. However, given the fluctuations of the Icelandic market it was important to ensure that the reference element is a reliable and useful official indicator, which is not open to manipulation and is widely known and recognised.

86 Ibid.

114 As for inconsistencies in Iceland's statements concerning the notion of an "average resident of Iceland", ESA stresses that Iceland has a wide margin of discretion in defining an SGEI addressing the particularities of the Icelandic housing market and that the SGEI in question consists in the grant of financing in order to foster private home ownership. IFSA has misunderstood the basic rationale behind the SGEI offered by the HFF, which is to ensure stability and assistance to any resident buying a residential property. Hence, the mechanism is based on a cap on the value of the eligible residential property and a minimum loan-to-value ratio, thus leading to a maximum loan amount allowed, and on other limitations, such as the "one person, one property" rule. Depending on the market conditions at the time, the commercial banks might be able to make a better or a different offer. IFSA's claims regarding the exceptions to the "one person, one property" rule and specific qualifications of eligible groups should be rejected. ESA requested Iceland to clarify those exemptions and concluded that there are very few and that they apply in exceptional circumstances only. The exemption referring to children studying away from home is due to the cultural fact that rental housing is rather uncommon or prohibitively expensive in Reykjavik and was thus adopted to cater for the lack of student accommodation available for rent. In relation to the criticism concerning the absence of specific eligibility criteria, ESA stresses that the HFF loan scheme is not based on a means test, but on a cost limitation test. An average resident is one who can afford an average residence, taking into account the link between the size of the dwelling and its value.

115 In response to the criticism that proper safeguards for ensuring the implementation of changes to the aid scheme are lacking, ESA maintains that it was not required to describe in detail in the contested decision how the national review mechanisms should operate or to monitor their implementation. In any event, Iceland is bound to implement the accepted appropriate measures. Compliance

will be monitored as part of ESA's ongoing duty to review existing aid schemes.

116 In its rejoinder, in response to criticism concerning the scope of the SGEI, ESA submits that the maximum price cap and the maximum loan amount have to be read together as they establish the necessary limitations on that scope. As regards IFSA's submission that the commercial banks provide mortgage loans for housing in rural areas, ESA considers this claim unsubstantiated. Further, it stresses the fact that eligibility for a loan from the HFF does not exclude the option to request funding from commercial banks which, in contrast to HFF, can also make tailored offers. The issue is whether the banks are and will be able to provide, on a consistent basis, mortgage loans for housing on manageable terms. As to the higher risk involved in the "top up" loans, ESA adds that the higher risks borne by the banks come at higher interest rates for the borrower and, thus, a higher financial reward for the commercial banks.

117 In response to IFSA's submission concerning the possibility that the taxation value of property may be manipulated, ESA maintains that the taxation value demonstrates the aggregate market price development as it is based on an aggregate of the value of all real estate contracts in a particular area. Therefore, it is more difficult to manipulate than individual real estate transactions. As for the notion of the average resident of Iceland, ESA notes that the rationale of the SGEI is that the average resident should be able to acquire a loan in order to finance an average residential property. For this purpose, no means test is necessary. The limitation by a cap on the value of the eligible property and a minimum loan-to-value ratio of 60% are sufficient to delineate the scope of the HFF's activities.

118 In response to IFSA's proposition that according to established case-law there is no need for an SGEI if the market itself can cater to

the demands for a certain service,[87] ESA contends that this is the key issue on which the two parties fundamentally differ. According to ESA, the commercial banks have not always been in a position to cater to the demand for mortgage loans, which justifies the existence of the HFF as an SGEI provider. As for the exception to the "one person, one property" rule, ESA contends that in August 2014 there were around 800 students on a waiting list for student housing in the capital and that rental prices in the capital area had increased by 41% from beginning of 2011 to February 2015. In its view, this confirms the shortage of supply and the high rental prices faced by students, notwithstanding the existence of student loans.

Second branch of the third plea: inapplicability due to lack of market failure

119 ESA submits that in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA* the Court acknowledged that the objective of the HFF goes beyond the normal economic interest of operators in the financial sector and that, thus, there was a gap in the market for the supply of such a service. The Icelandic authorities confirmed on several occasions, for example in a letter of 22 May 2014, the existence of a market failure in the mortgage market. ESA therefore based its conclusions on information it received from the Icelandic authorities covering the period from before 2008 until the first half of 2014. ESA avers that in its 2011 Decision it assessed the Icelandic market for mortgage lending and that it confirmed that assessment in the contested decision. Moreover, it notes that those banks which entered the housing finance market only in 2004 almost disappeared from it for the three to four years following the financial crisis and have, thus, been offering housing finance only for approximately eight years in total (2004 to 2008 and 2012 to the present date). This is considered too short in order to evidence

87 Reference is made to paragraph 69 of the reply.

stability, continuity and consistency in that market. In addition, mortgage loans for housing in rural areas have been offered by commercial banks mainly since their re-entry on the market 2012.

120 ESA submits that three major banks became insolvent in the aftermath of the financial crisis and were submitted to public control and liquidation, which resulted in a fundamental market failure as regards the provision of housing loans, notwithstanding the establishment of three new banks which took over the old banks' mortgage portfolios. Commercial banks sharply reduced their offering of mortgage loans from late 2007 and hardly provided such loans until approximately late 2011. The recovery and the expansion of the market share held by the commercial banks is attributed to non-indexed loans which the HFF has not been in a position to issue. ESA stresses further that the smooth transition from the insolvent to the new banks during the crisis only took place thanks to the interventions of the Icelandic State. It reports that the Icelandic authorities queried the reason for the sharp upturn in late 2011 and early 2012 in the number of new mortgages. Such upturn could also be attributed to mortgage loans used for consumer spending, investments, motor vehicles etc.[88] The Icelandic authorities also pointed out that the comparison of interest rates[89] on which IFSA relies is incomplete as it lacks the rate of funding. The Icelandic authorities also provided information from the Central Bank of Iceland on the commercial banks' lending activities from January 2005 until May 2012 which illustrates that these activities have been unstable. ESA acknowledges that the amended Housing Act 1998 includes the possibility for the HFF also to issue non-indexed bonds. However, the Regulation on HFF Mortgages and HFF Bonds, No 522/2004, has not yet been amended to implement the change.

88 Reference is made to page 8 of Annex D.1 to the defence.
89 Reference is made to data also submitted as Figure 4 of the application.

121 ESA submits that, contrary to the argument advanced by IFSA, data showing the credit terms for mortgages in 2014, as a snapshot of current market conditions, cannot be used demonstrate that the banks were able to continuously and consistently supply mortgage loans on manageable terms over the last decade. Moreover, it notes that, in the assessment of the Icelandic authorities, although market failure has subdued, there are still market distortions which need to be addressed with care.

122 Finally, ESA contends that the HFF's lending activities were fairly stable in terms of the percentage of purchase agreements on the Icelandic housing market until 2011 and that the market presence of the banks has been limited on the mortgage market in the rural areas. According to the information provided by the Icelandic authorities, neither the market presence of commercial banks nor the distribution of their branches throughout the territory necessarily reflect the scope of their lending activities for the purchase of residential property. ESA avers that it based its assessment both on the information received from IFSA and the Icelandic authorities. However, it maintains that its decision cannot be annulled for manifest error of assessment when its findings are based on information received from the Icelandic authorities.[90]

123 In its rejoinder, ESA submits that IFSA seeks to understate the extent and significance of the market failure in the Icelandic financial market.[91] It observes that the commercial banks have failed to maintain their market share in the aftermath of the crisis. In relation to the allegation that the HFF pursues an aggressive interest rate policy, ESA stresses that the HFF cannot adopt a policy of that kind. It contends that the loss of customers experienced by the commercial

90 Reference is made to *Freistaat Thüringen* v *Commission*, cited above, paragraph 88.
91 Reference is made to Case E-16/11 *ESA* v *Iceland* [2013] EFTA Ct. Rep. 4, paragraphs 153 and 161.

banks can be explained by the market failure in this sector of activity when they failed to provide mortgage loans on reasonable terms. ESA further stresses that the unresponsiveness of the HFF to the increases in bond market interest rates in 2008 may be explained by the different funding mechanisms of the commercial banks and the HFF. Moreover, if the HFF did indeed offer lower interest rates during the crisis, in any event that would have been in line with its objective. Further, contrary to the interpretation that IFSA seeks to place on the effects of capital controls and the State guarantee on deposits, ESA stresses that the positive impact of the latter should not be underestimated.

124 In response to IFSA's claim that ESA should have based its decision on the facts as they stood at the time of the contested decision and, thus, on the interest rates at that date, ESA contends that a snapshot of interest rates at the time of the decision does not suffice. Turning to the claim that ESA ignored IFSA's arguments concerning the commercial banks' activities in rural areas, ESA stresses that the Icelandic authorities and IFSA provided conflicting information in this regard.

Third branch of the third plea: disproportionality of the aid scheme

125 ESA contends that the commercial banks have not provided housing loans on a consistent basis throughout the last decade, as evidenced in its argument on the other branches of the third plea, and that the HFF does not aim to compete with the commercial banks. The objective of the HFF is to act on the market as a safety net, providing loans consistently on manageable terms and throughout the territory of Iceland. In response to IFSA's claim that the funding cost of the HFF remains artificially reduced, ESA argues that the exemption from income tax for all State institutions and State undertakings is a corollary of the State's unlimited liability. The HFF was not created to generate any form of profit and this explains why it is not required

to pay the same taxes as financial institutions. These tax measures, the lower capital adequacy ratio applied to the HFF and the unlimited State guarantee are all part of the public service compensation granted by the Icelandic State to the HFF as an SGEI provider. ESA asserts that the possibility remains that the commercial banks may again not be able to offer competitive housing loans, since the Icelandic housing market is very volatile and the current market conditions facing commercial banks are artificial due to the blanket State backing and capital restrictions.

126 As regards the alleged aggressive interest rate policy operated by the HFF, ESA stresses that the HFF lending rates are fixed by regulation with reference to the interest on securities issued by the HFF plus a specific margin. The HFF is therefore not in a position to adjust its interest rate with the aim of pursuing an aggressive interest rate policy or with a view to increasing its market share. The fact that the interest rate offered by the HFF was lower than that offered by the commercial banks during the financial crisis can be explained by the limited access of the latter to the capital markets and, consequently, their inability to offer housing loans on manageable terms. IFSA's acknowledgment that the HFF has maintained a stable interest rate irrespective of market developments throughout the last three years is confirmation that the HFF does not seek to compete with commercial banks.

127 In relation to the capital injections received by the HFF and criticised by IFSA, ESA stresses that, as long as the service provided by the HFF amounts to an SGEI, the actual cost incurred as a result of such activity can lawfully be covered by State resources. The model of operation of the HFF does not have to mirror the business model of financial institutions and therefore the experts' conclusions that the HFF's current operational model is unsustainable are irrelevant. ESA adds that the reason why the HFF is no longer required to provide any restructuring aid plan is that the investigations were closed.

Consequently, ESA maintains that the capital injections were proportionate as they covered, without overcompensating, the costs linked to the implementation of the SGEI.

128 In its rejoinder, ESA avers that in its 2011 Decision it described the measures from which the HFF benefits and also took account of them in its assessment.[92] Further, ESA stresses that the HFF's role in operating an SGEI and the tax rebate for mortgage loan interest fulfil different purposes. The former ensures that mortgages are made available, while the latter ensures that they are made more affordable. Moreover, it contends that IFSA has failed to substantiate its assertion that the minister basically rubber-stamps the HFF decision to change the interest rate. Nor has it provided any evidence to support its claim that the commercial banks had sufficient funds to finance their loan activities during the financial crisis. Moreover, ESA continues, it is evident that the concept of "manageable terms" must be construed as an evolving concept, since market conditions and considerations of what is affordable change over time.

129 On the question of the capital injections received by the HFF, ESA argues that IFSA fails to substantiate the amount of the capital injections used to compensate for the HFF's alleged aggressive interest rate policy. According to the Report from the Working Group on the Financial Status and Outlook for the HFF, the losses incurred by the HFF are mainly (58%) due to the prepayment risk, while operational losses only amount to a mere 10%. The operational losses are thus much lower than the alleged ISK 50 billion said to have been required to cover the losses incurred by the HFF as a result of its interest rate policy. Moreover, operational losses can also have other underlying causes, such as unexpected operational costs in

92 Reference is made to Section 1.1 assessing the presence of State resources, Section 1.2 assessing the selectivity of the measures, and the operative part of the 2011 Decision.

handling the number of defaults, the timing mismatch between the increase in costs, and new ministerial decisions on the margin.

Fourth branch of the third plea: disproportionate effects on trade by the aid scheme

130 ESA submits that the plea is vague. It is unclear, for example, whether IFSA contends that, due to alleged disproportionate effects on trade, the HFF scheme is incompatible with Article 59(2) EEA. However, the question of compatibility was dealt with in the 2011 Decision and ESA was under no obligation to re-assess it in the contested decision. In any event, ESA continues, following the acceptance and implementation of the proposed appropriate measures, the effect on trade will not be disproportionate. Moreover, given the legal and economic constraints on the HFF general loan scheme, the HFF does not seek to compete with either the Icelandic commercial banks or those from other EEA States.

THE GOVERNMENT OF ICELAND

ADMISSIBILITY

131 The Government of Iceland submits that nothing in IFSA's submissions indicates that the applicant's situation falls within any of the three required by case law for instituting proceedings.[93] The Government of Iceland notes that it is for IFSA to establish both the extent to which the aid has been detrimental to its market position and a link between the measure, which is the subject of the contested decision, and the alleged substantial effect on its position on the relevant market.[94] IFSA needs to demonstrate a loss of

93 Reference is made to Case T-189/08 *Forum 187* v *Commission* [2010] ECR II-1039, paragraphs 58 to 89 and case law cited.
94 Reference is made to *Spain* v *Commission*, cited above, paragraph 41.

opportunity to make a profit or less favourable development than would have been the case without such aid.[95] The evidence submitted by IFSA concerning the market relates primarily to the period before changes based on the appropriate measures proposed by ESA were made and is, thus, not relevant.

132 The Government of Iceland submits that, according to data from the Central Bank of Iceland, commercial banks secure most of the market. The Icelandic Competition Authority considers the three major banks to be collectively dominant on the financial market in Iceland and that the HFF's operations have not limited competition in the market, nor would competition increase if the HFF lending was left to the banks. It rejects IFSA's comparison of the interest rate margin of the banks and the HFF on the basis of the HFF44 bond yield,[96] as banks mainly finance their mortgage lending with callable deposits bearing low interest rates and thus securing a larger interest margin. In contrast to banks, the HFF is under the universal obligation to promote security and equal rights and has to offer the same interest rates throughout the country even though loan impairments have been considerably higher in the rural areas. Therefore it has not and does not compete on price.

133 The Government of Iceland adds that the fact that the HFF is the only mortgage provider in Iceland which is required to finance mortgages for their full term together with its universal service obligation puts it at a considerable disadvantage. Interest rates for indexed housing loans offered by the HFF have been higher than those offered by commercial banks since 2012. The allegation that the HFF offered lower interest rates in the past is not sufficient, as the alleged effect of the aid has to be evaluated at the time of the submission of the application. The Government of Iceland denies

95 Reference is made *Konkurrenten.no* v *ESA*, cited above, paragraph 100.
96 Reference is made to the second figure in paragraph 17 of the reply.

that the requirement for HFF loans to be secured with first priority collateral is relevant or liable to have detrimental impact on the commercial banks' market position, since data of the Central Bank of Iceland shows that increasing numbers of households are refinancing existing HFF mortgage loans with new loans from the commercial banks.

SUBSTANCE

First plea: support for the HFF must be qualified as new aid

134 The Government of Iceland submits that this plea is completely unfounded and inadmissible, as no part of the contested decision concerned the question whether the HFF general loan scheme was to be qualified as existing aid and not new aid. Were the applicant to be allowed to challenge the operative part of the 2008 Decision this would circumenvent the time-limint prescribed by Article 36 SCA. Thus, any plea made by the applicant relating to new aid should be dismissed as inadmissible.

Third plea: Wrongful interpretation of the notion of an SGEI pursuant to Article 59(2) EEA

First branch of the third plea: no service of general economic interest

135 The Government of Iceland submits that the EFTA States enjoy a wide discretion in defining SGEIs and may take account of objectives pertaining to their national policy when defining the services entrusted to certain undertakings, while ESA's competence is, in this respect, limited to verifying whether an EFTA State has made a manifest error in defining the service as an SGEI. The SGEI Decision only applies to certain undertakings, exempting aid to such undertakings from notification requirements. IFSA's arguments that the SGEI Decision is intended to exhaustively regulate which services

relating to housing policies may be considered SGEIs contradicts the very terms of the SGEI Decision, as well as ESA's framework for assessing State aid to SGEIs not falling within its scope. Further, the Court has acknowledged that the objective of security and equal housing by providing loans on manageable terms to the general public throughout the territory of Iceland goes beyond the normal economic interest of operators in the financial sector.[97] There is no indication in the decisional practice of the Commission referred to by IFSA that market conditions comparable to those in Iceland prevail in the relevant EU countries.

136 The Government of Iceland stresses that there are fundamental differences between the lending of the HFF and the banks. First, the HFF's lending is based on a universal service objective for the purchase of modest dwellings. Banks focus lending in the capital area. Second, the HFF is only permitted to offer one type of product, the indexed loan that, until July 2015, had a maturity of 40 years. Third, the HFF's mortgage loans are restricted to the purchase or renovation of residential property. Fourth, HFF funding, through the issuance of long-term HFF bonds, ensures the same interest rates during the entire term of the loan.

137 According to the Government of Iceland, information from the Central Bank of Iceland indicates that market failure existed over four years from the start of 2008 and IFSA has failed to present any evidence leading to a different conclusion. Data submitted by IFSA is partly incomplete as it counts mortgage loans with no indication as to the purpose of the loan. Further, the information is from prior to 2008. Although in 2012 there was some increase in the commercial banks' mortgage lending, it was not yet possible to assert that the market had stabilised. As it was considered that the market failure

97 Reference is made to *Bankers' and Securities Dealers' Association of Iceland* v *ESA*, cited above, paragraph 68.

would not be permanent, a review mechanism was introduced and the first review took place in spring 2014. HFF lending has decreased considerably since 2012 and an increasing number of households are refinancing existing HFF mortgage loans with loans from commercial banks.

138 With regard to IFSA's allegations concerning the unsuitability of using the taxation value for calculation of the value cap leading to residential property with a higher actual market value being eligible for HFF funding, the Government of Iceland submits that this has no bearing on the qualification of the HFF as a provider of an SGEI. The taxation value, moreover, offers predictability for home buyers as to which property may qualify for a loan from the HFF.

139 As regards the notion of the average resident of Iceland, the Government of Iceland contends that the objective of the HFF is to ensure lending on manageable terms to the average resident and ensure social and geographical cohesion, which has not been provided by the market in a sufficiently stable and consistent matter. In order to ensure availability of mortgage financing for the population at large, it was not considered logical to introduce any form of means testing to exclude the more affluent section of the population. As for the exception to the "one person, one property" rule criticised by IFSA, the Government of Iceland asserts that for such exception to apply an applicant has to sign a commitment to sell the property when it is no longer used for the relevant members of the family. Further, contrary to IFSA's allegation, there is a serious shortage of supply for student housing in the capital area, with long waiting lists for university and college student housing provided by associations and no eligible student housing for upper secondary students.

140 Finally, the Government of Iceland submits that the applicant's allegations regarding safeguards concerning the implementation of changes are unfounded, since a review resulting in reductions in the

value of eligible properties took place only four months prior to the lodging of the application. The applicant's predictions regarding future reviews are speculative and the establishment of the review mechanism reflects the discretion enjoyed by the Government of Iceland.

Third branch of the third plea: disproportionality of the aid scheme

141 The Government of Iceland submits that, due to the State's wide discretion to provide financing for housing in accordance with its policy, the form of the HFF is irrelevant. Moreover, IFSA's claim that the commercial banks ensured a continuous provision of housing mortgage loans under manageable terms is unsubstantiated. Finally, no aggressive interest rate policy exists, as the rates are traditionally determined on the basis of long term funding plus a regulated margin to cover cost.

Fourth branch of the third plea: disproportionate effects on trade by the aid scheme

142 The Government of Iceland submits that the operations of the HFF do not have a disproportionate effect on trade, as facts show that HFF lending has steadily decreased and since the restructuring of the major commercial banks the HFF has only been a minor provider of loans in the household financing market. The State's compensation to HFF had the aim to provide for losses of the past and prepayment losses and not to enhance its ability to enter the market.

EUROPEAN COMMISSION

ADMISSIBILITY

143 The Commission submits that, in the context of annulment actions directed against State aid decisions, to be considered individually

concerned it suffices for an applicant to show that it is an "interested party" pursuant to Article 1(h) of Part II of Protocol 3 SCA if that applicant is seeking to vindicate its procedural rights arising when interested parties are invited to participate in a formal investigation procedure. However, unlike the situation in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland* v *ESA*, there is no possibility under Protocol 3 SCA for ESA to open a formal investigation procedure once the EFTA State concerned accepts the appropriate measures proposed by ESA to modify the existing aid scheme.

144 It is for the applicant to demonstrate individual concern by showing that the decision it challenges affects them by reason of certain attributes which are peculiar to them or by reason of a circumstance in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed.[98]

145 It is not enough for an applicant to be an actual or potential competitor of the beneficiary of the measure examined in that decision. Rather, there must be a real competitive relationship between the applicant and the beneficiary, and the market position of the applicant must be substantially affected by the measures. Accordingly, an applicant must demonstrate the magnitude of the prejudice to its market position.[99] That test must be conducted by reference to the beneficiary of the aid measure at issue.[100] The fact that an annulment action is brought by an association bringing

98 Reference is made to *Plaumann* v *Commission*, cited above, p. 107.

99 Reference is made to *TF1* v *Commission*, cited above, paragraph 77, and *Werkgroep Commerciële Jachtshaven Zuidelijke Randmeren and Others* v *Commission*, cited above, paragraph 53.

100 Reference is made to *TF1* v *Commission*, cited above, paragraphs 78 and 91, Case T54/07 *Vtesse Networks* v *Commission* [2011] ECR II6, and Case T-58/10 *Phoenix-Reisen and DRV* v *Commission*, order of 11 January 2012, published electronically, paragraphs 35, 44, 47 and 50.

together the competitors of the aid beneficiary does not overcome that hurdle, unless it shows that one or more of its members is particularly affected by the aid measure in question.[101]

146 The Commission adds that it will not be sufficient for the applicant to invoke the fact that the beneficiary has a major market position, or that the applicant is the main competitor. Instead, the applicant will have to show a causal link between the factual elements it invokes and the prejudice to its market position[102] by reference to a number of concrete factors and not simply speculation.[103] Moreover, participation in the administrative proceedings leading to the adoption of a decision after a formal investigation procedure is neither necessary nor sufficient to be individually concerned, as only a significant effect on its market position will suffice.[104]

147 According to the Commission, associations of undertakings can be individually concerned, for *Plaumann* purposes, by State aid decisions on two main grounds: either because the decision affects directly and individually the association in its own rights or because its members are directly and individually concerned. Whereas the latter situation does not apply here, had the association shown that it had a role as a negotiator with the Commission or ESA which is

101 Reference is made to Case T-601/11 *Dansk Automat Brancheforening* v *Commission*, judgment of 26 September 2014, published electronically, paragraph 52.

102 Reference is made to *Vtesse Networks* v *Commission*, cited above, paragraphs 98 and 101 to 104, and Case T-344/10 *UPS Europe and United Parcel Service Deutschland* v *Commission*, order of 4 May 2012, published electronically, paragraphs 55 and 56.

103 Reference is made to Case T-90/09 *Mojo Concerts and Amsterdam Music Dome Exploitatie* v *Commission*, order of 26 January 2012, published electronically, paragraphs 43, 50 and 51, and *UPS Europe and United Parcel Service Deutschland* v *Commission*, cited above, paragraphs 55 and 56.

104 Reference is made to Case T-88/01 *Sniace* v *Commission* [2005] ECR II-1165, paragraphs 56 and 57, Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraphs 57 and 60, and *Vtesse Networks* v *Commission*, cited above, paragraphs 90 to 94.

affected by the contested decision, this could have demonstrated individual concern.[105]

148 The Commission contends that IFSA has not demonstrated *locus standi* and, consequently, the application should be dismissed as inadmissible.

SUBSTANCE

149 The Commission limits itself to setting out the elements regarding the concept of an SGEI, fully subscribing to ESA's submissions for the remainder. There is no general definition in EU law of the notion of SGEIs and no established concept definitively fixing the conditions that must be satisfied before a Member State can invoke the existence of an SGEI. The concept is dynamic and evolves depending on, among other things, the needs of citizens, technological and market developments, and social and political preferences. SGEIs are services that exhibit special characteristics as compared with those of other economic activities.[106] Member States have a wide discretion when defining an SGEI, which can be only called into question in the case of a manifest error.[107] In spheres which do not fall within the

105 Reference is made to *Van der Kooy* v *Commission*, cited above, and *CIRFS and Others* v *Commission*, cited above.

106 Reference is made to *Merci convenzionali porto di Genova*, cited above, paragraph 27, Case C-242/95 *GT-Link* v *De Danske Statsbaner* [1997] ECR I-4449, paragraph 53, and Case C-266/96 *Corsica Ferries France* v *Gruppo Antichi Ormeggiatori del porto di Genova and Others* [1998] ECR I-3949, paragraph 45.

107 Reference is made to *Merci convenzionali porto di Genova*, cited above, paragraph 27; *De Danske Statsbaner*, cited above, paragraph 53; Joined Cases C-34/01 to C-38/01 *Enrisorse* [2003] ECR I-14243, paragraphs 33 and 34; and Case T-309/12 *Zweckverband Tierkörperbeseitigung* v *Commission*, judgment of 16 July 2014, published electronically. Additional reference is made to the Commission's decision practice: Commission Decision C(2012) 1731 final of 21.03.2012 – State aid SA.31.550 (2012/C) (ex 2012/NN) – Germany – Nürburgring, OJ 2012 C 216, p. 14, recital 192, and Commission Decision 2014/19/EU of 19 June 2013 on State aid No SA.30753 (C 34/10) (ex N 140/10) which France is planning to implement for horse racing companies, OJ 2014 L 14, p. 17, recital 45.

powers of the Union or are based on only limited or shared Union competence the determination of the nature and the scope of an SGEI objective remains, in principle, within the competence of the Member States.[108] However, the existence of a market failure at the moment of the entrustment of the SGEI and during the entire duration of the entrustment of the SGEI provider is a necessary condition.[109] Where there are other, non-entrusted, undertakings operating under normal market conditions that already provide or could provide a service satisfactorily and under conditions such as price, objective quality characteristics, continuity and access to the service that are consistent with the public interest, there is no market failure. Hence, it is not appropriate to attach a public service obligation to such a service.[110] In addition, universality and compulsory nature are necessary features of an SGEI. Universality does not mean that the service in question must respond to a need common to the whole population or be supplied throughout the country, nor does it require that the price be regulated, be subject to a cap or that the service be provided free of charge or without consideration of economic profitability. It is sufficient that the service in question is offered at a uniform price, at non-discriminatory rates, and on similar conditions for all customers.[111] The compulsory nature has to be understood as meaning that the entrusted undertaking is, in principle, required to offer the service in

108 Reference is made to *BUPA and Others* v *Commission*, cited above, paragraph 167.

109 Reference is made to Case T-325/10 *Iliad and Others* v *Commission*, judgment of 16 September 2013, published electronically, paragraphs 169, 185 and 187.

110 Reference is made to Case C-205/99 *Analir* [2001] ECR I-1271, and Communication from the Commission on the application of the European State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012 C 8, p. 4, point 48.

111 Reference is made to *BUPA and Others* v *Commission*, cited above, paragraphs 202 and 203.

question and is obliged to contract, on consistent conditions, without being able to reject the other contracting party.[112]

150 The Commission respectfully suggests that on the basis of those criteria the Court can review whether ESA made a manifest error in the contested decision in accepting that Iceland had not itself made a manifest error in designating the activities entrusted to the HFF as an SGEI.

Carl Baudenbacher
Judge-Rapporteur

112 Ibid., paragraphs 188 to 190.

Case

E-14/15

Holship Norge AS

Norsk Transportarbeiderforbund

(Articles 31, 53 and 54 EEA – Competition law – Collective agreements – Collective action – Freedom of establishment)

2016 | Book 1

Sak

E-14/15

Holship Norge AS

mot

Norsk Transportarbeiderforbund

(EØS-avtalen artiklene 31, 53 og 54 – konkurranserett – tariffavtaler – kollektive tiltak – etableringsrett)

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Summary of the Judgment

1 A collective agreement falls outside the scope of the EEA competition rules if it fulfils two requirements. First, it has to have been entered into following collective bargaining between employers and employees, and secondly, it must pursue the objective of improving conditions of work and employment.

2 As regards the second requirement, account must be taken of the form and content of the agreement and of its various provisions, and of the circumstances under which they were negotiated. The agreement must not go beyond the improvement of conditions of work and employment.

3 When examining the collective agreement's provisions, their aggregate effect must be considered. Even if individually the provisions would not lead to any certain resolution of the status of the collective agreement in relation to the applicability of Articles 53 and 54 EEA, their aggregate effect may bring the agreement within the scope of those Articles.

4 For an entity to be regarded as an undertaking within the meaning of Articles 53 and 54 EEA it must be engaged in an economic activity. The provision of stevedore services is an economic activity, since it consists in the offering of a service on a market where the service provider actually or potentially competes with other providers. It is for the national court to assess to whom the provision of stevedoring services is attributable.

5 Articles 53 and 54 EEA apply to conduct which may have an appreciable effect on trade between EEA States, be it direct or indirect, actual or potential. Articles 53 and 54 EEA may apply separately or jointly.

Sammendrag av dommen

1 En tariffavtale faller utenfor konkurransereglenes virkeområde hvis den oppfyller to vilkår. For det første må den være inngått etter kollektive forhandlinger mellom arbeidsgivere og arbeidstakere, og for det andre må den må forfølge målet om å forbedre arbeids- og ansettelsesvilkår.

2 Når det gjelder det andre vilkår, må det tas hensyn til avtalen og dens ulike bestemmelsers form og innhold, samt under hvilke omstendigheter de ble forhandlet. Avtalen må ikke gå utover forbedring av arbeids- og ansettelsesvilkår.

3 Ved vurderingen av tariffavtalens bestemmelser må det tas hensyn til deres samlede virkning. Selv om bestemmelsene hver for seg ikke ville føre til noen sikker konklusjon om tariffavtalens forhold til EØS-avtalen artiklene 53 og 54, kan deres samlede virkning bli at avtalen omfattes av disse artikler.

4 For at en enhet skal kunne anses som et foretak etter EØS-avtalen artiklene 53 og 54, må den drive økonomisk virksomhet. Tilbydelsen av losse- og lastetjenester utgjør en økonomisk virksomhet, siden dette innebærer å tilby en tjeneste på et marked hvor tilbyderen faktisk eller potensielt konkurrerer med andre tilbydere. Den nasjonale domstol må vurdere hvem tilbydelsen av losse- og lastetjenester skal tilordnes.

5 EØS-avtalen artiklene 53 og 54 kommer til anvendelse på atferd som kan ha en merkbar påvirkning på samhandelen mellom EØS-stater, det være seg direkte eller indirekte, faktisk eller potensielt. EØS-avtalen artiklene 53 og 54 kan få anvendelse hver for seg eller sammen.

6 Pursuant to Article 54 EEA, the national court must determine the relevant geographic market. If it considers that the entity in question holds a dominant position, it would need to determine whether that position covers a substantial part of the EEA territory. A single port may be regarded as a substantial part of the EEA territory.

7 Should the national court find that the port in question cannot be regarded as a substantial part of the EEA territory, it would have to take into account identical or corresponding systems which may exist in other ports.

8 As for the question of abuse, the national court has to assess whether the entity in question obliges purchasers to obtain all or most of their requirements for stevedoring services from it, charges disproportionate prices, or refrains from the use of modern technology.

9 The exemption of collective agreements from EEA competition rules does not cover a clause whereby a port user is obliged to give priority to another company's workers over its own employees, or the use of a boycott in order to procure acceptance of the collective agreement containing that clause.

10 As regards the interpretation of Article 31 EEA, a boycott that aims at procuring acceptance of a collective agreement which includes a priority clause such as the one at issue constitutes a restriction on the freedom of establishment.

11 Restrictions on the freedom of establishment may be justified either by Article 33 EEA or by overriding reasons of general interest, such as the protection of workers. Those justifications must be interpreted in the light of fundamental rights, as unwritten principles of EEA law.

6 Etter EØS-avtalen artikkel 54 må den nasjonale domstol definere det relevante geografiske marked. Hvis domstolen kommer til det aktuelle foretak har en dominerende stilling, må den vurdere om denne stilling omfatter en vesentlig del av EØS. Én enkelt havn kan anses som en vesentlig del av EØS.

7 Dersom den nasjonale domstol finner at den aktuelle havn ikke kan betraktes som en vesentlig del av EØS, vil den måtte vurdere i hvilken utstrekning tilsvarende systemer finnes i andre havner.

8 Når det gjelder spørsmålet om utilbørlig utnyttelse, må den nasjonale domstol vurdere om foretaket pålegger sine kunder å dekke alle eller de fleste av sine behov for losse- og lastetjenester hos dette foretak, om foretaket krever uforholdsmessige priser eller unnlate å ta i bruk moderne teknologi.

9 Unntaket fra EØS-avtalens konkurranseregler som gjelder for tariffavtaler omfatter ikke en bestemmelse som innebærer at en havnebruker fortrinnsvis må benytte ansatte i et annet foretak fremfor sine egne, eller en boikott som tar sikte på å oppnå tilslutning til en tariffavtale med en slik bestemmelse.

10 En boikott som tar sikte på å oppnå tilslutning til en tariffavtale som inneholder en fortrinnsrettsbestemmelse som den saken gjelder, utgjør en restriksjon på etableringsretten etter EØS-avtalen artikkel 31.

11 Restriksjoner på etablieringsfriheten kan rettferdiggjøres etter EØS-avtalen artikkel 33 og i tvingende allmenne hensyn, slik som beskyttelse av arbeidstakere. Denne rettferdiggjøring må tolkes i lys av grunnleggende rettigheter, som utgjør en del av de uskrivne prinsipper i EØS-retten.

Judgment of the Court

19 April 2016[1]

(Articles 31, 53 and 54 EEA – Competition law – Collective agreements – Collective action – Freedom of establishment)

In Case E-14/15,

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 Supreme Court of Norway (*Norges Høyesterett*), in the case between

Holship Norge AS

and

Norsk Transportarbeiderforbund,

concerning the interpretation of the EEA Agreement, and in particular Articles 31, 53 and 54,

The Court

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

1 Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

Domstolens Dom

19. april 2016[1]

(EØS-avtalen artiklene 31, 53 og 54 – konkurranserett – tariffavtaler – kollektive tiltak – etableringsrett)

I sak E-14/15

ANMODNING til Domstolen i henhold til artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Norges Høyesterett i en sak for denne domstol mellom

Holship Norge AS

og

Norsk Transportarbeiderforbund,

om tolkningen av EØS-avtalen, særlig artiklene 31, 53 og 54, avsier

Domstolen,

sammensatt av: Carl Baudenbacher, president og saksforberedende dommer, Per Christiansen og Páll Hreinsson, dommere,

justissekretær: Gunnar Selvik,

1 Språket i anmodningen om rådgivende uttalelse: norsk. Engelske oversettelser av nasjonale bestemmelser er uoffisielle og er basert på oversettelsene i sakens dokumenter.

having considered the written observations submitted on behalf of:

– Holship Norge AS ("Holship"), represented by Nicolay Skarning, Advocate;

– Norsk Transportarbeiderforbund (the Norwegian Transport Workers' Union – "NTF"), represented by Håkon Angell and Lornts Nagelhus, Advocates;

– the Norwegian Government, represented by Pål Wennerås, Advocate, the Attorney General of Civil Affairs, and Janne Tysnes Kaasin, Senior Adviser, Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Director, Maria Moustakali, Officer, Øyvind Bø, Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Luigi Malferrari and Manuel Kellerbauer, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Holship, represented by Nicolay Skarning and Kristin Valla, Advocates; NTF, represented by Håkon Angell and Lornts Nagelhus; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Carsten Zatschler; and the Commission, represented by Luigi Malferrari and Manuel Kellerbauer, at the hearing on 11 November 2015,

gives the following

etter å ha tatt i betraktning de skriftlige innlegg inngitt på vegne av:

– Holship Norge AS ("Holship"), representert ved advokat Nicolay Skarning,

– Norsk Transportarbeiderforbund ("NTF"), representert ved advokatene Håkon Angell og Lornts Nagelhus,

– Norges regjering, representert ved advokat Pål Wennerås, Regjeringsadvokaten, og seniorrådgiver Janne Tysnes Kaasin, Utenriksdepartementet, som partsrepresentanter,

– EFTAs overvåkningsorgan ("ESA"), representert ved Carsten Zatschler, Director, Maria Moustakali, Officer, Øyvind Bø, Officer, og Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, som partsrepresentanter,

– Europakommisjonen ("Kommisjonen"), representert ved Luigi Malferrari og Manuel Kellerbauer, medlemmer av Kommisjonens juridiske tjeneste, som partsrepresentanter,

med henvisning til rettsmøterapporten,

og etter å ha hørt muntlige innlegg fra Holship, representert ved advokatene Nicolay Skarning og Kristin Valla; NTF, representert ved Håkon Angell og Lornts Nagelhus; Norges regjering, representert ved Pål Wennerås; ESA, representert ved Carsten Zatschler; og Kommisjonen, representert ved Luigi Malferrari og Manuel Kellerbauer, i rettsmøte 11. november 2015,

slik

Judgment

I LEGAL BACKGROUND

EEA LAW

1 Article 31(1) EEA reads as follows:

Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2 Article 34 EEA reads as follows:

Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons

Dom

I RETTSLIG BAKGRUNN

EØS-RETT

1 EØS-avtalen artikkel 31 nr. 1 lyder:

I samsvar med bestemmelsene i denne avtale skal det ikke være noen restriksjoner på etableringsadgangen for statsborgere fra en av EFs medlemsstater eller en EFTA-stat på en annen av disse staters territorium. Dette skal gjelde også adgangen til å opprette agenturer, filialer eller datterselskaper for så vidt angår borgere fra en av EFs medlemsstater eller en EFTA-stat som har etablert seg på en av disse staters territorium.

Etableringsadgangen skal omfatte adgang til å starte og utøve selvstendig næringsvirksomhet og til å opprette og lede foretak, særlig selskaper som definert i artikkel 34 annet ledd, på de vilkår som lovgivningen i etableringsstaten fastsetter for egne borgere, med forbehold for bestemmelsene i kapittel 4.

2 EØS-avtalen artikkel 34 lyder:

Når det gjelder anvendelsen av bestemmelsene i dette kapittel, skal selskaper som er opprettet i samsvar med lovgivningen i en av EFs medlemsstater eller en EFTA-stat, og som har sitt vedtektsbestemte sete, sin hovedadministrasjon eller sitt hovedforetak innen avtalepartenes territorium, likestilles med fysiske personer som er statsborgere i EFs medlemsstater eller EFTA-statene.

Ved selskaper skal forstås selskaper i sivil- eller handelsrettslig forstand, herunder også kooperative selskaper, samt andre juridiske personer i

governed by public or private law, save for those which are non-profit-making.

3 Article 53 EEA reads as follows:

1. *The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

   (b) limit or control production, markets, technical development, or investment;

   (c) share markets or sources of supply;

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

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

2. *Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

   – *any agreement or category of agreements between undertakings;*

offentlig- eller privatrettslig forstand, unntatt dem som ikke driver ervervsmessig virksomhet.

3 EØS-avtalen artikkel 53 lyder:

1. Enhver avtale mellom foretak, enhver beslutning truffet av sammenslutninger av foretak og enhver form for samordnet opptreden som kan påvirke handelen mellom avtalepartene, og som har til formål eller virkning å hindre, innskrenke eller vri konkurransen innen det territorium som er omfattet av denne avtale, skal være uforenlige med denne avtales funksjon og forbudt, særlig slike som består i

a) å fastsette på direkte eller indirekte måte innkjøps- eller utsalgspriser eller andre forretningsvilkår,

b) å begrense eller kontrollere produksjon, avsetning, teknisk utvikling eller investeringer,

c) å dele opp markeder eller forsyningskilder,

d) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,

e) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden.

2. Avtaler eller beslutninger som er forbudt i henhold til denne artikkel, skal ikke ha noen rettsvirkning.

3. Det kan imidlertid erklæres at bestemmelsene i nr. 1 ikke skal anvendes på

– avtaler eller grupper av avtaler mellom foretak,

– *any decision or category of decisions by associations of undertakings;*

– *any concerted practice or category of concerted practices;*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

4 Article 54 EEA reads as follows:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

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

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

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

– *beslutninger eller grupper av beslutninger truffet av sammenslutninger av foretak, og*

– *samordnet opptreden eller grupper av slik opptreden,*

som bidrar til å bedre produksjonen eller fordelingen av varene eller til å fremme den tekniske eller økonomiske utvikling, samtidig som de sikrer forbrukerne en rimelig andel av de fordeler som er oppnådd, og uten

a) *å pålegge vedkommende foretak restriksjoner som ikke er absolutt nødvendige for å nå disse mål, eller*

b) *å gi disse foretak mulighet til å utelukke konkurranse for en vesentlig del av de varer det gjelder.*

4 EØS-avtalen artikkel 54 lyder:

Et eller flere foretaks utilbørlige utnyttelse av sin dominerende stilling innen det territorium som er omfattet av denne avtale, eller i en vesentlig del av det, skal være forbudt og uforenlig med denne avtales funksjon i den utstrekning den kan påvirke handelen mellom avtalepartene.

Slik utilbørlig utnyttelse kan særlig bestå i

a) *å påtvinge, direkte eller indirekte, urimelige innkjøps- eller utsalgspriser eller andre urimelige forretningsvilkår,*

b) *å begrense produksjon, avsetning eller teknisk utvikling til skade for forbrukerne,*

c) *å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,*

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

5 Article 59(2) EEA reads as follows:

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

NATIONAL LAW

6 Section 2 of the Norwegian Boycott Act of 5 December 1947 No 1 ("the Boycott Act") lays down several conditions for a boycott to be lawful. The condition relevant for the present case is Section 2(a), according to which a boycott is unlawful when its purpose is unlawful or when it cannot achieve its goal without causing a breach of the law. Pursuant to Section 3, legal action may be instigated to determine whether a notified boycott is lawful.

THE FRAMEWORK AGREEMENT

7 The collective agreement relevant to this case is the Framework Agreement on a Fixed Pay Scheme for Dockworkers (*Rammeavtale om fastlønnssystem for losse- og lastearbeidere* – "the Framework Agreement"). Initially entered into in 1976 and subsequently renewed every other year, it was created to address the fact that dockworkers were originally casual workers with no guarantee of

d) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden.

5 EØS-avtalen artikkel 59 nr. 2 lyder:

Foretak som er blitt tillagt oppgaven å utføre tjenester av almen økonomisk betydning, eller som har karakter av et fiskalt monopol, skal være undergitt reglene i denne avtale, fremfor alt konkurransereglene, i den utstrekning anvendelsen av disse regler ikke rettslig eller faktisk hindrer dem i å utføre de særlige oppgaver som er tillagt dem. Utviklingen av samhandelen må ikke påvirkes i et omfang som strider mot avtalepartenes interesser.

NASJONAL RETT

6 Lov 5. desember 1947 nr. 1 om boikott ("boikottloven") § 2 oppstiller flere vilkår for at en boikott skal være lovlig. Vilkåret som er aktuelt for den foreliggende sak, er § 2 bokstav a, som fastsetter at en boikott er rettsstridig når den har et rettsstridig formål eller ikke kan nå sitt mål uten å føre til et rettsbrudd. Etter § 3 kan det reises søksmål for å få avgjort om en varslet boikott er lovlig.

RAMMEAVTALEN

7 Den aktuelle tariffavtale er Rammeavtale om fastlønnssystem for losse- og lastearbeidere ("Rammeavtalen"). Denne ble opprinnelig inngått i 1976 og har deretter blitt fornyet annethvert år. Den ble inngått for å avhjelpe at losse- og lastearbeidere opprinnelig var løsarbeidere uten noen garanti for arbeid eller sikker lønn. Rammeavtalen etablerte et fastlønnssystem for visse losse- og

work or a consistent salary. The Framework Agreement establishes a fixed pay scheme for certain dockworkers in the 13 largest ports in Norway, including the Port of Drammen.

8 The parties to the Framework Agreement on the employee side are the Norwegian Confederation of Trade Unions (*Landsorganisasjonen i Norge* – “LO”), which is the largest labour organisation in Norway, and its member union NTF, which represents the interests of dockworkers *inter alia* in Drammen. The parties on the employer side are the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon* “NHO”), which is the largest employers’ organisation in Norway, and its member association, the Norwegian Logistics and Freight Association (*NHO Logistikk og Transport*).

9 Clause 2(1) of the Framework Agreement, the so-called priority of engagement clause (“the priority clause”), reads as follows:

For vessels of 50 tonnes dwt and more sailing from a Norwegian port to a foreign port or vice versa, the unloading and loading shall be carried out by dockworkers. Exempted is all unloading and loading at the company’s own facilities where the company’s own workers carry out the unloading and loading.

10 Unloading and loading operations that fall within the scope of the priority clause are limited to the transfer of cargo from the ship onto the quay and vice versa. For the handling of goods from and to the quay, the port users may choose whether to engage the dockworkers or use other workers.

11 In accordance with clause 3 of the Framework Agreement, the Administration Office for Dock Work in Drammen (*Administrasjonskontoret for havnearbeid i Drammen* –“the AO”) was established.

lastearbeidere ved de 13 største havnene i Norge, blant annet Drammen.

8 Partene i Rammeavtalen er på arbeidstakersiden Landsorganisasjonen i Norge ("LO"), som er Norges største arbeidstakerorganisasjon, og NTF, som er et medlemsforbund i LO, og som representerer havnearbeiderne, blant annet i Drammen. På arbeidsgiversiden er Næringslivets Hovedorganisasjon ("NHO"), som er Norges største arbeidsgiverorganisasjon, og dens medlemsforening NHO Logistikk og Transport parter i avtalen.

9 Rammeavtalen § 2 nr. 1, den såkalte fortrinnsrettsbestemmelse, lyder slik:

For fartøyer på 50 tonn dw. og derover som går fra norsk havn — utenlandsk havn eller omvendt, skal losse- og lastearbeidet utføres av losse- og lastearbeidere. Unntatt er all lossing og lasting ved bedriftens egne anlegg hvor bedriftens egne folk anvendes til lossing eller lasting.

10 Losse- og lasteoperasjoner som faller inn under fortrinnsrettsbestemmelsen, er begrenset til å omfatte godshåndteringen fra skipet og ned på kaien, og omvendt. For godshåndteringen til og fra kaien kan havnebrukerne velge om de vil engasjere losse- og lastearbeiderne eller andre arbeidstakere.

11 I medhold av Rammeavtalen § 3 ble det ved Drammen havn opprettet et losse- og lastekontor – Administrasjonskontoret for havnearbeid i Drammen ("Administrasjonskontoret").

ILO CONVENTION NO 137

12 Norway is a signatory to the ILO Dock Work Convention, 1973 (No 137) ("the ILO Convention"), which entered into force on 24 July 1975. The priority clause in the Framework Agreement is regarded as part of the fulfilment of Norway's obligations under the ILO Convention.

13 Article 2 of the ILO Convention reads as follows:

1. It shall be national policy to encourage all concerned to provide permanent or regular employment for dockworkers in so far as practicable.

2. In any case, dockworkers shall be assured minimum periods of employment or a minimum income, in a manner and to an extent depending on the economic and social situation of the country and port concerned.

14 Article 3 of the ILO Convention reads as follows:

1. Registers shall be established and maintained for all occupational categories of dockworkers, in a manner to be determined by national law or practice.

2. Registered dockworkers shall have priority of engagement for dock work.

3. Registered dockworkers shall be required to be available for work in a manner to be determined by national law or practice.

15 Article 7 of the ILO Convention reads as follows:

The provisions of this Convention shall, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.

ILO-KONVENSJON NR. 137

12 Norge er tilsluttet ILO-konvensjon nr. 137 om havnearbeid (1973) ("ILOkonvensjonen"), som trådte i kraft 24. juli 1975. Fortrinnsrettsbestemmelsen har vært ansett som ledd i oppfyllelsen av Norges forpliktelser etter ILO-konvensjonen.

13 ILO-konvensjonen artikkel 2 lyder:

> *1. Det skal være vedkommende lands politikk å oppmuntre alle dem som berøres av dette til å skaffe havnearbeiderne fast eller regelmessig sysselsetting så langt det er mulig.*
>
> *2. I hvert fall skal havnearbeiderne sikres minimumsperioder med sysselsetting eller en minimumsinntekt, på en måte og i en utstrekning som avhenger av den økonomiske og sosiale tilstand i vedkommende land eller havn.*

14 ILO-konvensjonen artikkel 3 lyder:

> *1. Det skal opprettes og ajourføres registre over alle yrkeskategorier av havnearbeidere på en måte som fastsettes ved nasjonal lovgivning eller praksis.*
>
> *2. Registrerte havnearbeidere skal ha fortrinnsrett ved tildeling av havnearbeid.*
>
> *3. Registrerte havnearbeidere plikter å være disponible for arbeid på den måte som nasjonal lovgivning eller praksis bestemmer.*

15 ILO-konvensjonen artikkel 7 lyder:

> *Reglene i denne konvensjon skal gjøres gjeldende gjennom nasjonale lover eller forskrifter, i den utstrekning de ikke er gjort gjeldende gjennom tariffavtaler, voldgiftskjennelser eller på annen måte som er i samsvar med nasjonal praksis.*

II FACTS AND PROCEDURE

16 By a letter of 5 June 2015, registered at the Court on 11 June 2015, the Supreme Court of Norway made a request under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") in a case pending before it between Holship and NTF.

17 The case before the Supreme Court concerns an advance ruling pursuant to Section 3 of the Boycott Act regarding the lawfulness of a notified boycott. NTF gave notice of a boycott of Holship in order to procure its acceptance of the Framework Agreement giving priority of engagement for stevedore work to dockworkers registered at the AO at the Port of Drammen.

18 Holship is a Norwegian forwarding agent wholly owned by a Danish company. Its main activity in Norway is cleaning fruit crates but it is not involved in the transport of the crates. In addition, Holship handles certain goods transported by ships. Holship is neither a party to the Framework Agreement nor a member of NHO or the Norwegian Logistics and Freight Association. Rather, it is a member of the Norwegian Business Association (*Bedriftsforbundet*).

19 Holship has signed a collective agreement with the Norwegian General Workers' Union (*Norsk Arbeidsmandsforbund*), a union that, like NTF, is a member union of LO. The collective agreement covers cleaning work (referred to as onshore cleaning), which corresponds to the main business of the company. Therefore, there is no conflict between the matters covered by that agreement and the Framework Agreement. However, Holship has chosen to apply the collective agreement also to unloading and loading work.

20 Registered dockworkers in 14 other ports benefit from priority of engagement for unloading and loading under the same terms as provided for in the Framework Agreement, but they do not have a

II FAKTUM OG SAKSGANG

16 Ved brev 5. juni 2015, registrert ved EFTA-domstolen 11. juni 2015, fremsatte Norges Høyesterett en anmodning etter artikkel 34 i Avtalen mellom EFTAstatene om opprettelse av et Overvåkningsorgan og en Domstol ("ODA") i en sak som verserer mellom Holship og NTF.

17 Saken for Høyesterett gjelder en forhåndsavgjørelse etter boikottloven § 3 om lovligheten av en varslet boikott. NTF varslet boikott overfor Holship for å oppnå tilslutning til Rammeavtalen som gir fortrinnsrett til å utføre losse- og lastearbeid for losse- og lastearbeidere registrert ved Administrasjonskontoret i Drammen.

18 Holship er et norsk speditørfirma som er heleid av et dansk selskap. Hovedvirksomheten i Norge er rengjøring av fruktkasser, men firmaet er ikke involvert i transport av kassene. I tillegg håndterer Holship noe gods befordret med skip. Holship er ikke part i Rammeavtalen og er heller ikke medlem av NHO eller NHO Logistikk og Transport. Holship er i stedet medlem av arbeidsgiverorganisasjonen Bedriftsforbundet.

19 Holship har inngått en overenskomst med Norsk Arbeidsmandsforbund, en fagforening som i likhet med NTF er tilsluttet LO. Overenskomstens virkeområde omfatter renholdsarbeid (omtalt som renhold på land), som samsvarer med hovedvirksomheten til selskapet. Derfor er det ingen konflikt mellom tariffområdene for denne overenskomst og Rammeavtalen. Holship har imidlertid valgt å anvende overenskomsten også på losse- og lastearbeid.

20 Registrerte havnearbeiderne i 14 andre havner er sikret fortrinnsrett til losse- og lastearbeid på samme vilkår som etter Rammeavtalen,

fixed pay scheme. This is provided for in the the dock work agreement for Southern and Northern Norway (*Losse- og lasteoverenskomsten for Sør- og Nord-Norge*), entered into between the same parties as the Framework Agreement.

21 The priority of engagement is administered by the AO, which was established under clause 3 of the Framework Agreement. All permanently employed dockworkers in the Port of Drammen are engaged by the AO, which currently employs eight dockworkers. They are paid a fixed wage and may earn supplemental pay varying with each ship call. The dockworkers work under a rota managed by the AO. Additional personnel can be engaged when needed.

22 The AO is a non-profit-making entity and a legal person *sui generis*. It has its own board consisting of three representatives of the employers and two representatives of the employees. It is one of the board's tasks to employ the AO's dockworkers. Ships arrive 24 hours a day, and most port users rely upon AO's dockworkers to carry out unloading and loading operations.

23 Were Holship to affiliate to the Framework Agreement, it would be bound to observe the right of dockworkers employed by the AO to priority of engagement for unloading or loading operations at ship calls. The AO would decide whether it had the capacity to take on an assignment or whether Holship would be allowed to use its own employees. Holship would not be obliged to participate in the management of the AO or to provide the AO with funds. It would be required to pay for the unloading and loading assignments at the applicable rates set by the AO.

men de har ikke noe fastlønnssystem. Dette følger av Losse- og lasteoverenskomsten for Sør- og Nord-Norge, inngått mellom de samme parter som Rammeavtalen.

21 Fortrinnsretten utøves av Administrasjonskontoret, som ble opprettet i medhold av Rammeavtalen § 3. Alle faste losse- og lastearbeidere ved Drammen havn er ansatt i Administrasjonskontoret, som i dag har åtte losse- og lastearbeidere. De mottar alle fast lønn og kan få tilleggsbetaling avhengig av skipsanløp. Losse- og lastearbeiderne arbeider etter en turnus som blir satt opp ved Administrasjonskontoret. I tillegg benyttes tilkallingshjelp ved behov.

22 Administrasjonskontoret driver ikke ervervsmessig virksomhet og er en juridisk person *sui generis*. Det har eget styre med tre representanter for arbeidsgiverne og to representanter for arbeiderne. En av styrets oppgaver er å sysselsette Administrasjonskontorets losse- og lastearbeidere. Skipsanløp foregår hele døgnet, og de fleste havnebrukere benytter Administrasjonskontorets losse- og lastearbeidere til å utføre losse- og lasteoppgavene.

23 Dersom Holship skulle slutte seg til Rammeavtalen, ville selskapet bli forpliktet til å gi havnearbeidere ansatt ved Administrasjonskontoret fortrinnsrett til losse- og lastearbeid ved skipsanløp. Det ville da være Administrasjonskontoret som måtte avgjøre om det har kapasitet til å utføre oppdraget, eller om Holship ville kunne benytte egne ansatte. Holship ville ikke bli forpliktet til å delta i ledelsen av Administrasjonskontoret eller å tilføre Administrasjonskontoret kapital. Holship ville være forpliktet til å betale for losse- og lasteoppdragene etter gjeldende satser fastsatt av Administrasjonskontoret.

24 Holship has previously used the services of the AO. At the turn of the year 2012/2013, Holship acquired a new customer, which entailed an increase in the company's activities in the Port of Drammen. Until then, Holship employed one terminal worker. Now it employs five workers to handle the unloading and loading work. The parties disagree on the extent of Holship's unloading and loading activities in the Port of Drammen and on its relevance for determining whether the freedom of establishment has been restricted.

25 Following the company's increased activities in the Port of Drammen and its practice of using its own terminal workers for unloading and loading work, NTF sent a letter to Holship on 10 April 2013 demanding that Holship respect the Framework Agreement. Holship did not respond. NTF sent further letters requesting a response and eventually gave notice of a boycott in letters dated 26 April and 11 June 2013. In the latter, NTF stated that a declaration from the competent national court would be sought to determine whether the notified boycott was lawful. NTF brought a case before Drammen District Court (*Drammen tingrett*) on 12 June 2013, seeking an order declaring that the boycott notified in the letter of 11 June 2013 was lawful.

26 On 19 March 2014 Drammen District Court ruled that the notified boycott was lawful. On appeal, Borgarting Court of Appeal (*Borgarting lagmannsrett*) reached the same conclusion in a judgment of 8 September 2014.

27 Both the District Court and the Court of Appeal found that the priority of engagement provided by the Framework Agreement was exempted from EEA competition law and Norwegian competition law as it relates to conditions of work and employment. Furthermore, the Court of Appeal held that the fact that Holship was compelled to accept the terms of the Framework Agreement did not conflict with Article 31 EEA. Article 31 EEA was not at issue in the proceedings before the District Court.

24 Holship har tidligere brukt Administrasjonskontorets tjenester. Ved årsskiftet 2012/2013 fikk Holship en ny kunde, noe som medførte økt aktivitet for bedriften i Drammen havn. Holship hadde før dette én terminalarbeider, men har nå fem ansatte som tar hånd om losse- og lastearbeidet. Partene har ulikt syn på omfanget av Holships losse- og lasteaktiviteter ved Drammen havn, og på om dette har betydning for om det foreligger en restriksjon på etableringsretten.

25 På bakgrunn av Holships økte aktivitet i Drammen havn og bruk av egne terminalarbeidere til losse- og lastearbeidet, fremmet NTF i brev til Holship 10. april 2013 krav om at Holship skulle respektere Rammeavtalen. Holship besvarte ikke brevet. NTF purret gjentatte ganger på svar og varslet til sist boikott i brev 26. april og 11. juni 2013. I sistnevnte brev varslet NTF også søksmål om lovligheten av den varslede boikott. NTF tok ut stevning for Drammen tingrett 12. juni 2013, med påstand om at boikotten varslet i brev 11. juni 2013 var lovlig.

26 Drammen tingrett avsa 19. mars 2014 dom for at den varslede boikott var lovlig. Borgarting lagmannsrett kom i dom 8. september 2014 til samme resultat.

27 Både tingretten og lagmannsretten la til grunn at fortrinnsretten etter Rammeavtalen var unntatt fra EØS-avtalens konkurranseregler og norsk konkurranselovgivning siden den gjaldt arbeids- og ansettelsesvilkår. Lagmannsretten kunne videre ikke se at tariffkravet kom i konflikt med EØS-avtalen artikkel 31. EØS-avtalen artikkel 31 var ikke anført for tingretten.

28 Holship challenged the judgment of the Court of Appeal before the Supreme Court of Norway. Leave to appeal was granted by decision of 14 January 2015.

29 On 5 June 2015, the Supreme Court of Norway decided to make a request to the Court under Article 34 SCA and posed the following questions:

On competition law:

(A1) Does the exemption from the competition rules of the EEA Agreement that applies to collective agreements, as this exemption is described inter alia in the advisory opinion of the EFTA Court in Case E-8/00 Landsorganisasjonen i Norge and NKF [2002] EFTA Ct. Rep. 114, cover the use of a boycott against a port user in order to produce acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate administration office as described in paragraphs 7 and 10 to 14 [of the Request], rather than to use its own employees for the same work?

(A2) If not, should such a system be assessed under Article 53 or Article 54 of the EEA Agreement?

(A3) In that case, must the existence of an identical or corresponding system in other ports be taken into account in the assessment of whether there is a appreciable effect on cross-border trade within the EEA?

On the freedom of establishment:

(B1) Is it a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement for a trade union to use a boycott in order to produce acceptance of a collective agreement by a company whose parent company is based in another EEA State, when the collective agreement entails that the company

28 Holship anket lagmannsrettens dom inn for Norges Høyesterett. Anken ble tillatt fremmet ved beslutning 14. januar 2015.

29 Den 5. juni 2015 fremsatte Norges Høyesterett en anmodning etter ODA artikkel 34 med følgende spørsmål:

Om konkurranseretten:

A.1 Faller det innenfor unntaket fra EØS-avtalens konkurranseregler som gjelder for tariffavtaler, slik dette unntaket fremgår blant annet av EFTA-domstolens rådgivende uttalelse i sak E-8/00 [Landsorganisasjonen i Norge og NKF, Sml. 2002 s. 114], å benytte boikott overfor en havnebruker for å oppnå tilslutning til en tariffavtale, når en slik tilslutning innebærer at havnebrukeren fortrinnsvis må kjøpe losse- og lastetjenester fra et eget administrasjonskontor slik som beskrevet i avsnitt 7 og 10 til 14 [i anmodningen], fremfor å benytte egne ansatte til det samme arbeidet?

A.2 Hvis ikke, skal et slikt system bedømmes etter artikkel 53 eller artikkel 54 i EØS-avtalen?

A.3 Må man i så fall ved vurderingen av om det foreligger en merkbar påvirkning på samhandelen innen EØS ta hensyn til at samme eller tilsvarende system finnes i andre havner?

Om etableringsretten:

B.1 Utgjør det en restriksjon på etableringsretten i henhold til EØS-avtalen artikkel 31 å benytte boikott fra en fagforenings side for å oppnå tilslutning til en tariffavtale fra en bedrift hvis morselskap er hjemmehørende i en annen EØS-stat, når tariffavtalen innebærer at bedriften fortrinnsvis må kjøpe

must give preference to buying unloading and loading services from a separate administration office having the characteristics described in paragraphs 10 to 14 [of the Request], rather than use its own employees for this work?

(B2) Would it be of significance for the assessment of whether a restriction exists, if the company's need for unloading and loading services proved to be very limited and/or sporadic?

(B3) If a restriction exists: Is it of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work?

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 ANSWERS OF THE COURT

QUESTION A1

31 By its first question concerning competition law, the Supreme Court seeks to establish whether the exemption of collective agreements from EEA competition law applies to the use of a boycott against a port user in order to procure acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from an administration office in place of using its own employees for the same work.

losse- og lastetjenester fra et eget administrasjonskontor med de kjennetegn som fremgår av avsnittene 10 til 14 [i anmodningen], fremfor å benytte sine egne ansatte til dette arbeidet?

B.2 Er det av betydning for om det foreligger en restriksjon at bedriftens behov for losse- og lastetjenester eventuelt skulle vise seg å være svært begrenset og/eller sporadisk?

B.3 Dersom det foreligger en restriksjon: Er det av betydning for vurderingen av om restriksjonen er lovlig eller ikke, at bedriften for sine egne losse- og lastearbeidere anvender en annen tariffavtale fremforhandlet mellom arbeidslivets parter i den stat havnen ligger, når denne tariffavtalen gjelder et annet tariffområde enn losse- og lastearbeid?

30 Det henvises 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 nevnt eller drøftet så langt dette er nødvendig for EFTA-domstolens begrunnelse.

III EFTA-DOMSTOLENS SVAR

SPØRSMÅL A.1

31 Ved sitt første spørsmål om konkurranseretten søker Høyesterett å bringe på det rene om unntaket fra EØS-avtalens konkurranseregler som gjelder for tariffavtaler, omfatter bruk av boikott mot en havnebruker for å oppnå tilslutning til en tariffavtale, når en slik tilslutning innebærer at havnebrukeren fortrinnsvis må kjøpe losse- og lastetjenester fra et administrasjonskontor fremfor å benytte egne ansatte til det samme arbeid.

OBSERVATIONS SUBMITTED TO THE COURT

32 Holship, ESA and the Commission, mainly relying on the conditions set out in the judgment of the Court of Justice of the European Union (“ECJ”) in *Albany* (C-67/96, EU:C:1999:430) and the Court’s judgment in *LO* (Case E-8/00 *Landsorganisasjonen i Norge* [2002] EFTA Ct. Rep. 114) (“*LO*”), claim that the priority clause goes beyond the objective of improving conditions of work and employment and therefore is not exempted from the application of the EEA competition rules. ESA and the Commission argue that the notion of improving conditions of work and employment remains vague and that, in light of the *LO* judgment in particular, there are limits on how broadly it can be construed. Additionally, according to ESA, it does not suffice to consider merely whether the general objective of a collective agreement is to improve the conditions of work and employment, instead each provision must be assessed individually.

33 In relation to the case at hand, ESA and the Commission argue that the Framework Agreement imposes obligations on third parties and is detrimental to the interests of other workers, such as those employed by Holship. A general exclusion of collective agreements from competition rules carries a risk that trade associations will be able to circumvent those rules with provisions that restrict competition without having to establish a social policy justification for such restrictions.

34 NTF and the Norwegian Government accept that provisions of a collective agreement that do not improve conditions of work and employment may come within the scope of the EEA competition rules. However, they argue that, according to the case law of the Court, the concept of conditions of work and employment must be interpreted broadly and include various matters related to improving the situation of workers (reference is made to *LO*, cited above, paragraph 53).

INNLEGG INNGITT TIL EFTA-DOMSTOLEN

32 Ifølge Holship, ESA og Kommisjonen, som i det vesentligste støtter seg på vilkårene fastsatt av Den europeiske unions domstol ("EU-domstolen") i *Albany* (C-67/96, EU:C:1999:430) og EFTA-domstolens dom i *LO* (sak E-8/00 *Landsorganisasjonen i Norge*, Sml. 2002 s. 114) ("*LO*"), går fortrinnsrettsbestemmelsen lengre enn målet om å bedre arbeids- og ansettelsesvilkårene og er følgelig ikke unntatt fra anvendelsen av EØS-avtalens konkurranseregler. ESA og Kommisjonen anfører at begrepet forbedre arbeids- og ansettelsesvilkår er vagt, og at det spesielt i lys av *LO*-dommen er grenser for hvor bredt det kan forstås. Dessuten er det ifølge ESA ikke nok bare å vurdere om en tariffavtales generelle mål er å forbedre arbeids- og ansettelsesvilkår; hver bestemmelse må vurderes enkeltvis.

33 I den foreliggende sak anfører ESA og Kommisjonen at Rammeavtalen pålegger tredjemann forpliktelser og er til ulempe for andre arbeidstakere, for eksempel de som er ansatt hos Holship. Å utelukke tariffavtaler generelt fra konkurransereglene innebærer risiko for at bransjeorganisasjonene vil kunne omgå reglene ved å avtale bestemmelser som begrenser konkurransen, uten at de trenger å begrunne begrensningen i sosialpolitiske hensyn.

34 NTF og Norges regjering aksepterer at bestemmelser i en tariffavtale som ikke forbedrer arbeids- og ansettelsesvilkår, kan komme inn under virkeområdet for EØS-avtalens konkurranseregler. De gjør imidlertid gjeldende at etter EFTAdomstolens rettspraksis må begrepet arbeids- og ansettelsesvilkår fortolkes vidt og omfatte ulike forhold som bedrer situasjonen for arbeidstakerne (det vises til *LO*, som omtalt over (avsnitt 53)).

35 NTF concludes that the priority clause pursues social policy objectives and contributes to securing and improving conditions of work and employment for dockworkers. Therefore, the clause is not subject to the EEA competition rules.

36 On the question whether the provisions of the Framework Agreement fall outside the EEA competition rules, the Norwegian Government argues that it is for the Supreme Court to examine the purpose of the priority clause and to decide whether it pursues social objectives by improving work and employment conditions for dockworkers. In this regard, the Norwegian Government refers to the Supreme Court's judgment of 5 March 1997 in *Sola Havn* and notes that the Framework Agreement is regarded as part of the fulfilment of Norway's obligations under the ILO Convention and that its objective is to give dockworkers security of employment and pay by setting up dock work offices providing dockworkers with terms of permanent employment and minimum rates of pay, both of which are implemented by granting dockworkers priority of engagement.

FINDINGS OF THE COURT

37 The Court finds it appropriate at this stage to recall that the procedure provided for in Article 34 SCA is an instrument of cooperation between the Court and the national courts. It is the function of the Court to provide the national court with guidelines for the interpretation of EEA law that are required for the decision of the matter before it. It is for the national court to examine and evaluate evidence and to make factual findings, and then apply EEA law to the facts of the case (see *LO*, cited above, paragraph 48).

38 The law governing the creation, application and interpretation of agreements concluded in the process of collective bargaining between management and labour has not been the subject of

35 NTF konkluderer med at fortrinnsrettsbestemmelsen fremmer sosialpolitiske mål og bidrar til å sikre og forbedre arbeids- og ansettelsesvilkår for havnearbeidere. Følgelig er denne bestemmelse ikke omfattet av EØS-avtalens konkurranseregler.

36 Når det gjelder spørsmålet om bestemmelsene i Rammeavtalen faller utenfor EØSavtalens konkurranseregler, anfører Norges regjering at det er Høyesterett som må vurdere formålet for fortrinnsrettsbestemmelsen og om den fremmer sosiale mål ved å bedre arbeids- og ansettelsesvilkårene for havnearbeidere. Her viser Norges regjering til Høyesteretts dom 5. mars 1997 i *Sola Havn*. Det anføres at Rammeavtalen anses som ledd i oppfyllelsen av Norges forpliktelser etter ILOkonvensjonen, og at dens formål er å gi havnearbeidere sikker sysselsetting og lønn ved å etablere losse- og lastekontorer som gir havnearbeiderne fast ansettelse og minstelønn. Begge disse formål vil fremmes ved å gi havnearbeidere fortrinnsrett ved tildeling.

RETTENS BEMERKNINGER

37 EFTA-domstolen minner om at fremgangsmåten fastsatt i ODA artikkel 34 skal være et middel for samarbeid mellom EFTA-domstolen og de nasjonale domstoler. Det er EFTA-domstolens oppgave å gi den nasjonale domstol veiledning om tolkningen av de EØS-bestemmelser som er relevante for dens avgjørelse av den verserende sak. Det er den nasjonale domstols oppgave å bedømme bevisene i saken og avgjøre de faktiske omstendigheter som skal legges til grunn, og så anvende EØS-retten på sakens faktum (se *LO*, som omtalt over (avsnitt 48)).

38 Lovgivningen om inngåelse, anvendelse og fortolkning av avtaler inngått innenfor rammen av kollektive forhandlinger mellom partene i arbeidslivet har ikke vært gjenstand for harmonisering i

harmonisation within the EEA. However, both national law and collective agreements must comply with EEA law.

39 Fundamental differences distinguish the labour market from the markets for goods, services and capital. Industrial societies have recognised the need to establish a balance between employers and workers by enacting labour laws that authorise unions of workers to conclude collective agreements with employers or associations of employers.

40 It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if such agreements were prohibited because of their inherent effects on competition (see *LO*, cited above, paragraphs 36 to 44, and case law cited; and for comparison, the ECJ in *Albany*, cited above, paragraph 59; and the Opinion of Advocate General Poiares Maduro in *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti* ("*Viking Line*"), C438/05, EU:C:2007:292, point 27).

41 Yet, to exclude all collective agreements from the reach of competition law would go too far. It would create a legal environment where collective agreements containing provisions restricting competition could be concluded, without there being any judicial review of such restrictions.

42 According to established case law, the following conditions must each be satisfied for a collective agreement to fall outside the scope of competition law: the agreement must have been entered into following collective bargaining between employers and employees, and it must pursue the objective of improving conditions of work and employment (see *LO*, cited above, paragraphs 49 and 50).

EØS. Imidlertid må både nasjonal lovgivning og tariffavtaler være forenlige med EØS-retten.

39 Arbeidsmarkedet er fundamentalt forskjellig fra vare-, tjeneste- og kapitalmarkedet. Industrisamfunnene har erkjent at det er nødvendig å sikre balanse mellom arbeidsgiver og arbeidstakere og har derfor vedtatt arbeidsrettslig lovgivning som tillater sammenslutninger av arbeidere å inngå tariffavtaler med arbeidsgivere eller arbeidsgiverorganisasjoner.

40 Det er utvilsomt at tariffavtaler mellom arbeidsgiver- og arbeidstakerorganisasjoner har visse innebygde konkurransebegrensende egenskaper. Imidlertid ville de sosialpolitiske mål slike avtaler fremmer, bli alvorlig undergravd dersom slike avtaler ble forbudt på grunn av deres innebygde virkning på konkurransen (se *LO*, som omtalt over (avsnitt 36 til 44),og den rettspraksis som det vises til der, samt for sammenligning EU-domstolen i *Albany*, som omtalt over (avsnitt 59) og uttalelsen fra generaladvokat Poiares Maduro i *International Transport Workers' Federation og Finnish Seamen's Union* mot *Viking Line ABP og OÜ Viking Line Eesti* ("*Viking Line*"), C438/05, EU:C:2007:292 (avsnitt 27)).

41 Det ville likevel gå for langt om alle tariffavtaler skulle skjermes fra konkurranselovgivningens virkeområde. Det ville skapt en rettstilstand der tariffavtaler med bestemmelser som begrenser konkurransen kunne inngås, uten at det finnes noen rettslig overprøving av slike begrensninger.

42 Etter fast rettspraksis må følgende vilkår være oppfylt for at en tariffavtale skal falle utenfor konkurransereglenes virkeområde: Avtalen må være inngått etter kollektive forhandlinger mellom arbeidsgivere og arbeidstakere, og den må forfølge målet om å forbedre arbeids- og ansettelsesvilkår (se *LO*, som omtalt over (avsnitt 49 og 50)).

43 The first requirement, that the agreement must have been entered into after collective bargaining between employers and employees, is fulfilled in the present case.

44 With regard to the second requirement, the Court notes that the term "conditions of work and employment" must be interpreted broadly (see *LO*, cited above, paragraph 53 and case law cited). It relates to core elements of collective agreements, such as wages, working hours and other working conditions. Further elements may concern, *inter alia*, safety, the workplace environment, holidays, training and continuing education, and consultation and co-determination between workers and management.

45 In determining whether the second requirement is fulfilled, account must be taken of the form and content of the agreement and of its various provisions, and of the circumstances under which they were negotiated. The subsequent practice of the parties to the agreement may be of importance, as may be the effect, in practice, of its provisions. It is not sufficient that the broad objective of a collective agreement is recognised as seeking to improve conditions of work and employment, as individual provisions may be directed towards other purposes (see *LO*, cited above, paragraph 51).

46 When examining the collective agreement's provisions, their aggregate effect must be considered. Even if individually the provisions would not lead to any certain resolution of the status of the collective agreement in relation to the applicability of Articles 53 and 54 EEA, their aggregate effect may bring the agreement within the scope of those Articles (see *LO*, cited above, paragraph 57).

47 Clause 3 of the Framework Agreement provides for the establishment of the AO in the Port of Drammen, and clause 2(1) is the priority clause for dockworkers employed by the AO.

48 It follows from the request that the aggregate effect of the two clauses is that port users bound by the Framework Agreement must

43 Det første krav, at avtalen må være inngått etter kollektive forhandlinger mellom arbeidsgivere og arbeidstakere, er oppfylt i den foreliggende sak.

44 Når det gjelder det andre vilkår, legger EFTA-domstolen til grunn at begrepet arbeids- og ansettelsesvilkår må fortolkes vidt (se *LO*, som omtalt over (avsnitt 53), og den rettspraksis som det vises til der). Dette vilkår er knyttet til sentrale elementer i tariffavtaler, så som lønn, arbeidstid og andre arbeidsvilkår. Ytterligere elementer kan blant annet gjelde sikkerhet, arbeidsmiljø, ferie, opplæring og etter- og videreutdanning samt medvirkning og medbestemmelse mellom partene i arbeidslivet.

45 Ved vurderingen av om det andre krav er oppfylt, må det tas hensyn til avtalen og dens ulike bestemmelsers form og innhold, samt under hvilke omstendigheter de ble forhandlet. Avtalepartenes etterfølgende atferd kan være av betydning. Det samme gjelder virkningen av avtalens bestemmelser i praksis. En erkjennelse av at en tariffavtale har som generelt mål å søke å forbedre arbeids- og ansettelsesforhold, er ikke tilstrekkelig, for enkelte bestemmelser kan ha andre formål (se *LO*, som omtalt over (avsnitt 51)).

46 Ved vurderingen av tariffavtalens bestemmelser må det tas hensyn til deres samlede virkning. Selv om bestemmelsene hver for seg ikke ville føre til noen sikker konklusjon om tariffavtalens forhold til EØS-avtalen artiklene 53 og 54, kan deres samlede virkning bli at avtalen omfattes av disse artikler (se *LO*, som omtalt over (avsnitt 57)).

47 Administrasjonskontoret i Drammen er opprettet ved Rammeavtalen § 3, og fortrinnsrett ved tildeling for havnearbeidere ansatt ved Administrasjonskontoret er fastsatt i § 2.1.

48 Det følger av anmodningen at den samlede virkning av disse to bestemmelser er at havnebrukere som er bundet av Rammeavtalen,

engage dockworkers employed by the AO to unload or load cargo from or to their ships, unless the AO has decided that it has insufficient capacity to take on an assignment. Consequently, these provisions appear to benefit workers employed by the AO, in the sense that they guarantee the employees of the AO permanent employment and a certain wage.

49 It follows further from the request that the boycott seeks to protect the effect of this system, by compelling Holship to observe the terms of the Framework Agreement. As a rule, a trade union's industrial action is initiated to promote only the interests of its members. The Framework Agreement established the AO in the Port of Drammen. NTF is a party to that agreement. It follows from the request that NTF participates in the management of the AO. It is in NTF's and the AO's common interest to preserve the market position of the AO. This combination of a business objective with NTF's core tasks as a trade union becomes possible when a trade union engages in the management of an undertaking, such as it turns out in the present case. In this situation, NTF acts in support of the AO. The boycott must therefore also be attributed to the AO, although it was NTF, which notified the boycott.

50 The effects of the priority clause and the creation of the AO appear therefore not to be limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition (see *LO*, cited above, paragraph 55).

51 Moreover, the Court notes that the AO system in the present case protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation. They are barred from performing

må benytte havnearbeidere ansatt ved Administrasjonskontoret til å losse eller laste gods fra eller til deres skip, med mindre Administrasjonskontoret finner ikke å ha kapasitet til å påta seg et oppdrag. Det ser da ut til at disse bestemmelser begunstiger arbeidere ansatt ved Administrasjonskontoret, ved at de sikrer de ansatte ved Administrasjonskontoret fast ansettelse og en viss lønn.

49 Det følger videre av anmodningen at boikotten søker å ivareta denne virkning av systemet ved å tvinge Holship til å overholde vilkårene i Rammeavtalen. Som regel benytter en fagforening arbeidskamp bare for å fremme sine medlemmers interesser. Ved Rammeavtalen ble Administrasjonskontoret opprettet ved Drammen havn. NTF er part i denne avtale. Det følger av anmodningen at NTF deltar i ledelsen av Administrasjonskontoret. Det er i NTFs og Administrasjonskontorets felles interesse å bevare Administrasjonskontorets markedsposisjon. Denne kombinasjon av forretningsmessig mål og NTFs kjerneoppgave som fagforening blir mulig når en fagforening deltar i ledelsen av et foretak, slik som det viser seg i dette tilfelle. I denne situasjon opptrer NTF som støtte for Administrasjonskontoret. Boikotten må derfor også tilordnes Administrasjonskontoret, selv om det var NTF som varslet boikotten.

50 Virkningen av bestemmelsene om fortrinnsrett og opprettelsen av Administrasjonskontoret synes derfor ikke begrenset til å fastsette eller å forbedre arbeidsvilkår for arbeidstakere ved Administrasjonskontoret, og går lenger enn kollektive forhandlingers hovedformål og kjerneelementer og deres innebygde virkning på konkurransen (se *LO*, som omtalt over (avsnitt 55)).

51 EFTA-domstolen legger videre til grunn at systemet med administrasjonskontorer i denne sak bare beskytter en begrenset gruppe arbeidstakere, på bekostning av andre arbeidstakere, uavhengig av de andre arbeidstakeres beskyttelsesnivå. Spesielt vil en boikott, som den saken gjelder, påvirke deres situasjon negativt.

the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement.

52 Consequently, the collective agreement in the present case appears to differ from those at issue in the *Albany* line of case law and, for the reasons set out above, cannot generally be exempted from the scope of the EEA competition rules.

53 Therefore, the answer to Question A1 must be that the exemption from the EEA competition rules applicable to collective agreements does not cover the assessment of a priority of engagement rule, such as the one at issue, or the use of a boycott against a port user in order to procure acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate company, such as the AO, in place of using its own employees for the same work.

QUESTIONS A2 AND A3

54 By its second question concerning competition law, the referring court essentially asks whether the system under consideration should be assessed under Article 53 or 54 EEA. By its third question concerning competition law, it asks further whether the existence of an identical or corresponding system in other ports must be taken into account in the assessment of whether there is an appreciable effect on cross-border trade within the EEA. These questions will be assessed together.

OBSERVATIONS SUBMITTED TO THE COURT

55 Holship contends that the exclusive right to carry out an economic activity conferred upon the AO and the workers employed there is

De hindres i å utføre losse- og lastetjenester og kan til og med miste sitt arbeid dersom deres arbeidsgiver slutter seg til Rammeavtalen.

52 Følgelig synes tariffavtalen i den foreliggende sak å skille seg fra avtalene som rettspraksis etter *Albany* gjelder, og kan av grunnene som er omtalt foran, ikke unntas fra virkeområdet for EØS-avtalens konkurranseregler.

53 Derfor må svaret på det første spørsmål om konkurranseretten bli at unntaket fra EØS-avtalens konkurranseregler som gjelder for tariffavtaler, ikke omfatter vurderingen av en regel om fortrinnsrett ved tildeling, som den denne sak gjelder, eller en boikott mot en havnebruker for å oppnå tilslutning til en tariffavtale, når tilslutningen innebærer at havnebrukeren fortrinnsvis må kjøpe losse- og lastetjenester fra et eget foretak, som Administrasjonskontoret, fremfor å benytte sine egne ansatte til det samme arbeid.

SPØRSMÅL A.2 OG A.3

54 Ved sitt andre spørsmål om konkurranseretten søker den anmodende domstol i hovedsak å avklare om systemet saken gjelder, skal bedømmes etter EØS-avtalen artikkel 53 eller artikkel 54. Det tredje spørsmål om konkurranseretten gjelder om det ved vurderingen av om det foreligger en merkbar påvirkning av samhandelen innen EØS, må tas hensyn til at et likt eller tilsvarende system finnes i andre havner. Disse spørsmål vil bli vurdert samlet.

INNLEGG INNGITT TIL EFTA-DOMSTOLEN

55 Holship gjør gjeldende at eneretten til å drive økonomisk virksomhet gitt til Administrasjonskontoret og arbeidstakerne som er ansatt der,

contrary to Article 53 EEA, as this goes beyond the aim of improving working and employment conditions.

56 Furthermore, Holship claims that the imposition of a duty to hire personnel regardless of actual need constitutes an abuse of a dominant position contrary to Article 54 EEA, in the sense that payment is demanded for services that have not been requested and are not required.

57 ESA argues in relation to Article 53 EEA that NTF does not constitute an undertaking within the meaning of the EEA competition rules. Furthermore, although the AO is an undertaking, it is not a party to the Framework Agreement and therefore not a party to an agreement for the purposes of Article 53 EEA. Hence, for there to be a breach, there would have to be another party to the Framework Agreement constituting an undertaking within the meaning of the provision. Alternatively, ESA suggests that the referring court could examine whether the decision by NHO and the Norwegian Logistics and Freight Association to conclude the Framework Agreement falls within the scope of Article 53 EEA as a decision by an association of undertakings. Should the Framework Agreement fall under Article 53 EEA, ESA contends that, in any event, a breach is unlikely given that there is no explicit basis in the Framework Agreement for boycotting third parties and that the employee side alone initiated the boycott in question.

58 In relation to Article 54 EEA, ESA submits that it is for the Supreme Court to determine whether the AO as an undertaking holds a dominant position on the relevant market, which – in ESA's view – is the provision of stevedoring services in Drammen. In this respect, ESA refers to the ECJ's judgment in *Merci* (C-179/90, EU:C:1991:464), which held that even a market limited to a single port can constitute a substantial part of the internal market. ESA also cites the ECJ's judgment in *Crespelle* (C-323/93, EU:C:1994:368), which held that there may be an EU interest in a situation that involves a network of

er i strid med EØSavtalen artikkel 53, da dette går lenger enn målet om å bedre arbeids- og ansettelsesvilkår.

56 Holship hevder videre at pålegget om å leie inn personell uavhengig av faktisk behov utgjør utilbørlig utnyttelse av dominerende stilling i strid med EØS-avtalen artikkel 54, ved at det kreves betaling for tjenester som ikke er bestilt og som ikke trengs.

57 ESA anfører at etter EØS-avtalen artikkel 53 utgjør ikke NTF et foretak etter EØSavtalens konkurranseregler. Videre, selv om Administrasjonskontoret er et foretak, er det ikke part i Rammeavtalen og følgelig ikke en avtalepart etter EØS-avtalen artikkel 53. Følgelig måtte det, for at det skal foreligge brudd, være en annen part i Rammeavtalen som utgjorde et foretak etter denne bestemmelse. Alternativt foreslår ESA at den anmodende domstol kan undersøke om NHO og NHO Logistikk og Transports beslutning om å inngå Rammeavtalen faller inn under virkeområdet for EØS-avtalen artikkel 53 som en beslutning truffet av en sammenslutning av foretak. Dersom Rammeavtalen omfattes av EØS-avtalen artikkel 53, anfører ESA at det uansett er lite sannsynlig at det foreligger brudd på denne artikkel siden det ikke finnes noen uttrykkelig hjemmel i Rammeavtalen for å boikotte tredjemann, og at det var arbeidstakersiden alene som tok initiativ til boikotten.

58 Når det gjelder EØS-avtalen artikkel 54, anfører ESA at det tilkommer Høyesterett å vurdere om Administrasjonskontoret som foretak har en dominerende stilling på det relevante marked, som – slik ESA ser det – er markedet for losse- og lastetjenester i Drammen. I denne sammenheng viser ESA til EU-domstolens dom i *Merci* (C-179/90, EU:C:1991:464), der det ble lagt til grunn at selv et marked som er begrenset til en enkelt havn, kan utgjøre en vesentlig del av det indre marked. ESA siterer også fra EU-domstolens dom i *Crespelle* (C-323/93, EU:C:1994:368), som la til grunn at en situasjon

undertakings enjoying dominance in markets, which together may constitute a substantial part of the territory covered by the internal market. ESA submits that, by analogy, it must amount to an abuse for an undertaking in a dominant position to initiate or employ a boycott against a purchaser in order to compel the purchaser to accept a priority clause. Reference is made to the ECJ's judgment in *Hoffmann-La Roche* (102/77, EU:C:1978:108). Therefore, the referring court should consider whether the AO initiated the boycott or was involved in its preparation.

59 Finally, ESA considers there to be sufficient evidence to conclude that the priority clause may affect trade between EEA States, not least because of the fact that it covers the 13 largest ports in Norway and applies to all ships of 50 tonnes dwt and more sailing between one of those ports and a port in another EEA State.

60 The Commission notes that Articles 53 and 54 EEA apply only to undertakings. Neither the dockworkers themselves nor NTF qualify as an undertaking. However, in the Commission's view, the AO constitutes an undertaking.

61 With regard to the cartel prohibition laid down in Article 53 EEA, the Commission contends that it must be examined whether the AOs in various Norwegian ports are actual or potential competitors. In the Commission's view, this cannot be the case as it would generate disproportionate additional costs for an AO established in one port to provide registered dockworkers to ship calls in another port. Thus, for the assessment of the priority clause, the relevant geographic market is local.

der et nettverk av foretak som dominerer markeder som samlet sett utgjør en vesentlig del av det territorium som utgjør det indre marked, kan være relevant etter EØS-avtalen. ESA anfører at det da også må være utilbørlig utnyttelse dersom et foretak som har en dominerende stilling, tar initiativ til eller benytter boikott mot en kjøper med sikte på å tvinge vedkommende til å akseptere en fortrinnsrettsbestemmelse. Det vises til EUdomstolens dom i *Hoffmann-La Roche* (102/77, EU:C:1978:108). Følgelig bør den anmodende domstol vurdere om Administrasjonskontoret tok initiativet til boikotten eller var involvert i forberedelsen av boikotten.

59 Endelig er ESA av den oppfatning at det er tilstrekkelig grunnlag for å konkludere med at fortrinnsrettsbestemmelsen kan påvirke samhandelen mellom EØS-statene, ikke minst fordi den omfatter de 13 største havnene i Norge og gjelder alle skip på 50 tonn dw. og mer som seiler mellom en av disse havner og en havn i en annen EØS-stat.

60 Kommisjonen anfører at EØS-avtalen artiklene 53 og 54 bare får anvendelse på foretak. Verken havnearbeiderne eller NTF kvalifiserer som et foretak. Etter Kommisjonens oppfatning utgjør imidlertid Administrasjonskontoret et foretak.

61 Når det gjelder forbudet mot kartellvirksomhet fastsatt i EØS-avtalen artikkel 53, anfører Kommisjonen at det må vurderes om administrasjonskontorene i ulike norske havner faktisk eller potensielt er konkurrenter. Slik Kommisjonen ser det, kan dette ikke være tilfelle siden det ville medføre uforholdsmessig store kostnader for et administrasjonskontor etablert i én havn å besørge registrerte havnearbeidere til skipsanløp i en annen havn. For vurderingen av fortrinnsrettsbestemmelsen vil det relevante geografiske marked derfor være lokalt.

62 As regards Article 54 EEA, the Commission argues that it is unnecessary to determine whether the Port of Drammen is in itself a substantial part of the territory covered by the EEA Agreement. This is because the priority clause that applies in all major ports in Norway should be considered cumulatively to cover a substantial part of the internal market. The Commission considers the conduct of the AO to constitute an abuse in that it seeks to force a customer to take its services although the customer does not want or need them. Moreover, the behaviour of the AO cannot be justified and, in any case, goes beyond what is necessary to protect the rights of employees.

63 Like ESA, the Commission submits that, even if the Port of Drammen is considered too small to be of importance for trade between EEA States, the cumulative impact of the priority clause applying in all major ports in Norway in accordance with the Framework Agreement still leads to the conclusion that trade between EEA States may be affected.

64 NTF, with reference to the judgments in *Albany* (cited above) and *Becu and Others* (C-22/98, EU:C:1999:419), argues that neither itself, nor the employers represented by NHO, can be regarded as undertakings. Therefore, the present case does not give rise to an agreement between undertakings for the purposes of Article 53 EEA. Furthermore, NTF claims that, whether or not the AO can be regarded as an undertaking, it cannot be held that any form of concerted practice exists.

65 With respect to Article 54 EEA, NTF contends that the AO cannot be regarded as an undertaking. In the view of NTF, the AO is rather to be regarded as an administrative body for what is characterised as a “pool agreement”. The priority clause has been granted to the individual dockworkers and not to the AO. NTF claims that although the workers are formally employed with the AO, they are subject to

62 Når det gjelder EØS-avtalen artikkel 54, gjør Kommisjonen gjeldende at det ikke er nødvendig å vurdere om Drammen havn som sådan utgjør en vesentlig del av det territorium som er omfattet av EØS-avtalen. Dette er fordi fortrinnsrettsbestemmelsen, som gjelder i alle større havner i Norge, bør anses til sammen å dekke en vesentlig del av det indre marked. Kommisjonen mener at Administrasjonskontorets opptreden er utilbørlig utnyttelse ved at det søker å tvinge en kunde til å leie dets tjenester selv om kunden ikke ønsker det og ikke trenger disse tjenester. Dessuten er det ikke mulig å rettferdiggjøre Administrasjonskontorets atferd, som uansett går lenger enn det som er nødvendig for å beskytte arbeidstakernes rettigheter.

63 I likhet med ESA anfører Kommisjonen at selv om Drammen havn vurderes som for liten til å være av betydning for samhandelen mellom EØS-statene, fører den sammenlagte virkning av fortrinnsrettsreglene i alle større havner i Norge på grunn av Rammeavtalen fortsatt til den konklusjon at samhandelen mellom EØS-statene kan påvirkes.

64 NTF viser til dommene i *Albany* (som omtalt over) og *Becu m.fl.* (C-22/98, EU:C:1999:419) og gjør gjeldende at verken NTF eller arbeidsgiverne representert ved NHO kan betraktes som foretak. I den foreliggende sak er det dermed ikke inngått noen avtale mellom foretak etter EØS-avtalen artikkel 53. Videre gjør NTF gjeldende at uansett om Administrasjonskontoret kan betraktes som et foretak, kan det ikke hevdes at det foreligger noen form for samordnet opptreden.

65 Når det gjelder EØS-avtalen artikkel 54, gjør NTF gjeldende at Administrasjonskontoret ikke kan betraktes som et foretak. Slik NTF ser det, må Administrasjonskontoret snarere betraktes som et administrasjonsorgan for det som betegnes som en "pool-ordning". Fortrinnsretten er gitt den enkelte havnearbeider, ikke Administrasjonskontoret. NTF hevder at selv om havnearbeiderne

the port user's instructions in the same way as if they were employed by the user. Finally, NTF argues that the AO cannot be described as abusing a dominant position since its activity is the hiring out of dockworkers and not the provision of dock work services. Therefore, the AO does not, in the view of NTF, offer unloading and loading services in the Port of Drammen and consequently does not operate on the market for unloading and loading services. Furthermore, NTF observes that the collective agreement system in Norwegian ports does not establish a monopoly, but only a priority clause, which means that the labour capacity is not restricted, as port users are free to use other labour where demand cannot be met by the AO.

66 NTF adds that the third question concerning competition law must be answered in the affirmative, provided that the other conditions are met.

FINDINGS OF THE COURT

Notion of an undertaking

67 The application of Articles 53 and 54 EEA requires that the actors involved are undertakings.

68 Under the 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, and *LO*, cited above, paragraph 62).

69 Any activity consisting of offering goods or services in a given market is an "economic activity" (see, in particular, Joined Cases E-4/10, E-6/10 and E-7/10 *REASSUR and Swisscom* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 54).

formelt er ansatt ved Administrasjonskontoret, er de underlagt havnebrukernes instrukser på samme måte som om de hadde vært ansatt hos brukeren. Endelig gjør NTF gjeldende at Administrasjonskontoret ikke kan anses å utnytte en dominerende stilling siden dets virksomhet er å leie ut havnearbeidere, ikke å yte losse- og lastetjenester. Derfor tilbyr ikke Administrasjonskontoret etter NTFs oppfatning losse- og lastetjenester i Drammen havn, og det opererer følgelig ikke på markedet for losse- og lastetjenester. Videre anfører NTF at tariffavtalesystemet i norske havner ikke etablerer noe monopol, bare en fortrinnsrett, som innebærer at det ikke er restriksjoner på arbeidskraften, siden havnebrukerne fritt kan benytte annen arbeidskraft dersom Administrasjonskontoret ikke kan dekke etterspørselen.

66 NTF legger til at det tredje spørsmål om konkurranseretten må besvares med et ja, forutsatt at de øvrige vilkår er oppfylt.

RETTENS BEMERKNINGER

Begrepet foretak

67 Anvendelsen av EØS-avtalen artiklene 53 og 54 forutsetter at de involverte aktører er foretak.

68 Etter EØS-avtalens konkurranseregler omfatter begrepet foretak enhver enhet som driver økonomisk virksomhet, uansett rettslig status og hvordan den finansieres (se artikkel 1 i protokoll 22 til EØS-avtalen og *LO*, som omtalt over (avsnitt 62)).

69 Enhver virksomhet som består i å tilby varer eller tjenester på et gitt marked, er en økonomisk virksomhet (se spesielt forente saker E-4/10, E-6/10 og E-7/10 *REASSUR og Swisscom* mot *ESA*, Sml. 2011 s. 16 (avsnitt 54)).

70 In the present case, the relevant activity under consideration is the offering and performance of stevedore work by the AO, a legal person *sui generis*. The referring court must assess, in light of the system established under the Framework Agreement, whether this activity is attributable to the AO.

71 The stevedore services offered and provided by the AO are an economic activity as this involves offering a service on a market. The customers in this market are all undertakings requiring stevedore work at the Port of Drammen, whether or not they are bound by the Framework Agreement. The AO competes with other actual or potential market players who offer such stevedore services. Furthermore, the fact that the AO is organised as a non-profit entity is of no relevance in the assessment whether the AO is to be considered an undertaking (compare the ECJ in *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraphs 19 to 22).

72 Accordingly, an entity such as the AO will constitute an undertaking within the meaning of Articles 53 and 54 EEA provided that the conditions which the Court has set out above are fulfilled. It is for the referring court to assess whether that is the case in the present proceedings.

73 For the sake of order, the Court recalls that a trade union is normally not considered an undertaking when it acts as an agent of its members and is solely an executive organ of an agreement between its members (compare the ECJ in *Becu and Others*, cited above, paragraph 28). However, a trade union will be considered an undertaking with respect to activities where it is acting in its own right, independent to a certain extent of the will of its members, and not merely operating as an executive organ of an agreement between its members (compare the Opinion of Advocate General Jacobs in *Albany*, C-67/96, EU:C:1999:28, points 222 and 224). With regard to trade union activities a two-stage approach is therefore necessary. It must be asked, first, whether a certain activity is attributable to the

70 *I den foreliggende sak er den aktuelle virksomhet tilbud om og utførelse av losse- og lastearbeid ved Administrasjonskontoret, en juridisk person sui generis. Den anmodende domstol må vurdere, i lys av systemet som etableres ved Rammeavtalen, om denne virksomhet må tilordnes Administrasjonskontoret.*

71 *Losse- og lastetjenestene som Administrasjonskontoret tilbyr og yter, utgjør en økonomisk virksomhet, da dette innebærer å tilby en tjeneste på et marked. Kundene på dette marked er alle foretak som trenger losse- og lastetjenester i Drammen havn, enten de er bundet av Rammeavtalen eller ikke. Administrasjonskontoret konkurrerer med faktiske eller potensielle markedsaktører som tilbyr slike losse- og lastetjenester. Videre er det forhold at Administrasjonskontoret er organisert uten et økonomisk formål, ikke relevant for vurderingen av om det skal betraktes som et foretak (jf. EU-domstolen i Ambulanz Glöckner, C-475/99, EU:C:2001:577 (avsnitt 19–22)).*

72 Følgelig vil en enhet som Administrasjonskontoret utgjøre et foretak etter EØSavtalen artiklene 53 og 54, forutsatt at vilkårene EFTA-domstolen har fastsatt over, er oppfylt. Det tilkommer den anmodende domstol å vurdere om dette er tilfelle i den foreliggende sak.

73 For ordens skyld minner EFTA-domstolen om at en fagforening vanligvis ikke betraktes som et foretak når den opptrer som representant for sine medlemmer og utelukkende er et utøvende organ for en avtale mellom dens medlemmer (jf. EUdomstolen i *Becu m.fl.*, som omtalt over (avsnitt 28)). Imidlertid vil en fagforening betraktes som et foretak når det gjelder virksomhet der den opptrer på egne vegne, til en viss grad uavhengig av medlemmenes vilje, og ikke bare tjener som et utøvende organ for en avtale mellom medlemmene (jf. uttalelse fra generaladvokat Jacobs i *Albany*, C-67/96, EU:C:1999:28 (avsnitt 222 og 224)). Når det gjelder fagforeningsvirksomhet, må man derfor ha en totrinnstilnærming. Man må først spørre om en viss virksomhet må tilskrives

trade union itself and, if so, second, whether that activity is of an economic nature.

Effect on trade between EEA States

74 Article 53 EEA prohibits certain agreements between undertakings "which may affect trade between Contracting Parties". Similarly, Article 54 EEA prohibits the abuse by an undertaking of a dominant position "in so far as it may affect trade between Contracting Parties". The concept of an agreement or an abuse of a dominant position which "may affect trade between Contracting Parties" is intended to define the boundary between the areas covered respectively by EEA law and national law. It is only to the extent to which the agreement or the abuse may affect trade between EEA States that the deterioration in competition it causes falls under the prohibition laid down in Articles 53 or Article 54 EEA (compare the ECJ in *Consten and Grundig* v *Commission*, Joined Cases 56/64 and 58/64 EU:C:1966:41).

75 It is sufficient for the purposes of Articles 53 and 54 EEA that trade between EEA States "may" be affected. For this condition to be fulfilled, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that the practices under consideration may have an influence, direct or indirect, actual or potential, on the pattern of trade between EEA States (compare the ECJ in *Ambulanz Glöckner*, cited above, paragraphs 48 and 49).

76 Moreover, Articles 53 and 54 EEA apply only to agreements and abuses of a dominant position whose effect on trade between EEA States may be appreciable. In that assessment, account must be taken of the position and the importance of the parties on the market for the goods or the services concerned. However, an agreement or an

fagforeningen som sådan, og hvis dette er tilfelle, dernest, om denne virksomhet er av økonomisk art.

Virkning på samhandelen mellom EØS-statene

74 EØS-avtalen artikkel 53 forbyr visse avtaler mellom foretak "som kan påvirke handelen mellom avtalepartene". EØS-avtalen artikkel 54 setter også forbud mot at et foretak kan utnytte en dominerende stilling "dersom denne utilbørlige utnyttelse kan påvirke handelen mellom avtalepartene". Hensikten med begrepet avtale eller utilbørlig utnyttelse av dominerende stilling som "kan påvirke handelen mellom avtalepartene" er å trekke grensen mellom de områder som omfattes av EØS-retten, og de områder som omfattes av nasjonal rett. Det er bare i den utstrekning avtalen eller den utilbørlige utnyttelse kan påvirke handelen mellom EØS-statene at den svekkede konkurranse dette fører til, faller inn under forbudet fastsatt i EØS-avtalen artikkel 53 eller 54 (jf. EU-domstolen i *Consten og Grundig* mot *Kommisjonen*, forente saker 56/64 og 58/64, EU:C:1966:41).

75 Etter EØS-avtalen artiklene 53 og 54 er det tilstrekkelig at handelen mellom EØSstatene "kan" bli påvirket. For at dette vilkår skal være oppfylt, må det være mulig å forutse med en tilstrekkelig høy grad av sannsynlighet, på grunnlag av et sett objektive faktorer av rettslig eller faktisk art, at praksisen saken gjelder, kan ha en direkte eller indirekte, faktisk eller potensiell virkning på mønsteret for samhandelen mellom EØS-statene (jf. EU-domstolen i *Ambulanz Glöckner*, som omtalt over (avsnitt 48 og 49)).

76 Videre kommer EØS-avtalen artiklene 53 og 54 bare til anvendelse på avtaler og utilbørlig utnyttelse av dominerende stilling hvis virkning på samhandelen mellom EØS-statene kan bli merkbar. I denne vurdering må det tas hensyn til partenes stilling og betydning på markedet for de berørte varer eller tjenester. Imidlertid kan en

abuse of a dominant position confined to the territory of an EEA State, or to part of that territory, is capable of appreciably affecting trade between EEA States.

77 Whether the requirement is fulfilled in the present case, is an issue for the referring court to determine on the basis of all the facts before it. As mentioned above, indirect and potential effects on trade are to be taken into account alongside direct and actual effects. In particular, regard may be given to foreseeable market developments.

Article 54 EEA

78 As part of the assessment under Article 54 EEA the relevant market needs to be defined.

79 First, the referring court has to determine the relevant product market (compare the ECJ in *Raso and Others*, C-163/96, EU:C:1998:54, paragraph 54). That market comprises all products that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, prices and intended use. Depending on the circumstances, supply-side substitutability must also be taken into account (see Case E-7/01 *Hegelstad and Others* [2002] EFTA Ct. Rep. 310, paragraph 29).

80 Second, the referring court must consider the geographical scope of the market. The relevant area is the area in which the undertakings concerned are involved in the supply and demand of products and in which the conditions of competition are sufficiently homogeneous, and it can be distinguished from neighbouring areas because the conditions of competition are appreciably different (see *Hegelstad and Others*, cited above, paragraph 30).

avtale eller utilbørlig utnyttelse av dominerende stilling som er begrenset til en EØS-stats territorium, eller til en del av dette territorium, ha en merkbar virkning på samhandelen mellom EØS-statene.

77 Om kravet er oppfylt i den foreliggende sak, er et spørsmål den anmodende domstol må vurdere på grunnlag av alle de fakta den har fått seg forelagt. Som nevnt over, skal indirekte og potensielle virkninger på samhandelen tas i betraktning, sammen med direkte og faktiske virkninger. Særlig kan det tas hensyn til forventet utvikling på markedet.

EØS-avtalen artikkel 54

78 Som et ledd i vurderingen etter EØS-avtalen artikkel 54, må det relevante marked defineres.

79 For det første må den anmodende domstol definere det relevante produktmarked (jf. EU-domstolen i *Raso m.fl.*, C-163/96, EU:C:1998:54 (avsnitt 54)). Dette marked omfatter alle produkter hvis egenskaper, pris og tiltenkte bruk gjør at forbrukeren anser dem som utbyttbare eller substituerbare. Avhengig av omstendighetene må også substituerbarhet på leverandørsiden tas i betraktning (se sak E-7/01 *Hegelstad m.fl.*, Sml. 2002 s. 310 (avsnitt 29)).

80 Dernest må den anmodende domstol vurdere markedets geografiske utstrekning. Det relevante område er det område der de berørte foretak er involvert i tilbud og etterspørsel etter produkter, og der konkurransevilkårene er tilstrekkelig like, og det skiller seg fra tilstøtende områder ved at konkurransevilkårene der er vesentlig annerledes (se *Hegelstad m.fl.*, som omtalt over (avsnitt 30)).

81 In the present case, the referring court must assess whether the relevant market is limited geographically to the Port of Drammen. However, the possibility that the relevant market includes other ports cannot be ruled out. Therefore, the national court must also consider in its assessment and determination of the geographical scope of the market whether the AO's potential customers include undertakings who currently use other ports for their unloading and loading needs.

82 The referring court must then assess whether the AO holds a dominant position on the relevant market. A dominant position relates to the economic strength enjoyed by an undertaking. That economic strength enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (compare the ECJ in *United Brands*, 27/76, EU:C:1978:22, paragraph 65).

83 A market share of 50% or more is in itself, save in exceptional circumstances, evidence of the existence of a dominant position (compare the ECJ in *AKZO Chemie* v *Commission*, C-62/86, EU:C:1991:286, paragraph 60).

84 It follows from the information before the Court that the majority of undertakings operating in the Port of Drammen are members of NHO, and are covered by the Framework Agreement. The referring court must assess whether this fact, taken together with other facts of the case, leads to a dominant position of the AO in the market in question.

85 If the referring court comes to the conclusion that the AO holds a dominant position, it must assess further whether that position covers a "substantial part" of the EEA territory, as required by Article 54 EEA (compare the ECJ in *Ambulanz Glöckner*, cited above, paragraph 38). In that respect, one port may be regarded as a

81 I den foreliggende sak må den anmodende domstol vurdere om det relevante marked er geografisk begrenset til Drammen havn. Det kan likevel ikke utelukkes at det relevante marked kan omfatte andre havner. Derfor må den nasjonale domstol i sin vurdering og ved fastsettelsen av markedets geografiske utstrekning også se om det blant Administrasjonskontorets potensielle kunder er foretak som for tiden benytter andre havner ved behov for losse- og lastetjenester.

82 Den anmodende domstol må deretter vurdere om Administrasjonskontoret har en dominerende stilling i det relevante marked. En dominerende stilling er forbundet med et foretaks økonomiske styrke. Ved sin økonomiske styrke er det i stand til å forhindre effektiv konkurranse på det relevante marked ved at det i stor grad har makt til å opptre uavhengig av sine konkurrenter, kunder og i siste instans forbrukere (jf. EU-domstolen i *United Brands*, 27/76, EU:C:1978:22 (avsnitt 65)).

83 En markedsandel på 50 % eller mer er i seg selv bevis for at det foreligger en dominerende stilling, bortsett fra under ekstraordinære omstendigheter (jf. EUdomstolen i *AKZO Chemie* mot *Kommisjonen*, C-62/86, EU:C:1991:286 (avsnitt 60)).

84 Det følger av opplysningene EFTA-domstolen har at flertallet av foretakene som driver virksomhet i Drammen havn er medlemmer av NHO, og er omfattet av Rammeavtalen. Den anmodende domstol må vurdere om dette faktum, sett opp mot sakens øvrige faktiske forhold, medfører at Administrasjonskontoret har en dominerende stilling på det aktuelle marked.

85 Dersom den anmodende domstol kommer til at Administrasjonskontoret har en dominerende stilling, må den videre vurdere om denne stilling omfatter en “vesentlig del” av EØS, slik EØS-avtalen artikkel 54 krever (jf. EU-domstolen i *Ambulanz Glöckner*, som omtalt over (avsnitt 38)). I så måte kan én havn

substantial part of the EEA, depending on the volume of traffic in that port and its importance in relation to maritime import and export operations as a whole in the EEA (compare the ECJ in *GT-Link*, C-242/95, EU:C:1997:376, paragraph 37, and case law cited).

86 If the Port of Drammen is considered not to cover a substantial part of the EEA, the referring court would have to assess the extent to which comparable AO systems exist in other ports. In the case at hand, it appears that on the basis of the Framework Agreement a series of AOs linked by that agreement were established in the largest ports of Norway. Thus, when assessing whether a substantial part of the EEA territory is covered, due account may be taken of the system established by the Framework Agreement.

87 The notion of abuse of a dominant position is a legal notion that must be examined in the light of economic considerations (see Cases E4/05 *HOB-vín* [2006] EFTA Ct. Rep. 4, paragraph 51, and E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 126). Moreover, Article 54 EEA must be interpreted as referring not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition.

88 Article 54 EEA does not prohibit an undertaking from acquiring, on its own merits, a dominant position in a market. However, an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the EEA internal market (see *Posten Norge* v *ESA*, cited above, paragraph 127).

89 The concept of abuse of a dominant position, prohibited by Article 54 EEA, is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from

betraktes som en vesentlig del av EØS, avhengig av trafikkvolumet i denne havn og dets betydning sammenlignet med innførsel og utførsel sjøveis i hele EØS (jf. EUdomstolen i *GT-Link*, C-242/95, EU:C:1997:376 (avsnitt 37), og den rettspraksis som det vises til der).

86 Dersom Drammen havn ikke anses for å dekke en vesentlig del av EØS, vil den anmodende domstol måtte vurdere i hvilken utstrekning tilsvarende systemer med administrasjonskontor finnes i andre havner. I den foreliggende sak fremgår det at det ved Rammeavtalen ble etablert en rekke administrasjonskontorer som var knyttet sammen i avtalen, i de største havner i Norge. I vurderingen av om en vesentlig del av EØS er dekket, må det derfor tas behørig hensyn til det system som ble etablert ved Rammeavtalen.

87 Begrepet utilbørlig utnyttelse av dominerende stilling er et juridisk begrep som må vurderes i lys av økonomiske betraktninger (se sakene E4/05 *HOB-vín*, Sml. 2006 s. 4 (avsnitt 51) og E-15/10 *Posten Norge* mot *ESA*, Sml. 2012 s. 246 (avsnitt 126)). Videre må EØS-avtalen artikkel 54 fortolkes slik at den ikke bare viser til praksis som kan skade forbrukere direkte, men også til praksis som kan skade dem gjennom sin påvirkning av konkurransen.

88 EØS-avtalen artikkel 54 inneholder ikke noe forbud mot at et foretak ved egen innsats kan opparbeide seg en dominerende stilling på et marked. Et foretak som har en dominerende stilling, har imidlertid et særlig ansvar for ikke å tillate seg at dets atferd er til hinder for reell konkurranse på like vilkår på det indre marked i EØS (se *Posten Norge* mot *ESA*, som omtalt over (avsnitt 127)).

89 Begrepet utilbørlig utnyttelse av dominerende stilling, som er forbudt etter EØSavtalen artikkel 54, er et objektivt begrep som gjelder atferden til et dominerende foretak som på et marked der graden av konkurranse allerede er redusert som følge av det berørte foretaks tilstedeværelse, gjennom dets bruk av metoder som skiller

those governing normal competition in goods or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see *Posten Norge* v *ESA*, cited above, paragraph 130).

90 The referring court needs to assess different types of abuse that may exist in the present case: in particular, first, where an undertaking enjoying a dominant position obliges purchasers to obtain all or most of their requirements from that undertaking, it will be abusing its dominant position (compare the ECJ in *Hoffmann-La Roche & Co.* v *Commission*, 85/76, EU:C:1979:36, paragraph 89). As the Court held above, the boycott and the Framework Agreement, of which the boycott seeks to procure acceptance, appear inextricably linked.

91 Second, it constitutes abuse to charge disproportionate prices or to grant price reductions to certain consumers and to offset such reductions by an increase in the charges to others (compare the ECJ in *Merci*, cited above, paragraphs 19 and 20).

92 As for charging disproportionate prices, it follows from the information before the Court that if Holship were to affiliate to the Framework Agreement, it would be subject to the pay rates fixed by the AO for using dockworkers in the Port of Drammen.

93 Third, the priority clause may reduce incentives for the AO to employ modern technology. Were this the case, it could imply higher costs for stevedore services in the Port of Drammen.

seg fra metodene som styrer normal konkurranse om varer eller tjenester på grunnlag av kommersielle operatørers transaksjoner, har den virkning at det ikke vil være mulig å opprettholde den grad av konkurranse som fortsatt finnes på markedet, eller å øke denne konkurranse (se *Posten Norge* mot *ESA*, som omtalt over (avsnitt 130)).

90 Den anmodende domstol må vurdere ulike typer utilbørlig utnyttelse som kan være aktuelle i den foreliggende sak: For det første, der et foretak som har en dominerende stilling pålegger sine kunder å dekke alle eller de fleste av sine behov hos dette foretak, vil dette utnytte sin dominerende stilling på en utilbørlig måte (jf. EU-domstolen i *Hoffmann-La Roche & Co.* mot *Kommisjonen*, 85/76, EU:C:1979:36 (avsnitt 89)). Som EFTA-domstolen la til grunn ovenfor, synes boikotten og Rammeavtalen, som boikotten søker å oppnå tilslutning til, uløselig knyttet til hverandre.

91 Dernest utgjør det utilbørlig utnyttelse å kreve uforholdsmessige priser eller innrømme visse forbrukere prisreduksjoner og dekke inn disse reduksjoner ved å øke avgiftene for andre (jf. EU-domstolen i *Merci*, som omtalt over (avsnitt 19 og 20)).

92 Når det gjelder å kreve uforholdsmessige priser, følger det av opplysningene EFTA-domstolen har, at dersom Holship sluttet seg til Rammeavtalen, ville foretaket måtte betale satsene fastsatt av Administrasjonskontoret for å benytte dets havnearbeidere i Drammen havn.

93 For det tredje kan fortrinnsrettsbestemmelsen redusere Administrasjonskontorets tilskyndelse til å ta i bruk moderne teknologi. Dersom dette er tilfelle, ville det kunne innebære høyere kostnader for losse- og lastetjenester i Drammen havn.

94 The referring court must determine on the basis of a full assessment of the facts, whether the AO abused a dominant position on the relevant market in breach of Article 54 EEA.

95 If abuse of a dominant position exists, it is open to a dominant undertaking to provide justification for conduct otherwise caught by the prohibition under Article 54 EEA.

96 An undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary, or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (see, for comparison, the ECJ in *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 41, and case law cited). In the present case, it appears difficult to conclude that the conduct of the AO was objectively necessary, or that the exclusionary effect produced can be counterbalanced or outweighed by advantages or efficiencies.

97 Finally, the Court notes for the sake of completeness that, contrary to the claim made in NTF's pleadings, the AO cannot rely upon Article 59(2) EEA, since it appears from the file that the AO cannot be considered an undertaking entrusted with the operation of services of general economic interest. It suffices to recall in that regard that the AO has the possibility to decline requests to use their services.

Article 53 EEA

98 As regards the application of Article 53 EEA to the system in the present case, the referring court must assess whether the 13 AOs are

94 Den anmodende domstol må vurdere, på grunnlag av en full gjennomgang av de faktiske forhold, om Administrasjonskontoret utilbørlig utnyttet en dominerende stilling på det relevante marked, i strid med EØS-avtalen artikkel 54.

95 Dersom det foreligger utilbørlig utnyttelse av en dominerende stilling, er det opp til det dominerende foretak å rettferdiggjøre atferd som ellers ville vært omfattet av forbudet etter EØS-avtalen artikkel 54.

96 Et foretak kan for dette formål vise enten at dets atferd objektivt sett er nødvendig, eller at den utestengende virkning dette får, kan motvirkes, eller til og med oppveies, av fordeler i form av effektivitetsgevinst som også vil komme forbrukerne til gode (se, for sammenligning, EU-domstolen i *Post Danmark*, C209/10, EU:C:2012:172 (avsnitt 41), og den rettspraksis som det vises til der). I den foreliggende sak synes det vanskelig å slutte at Administrasjonskontorets atferd objektivt sett var nødvendig, eller at den utestengning dette fører til kan motvirkes eller oppveies av fordeler eller effektivitetsgevinster.

97 For fullstendighets skyld nevner EFTA-domstolen til slutt at, i motsetning til hva NTF hevder i sitt innlegg, kan Administrasjonskontoret ikke påberope seg EØSavtalen artikkel 59 nr. 2, fordi det fremgår av sakens dokumenter at Administrasjonskontoret ikke kan anses som et foretak som er blitt tillagt oppgaven å utføre tjenester av allmenn økonomisk betydning. I denne sammenheng er det nok å peke på at Administrasjonskontoret har anledning til å avslå forespørsler om å benytte dets tjenester.

EØS-avtalen artikkel 53

98 Når det gjelder anvendelsen av EØS-avtalen artikkel 53 på systemet i den foreliggende sak, må den anmodende domstol vurdere om de 13

parties to an agreement or whether there is any concerted practice between them.

99 The information before the Court is not sufficient in order to give guidance on whether there is an agreement between the AOs themselves or a concerted practice that needs to be assessed under Article 53 EEA.

100 The answer to the second competition law question is therefore that Articles 53 and 54 EEA may apply separately or jointly to the system under consideration. The answer to the third competition law question is that, should a port, such as the one at issue, not be regarded as a substantial part of the EEA territory, identical or corresponding AO systems, which may exist in other ports, must be taken into account in order to determine whether a dominant position covers the territory of the EEA Agreement or of a substantial part of it.

QUESTIONS B1 TO B3

101 By the fourth to six question, the referring court essentially seeks guidance on whether it constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA when a trade union uses a boycott against a company in order to procure acceptance of a collective agreement, when the collective agreement entails that the company must give preference to buying unloading and loading services from an administrative office in place of using its own employees. The referring court further seeks clarification on whether specific circumstances are relevant for the existence of a restriction and, if a restriction exists, whether it may be lawful. It is appropriate to assess these questions together.

administrasjonskontorer er avtaleparter eller om det foreligger noen samordnet opptreden mellom dem.

99 Opplysningene EFTA-domstolen har er ikke tilstrekkelige til at den kan gi veiledning om det foreligger en avtale mellom administrasjonskontorene som sådan eller en samordnet opptreden, som må vurderes etter EØS-avtalen artikkel 53.

100 Svaret på det andre spørsmål om konkurranseretten er derfor at EØS-avtalen artiklene 53 og 54 hver for seg eller sammen kan få anvendelse på systemet saken gjelder. Svaret på det tredje spørsmål om konkurranseretten er at dersom en havn, som den saken gjelder, ikke selv skulle anses som en vesentlig del av EØS, må det tas hensyn til like eller lignende systemer med administrasjonskontor som kan finnes i andre havner, for å vurdere om utilbørlig utnyttelse av en dominerende stilling dekker EØS-avtalens område eller en vesentlig del av det.

SPØRSMÅL B.1 TIL B.3

101 Med fjerde til sjette spørsmål søker den anmodende domstol veiledning med hensyn til om det utgjør en restriksjon for etableringsretten etter EØS-avtalen artikkel 31 at en fagforening bruker boikott mot et selskap for å oppnå tilslutning til en tariffavtale, når tariffavtalen innebærer at selskapet fortrinnsvis må kjøpe losse- og lastetjenester fra et administrasjonskontor fremfor å benytte sine egne ansatte. Den anmodende domstol søker videre avklaring av om spesielle omstendigheter er relevante for om det foreligger en restriksjon, og dersom det foreligger en restriksjon, om den kan være lovlig. Det er hensiktsmessig å se disse spørsmål samlet.

OBSERVATIONS SUBMITTED TO THE COURT

102 Holship, ESA and the Commission submit that the boycott at issue entails a restriction on the freedom of establishment under Article 31 EEA.

103 Upon a question from the bench, the Commission put forward arguments at the oral hearing on the basis of the judgment of the European Court of Human Rights ("ECtHR") in *Sørensen and Rasmussen* v *Denmark* [2008] 46 EHRR 29. In that case, the ECtHR held that a closed shop arrangement, whereby a specific employment was contingent on the workers joining a trade union with which the employer had a special relationship, infringed Article 11 of the European Convention on Human Rights ("ECHR").

104 The Commission contends that, with regard to the negative freedom of association, employers such as Holship are in an analogous position to the applicants in *Rasmussen* in so far as the priority clause means that they are not permitted to provide a service unless they agree to a collective agreement, which they were not involved in negotiating. Moreover, a collective agreement that restricts the freedom of establishment cannot be justified by reason of the protection of workers where, in reality, that agreement amounts to a closed shop arrangement.

105 ESA and the Commission submit further that the restriction imposed on the freedom of establishment cannot be justified by any overriding reason of public interest and that the boycott is disproportionate. Furthermore, there is no *de minimis* rule applying to the freedom of establishment and it is thus irrelevant whether the collective action in question has only little restrictive effect.

106 NTF argues that the priority clause must be respected whether the undertaking needing unloading and loading services is based in Norway or a different country and that Holship is not prevented from

INNLEGG INNGITT TIL EFTA-DOMSTOLEN

102 Holship, ESA og Kommisjonen anfører at boikotten saken gjelder, innebærer en restriksjon for etableringsfriheten etter EØS-avtalen artikkel 31.

103 På spørsmål fra retten benyttet Kommisjonen i den muntlige høring argumenter som var basert på Den europeiske menneskerettighetsdomstols ("EMD") dom i *Sørensen og Rasmussen* mot *Danmark* [2008] 46 EHRR 29. I den aktuelle sak la EMD til grunn at ordninger med organisasjonstvang, der et gitt arbeidsforhold er betinget av at arbeidstakerne er tilsluttet en fagforening som arbeidsgiveren har en egen forbindelse til, er i strid med artikkel 11 i Den europeiske menneskerettighetskonvensjon ("EMK").

104 Kommisjonen anfører at når det gjelder den negative foreningsfrihet, står arbeidsgivere som Holship i en tilsvarende stilling som klagerne i *Rasmussen* i den utstrekning fortrinnsrettsbestemmelsen innebærer at de ikke tillates å yte en tjeneste med mindre de slutter seg til en tariffavtale som de ikke har vært med på å fremforhandle. Videre kan en tariffavtale som begrenser etableringsadgangen ikke rettferdiggjøres ved beskyttelse av arbeidstakere når avtalen i realiteten utgjør en ordning med organisasjonstvang.

105 ESA og Kommisjonen anfører videre at restriksjonen på etableringsretten ikke kan rettferdiggjøres i noen tvingende allmenne hensyn, og at boikotten er uforholdsmessig. Videre finnes det ingen *de minimis*-regel som får anvendelse for etableringsretten, og det er derfor irrelevant om det kollektive tiltak saken gjelder, bare har mindre restriktiv virkning.

106 NTF gjør gjeldende at fortrinnsrettsbestemmelsen må overholdes uansett om foretaket som trenger losse- og lastetjenester er etablert i Norge eller i et annet land, og at Holship ikke hindres i å få adgang

gaining access to the market. Therefore, NTF argues that there is no restriction on the freedom of establishment. NTF further maintains that an undertaking's conclusion of a collective agreement covering a different group of workers does not constitute a recognised restriction on the right of other workers to demand a collective agreement or to pursue such a demand through industrial action. Finally, it contends that, as the AO is a non-profit undertaking, it falls outside the scope of Article 34 EEA.

107 The Norwegian Government contends that it is for the national court to determine whether the use of a boycott in the present case constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA. The right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the EEA Agreement.

FINDINGS OF THE COURT

108 If EEA competition law is found not to be applicable with regard to an agreement or an activity, the rules on free movement may still apply, as the two sets of provisions are based on different conditions (compare, to that effect, the ECJ in *Viking Line*, C438/05, EU:C:2007:772, paragraph 53).

109 According to settled case law, the right of establishment is intended to enable an EEA national to participate, on a stable and continuous basis, in the economic life of an EEA State other than his State of origin and to profit from that participation, thus contributing to the economic well-being of the EEA (see, to this effect, Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 94).

110 The freedom of establishment under Article 34 EEA entails the right for companies, formed in accordance with the law of an EEA State

til markedet. NTF anfører at det følgelig ikke foreligger noen restriksjoner på etableringsadgangen. NTF hevder videre at selv om et foretak inngår en tariffavtale for en annen arbeidstakergruppe, betyr ikke dette at det foreligger en anerkjent restriksjon på andre arbeidstakeres rett til å kreve tariffavtale eller til å forfølge et slikt krav via arbeidskamp. Endelig gjør NTF gjeldende at i og med at Administrasjonskontoret ikke har en økonomisk karakter, faller det utenfor virkeområdet for EØS-avtalen artikkel 34.

107 Norges regjering anfører at det er den nasjonale domstol som skal vurdere om bruk av boikott i den foreliggende sak utgjør en restriksjon på etableringsretten etter EØS-avtalen artikkel 31. Retten til å iverksette kollektive tiltak for å beskytte arbeidstakere er et rettmessig hensyn, som i prinsippet berettiger en restriksjon på en av de grunnleggende friheter som sikres i EØS-avtalen.

RETTENS BEMERKNINGER

108 Selv om det skulle legges til grunn at en avtale eller virksomhet ikke er omfattet av EØS-avtalens konkurranseregler, kan den likevel være omfattet av reglene om fri bevegelighet, da det er tale om to regelverk som bygger på ulike vilkår (jf. om dette, EU-domstolen i *Viking Line*, C438/05, EU:C:2007:772 (avsnitt 53)).

109 Etter fast rettspraksis er etableringsfriheten ment å gi borgerne i EØS-statene mulighet til å delta, på en stabil og vedvarende måte, i det økonomiske liv i en annen EØS-stat enn sin egen og dra fordel av denne deltakelse, og dermed bidra til den økonomiske velferd i EØS (se, om dette, forente saker E-3/13 og E-20/13 *Olsen m.fl.*, Sml. 2014 s. 400 (avsnitt 94)).

110 Etableringsfriheten etter EØS-avtalen artikkel 34 innebærer en rett for selskap som er opprettet i samsvar med lovgivningen i en EØS-

and having their registered office, central administration or principal place of business within the EEA, to pursue their activities in another EEA State through a subsidiary established there (compare Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 58).

111 According to the facts presented to the Court, Holship, founded in 1996 and wholly owned by a Danish company, is established on a stable and continuous basis in Norway and may rely on the provisions on freedom of establishment.

112 The Court recalls that the provisions on the fundamental freedoms also extend to rules of any nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (compare the ECJ in *Viking Line*, cited above, paragraph 33 and case law cited).

113 Working conditions in the different EEA States may be governed by provisions laid down by law or regulation, or by collective agreements and other acts concluded or adopted by private persons. Consequently, there would be a risk of creating inequality in the application of the prohibitions set out in the fundamental freedoms if their scope were limited to acts of a public authority (compare the ECJ in *Viking Line*, cited above, paragraph 34 and case law cited).

114 In the present proceedings, the organisation of collective action by trade unions must be regarded as covered by the legal autonomy, which those organisations enjoy pursuant to the trade union rights accorded to them by national and other sources of law. Collective action, which may be the trade unions' last resort to ensure the success of their claim to regulate work, must be considered inextricably linked to the collective agreement the conclusion of which is sought in the case at hand (compare the ECJ in *Viking Line*, cited above, paragraphs 35 and 36).

stat, og som har sitt vedtektsbestemte sete, sin hovedadministrasjon eller sitt hovedforetak innenfor EØS, til å fortsette sin virksomhet i en annen EØS-stat gjennom en filial etablert der (jf. sak E-15/11 *Arcade Drilling*, Sml. 2012 s. 676 (avsnitt 58)).

111 Etter de faktiske forhold som er fremlagt for EFTA-domstolen, er Holship, som ble stiftet i 1996 og er heleid av et dansk selskap, etablert på stabil og vedvarende måte i Norge og kan påberope seg bestemmelsene om etableringsfrihet.

112 EFTA-domstolen peker på at bestemmelsene om de grunnleggende friheter også gjelder regler av enhver art som tar sikte på kollektiv regulering av lønnet arbeid, selvstendig næringsvirksomhet og ytelse av tjenester (jf. EU-domstolen i *Viking Line*, som omtalt over (avsnitt 33), og den rettspraksis som det vises til der).

113 Arbeidsvilkårene i de ulike EØS-stater kan være regulert ved lov eller forskrift eller ved tariffavtaler og andre rettslige disposisjoner inngått eller vedtatt av privatpersoner. Følgelig ville man risikere å skape forskjeller ved anvendelsen av forbudene som følger av de grunnleggende friheter, dersom deres virkeområde var avgrenset til offentlige myndigheters rettsakter (jf. EU-domstolen i *Viking Line*, som omtalt over (avsnitt 34), og den rettspraksis som det vises til der).

114 I den foreliggende sak må fagforeningers organisering av kollektive tiltak anses å omfattes av den rettslige autonomi som disse organisasjoner har etter de fagforeningsrettigheter de er tilstått i nasjonal lovgivning og andre rettskilder. Kollektive tiltak, som kan være fagforeningers siste utvei for å sikre at deres krav om regulering av arbeid fører frem, må anses som uløselig knyttet til den tariffavtale som søkes inngått i den foreliggende sak (jf. EU-domstolen i *Viking Line*, som omtalt over (avsnitt 35 og 36)).

Existence of a restriction

115 Article 31 EEA prohibits all restrictions on the freedom of establishment within the EEA. Measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, albeit applicable without discrimination on grounds of nationality, are an encroachment upon these freedoms requiring justification (compare Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 64, and Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 82).

116 With regard to question B2 it is important to recall that a restriction on the right of establishment is prohibited by Article 31 EEA, even if it is of limited scope or minor importance. No form of *de minimis* rule exists in that regard. It is thus of no significance for the assessment whether a restriction on the freedom of establishment exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.

117 In the present case, a boycott aiming at protecting the priority clause is at issue. According to the referring court, the boycott is intended to compel Holship to affiliate to the Framework Agreement, as a result of which Holship would be obliged to resort by way of priority to the dockworkers engaged by the AO in order to carry out unloading and loading operations. As the Court held above, the boycott and the Framework Agreement, of which the boycott seeks to procure acceptance, appear inextricably linked.

118 Under the Framework Agreement, Holship would be bound by the priority clause, as administered by the AO, which employs all permanently employed dockworkers in the Port of Drammen. The AO would decide whether it has the capacity to take on an assignment or whether Holship is allowed to use its own employees. Although Holship would not be obliged to participate in the AO or provide it

Tilstedeværelsen av en restriksjon

115 EØS-avtalen artikkel 31 forbyr enhver restriksjon på etableringsretten i EØS. Tiltak som kan hindre utøvelsen av de grunnleggende friheter som sikres i EØSavtalen, eller gjøre den mindre interessant, er, selv om de får anvendelse uten hensyn til nasjonalitet, en krenkelse av disse friheter som må rettferdiggjøres (jf. sakene E-2/06 *ESA* mot *Norge*, Sml. 2007 s. 164 (avsnitt 64), og E-9/11 *ESA* mot *Norge*, Sml. 2012 s. 442 (avsnitt 82)).

116 Når det gjelder det femte spørsmål, er det viktig å peke på at en restriksjon på etableringsadgangen er forbudt etter EØS-avtalen artikkel 31, også om den er av begrenset omfang eller av mindre betydning. Det finnes ingen *de minimis*-regel på dette område. Det er således uten betydning for vurderingen av om det foreligger en restriksjon på etableringsadgangen, at bedriftens behov for losse- og lastetjenester skulle vise seg å være svært begrenset og/eller sporadisk.

117 Den foreliggende sak gjelder en boikott med sikte på å beskytte fortrinnsrettsbestemmelsen. Ifølge den anmodende domstol er formålet med boikotten å tvinge Holship til å slutte seg til Rammeavtalen, noe som ville gjøre Holship forpliktet til fortrinnsvis å benytte havnearbeidere ansatt ved Administrasjonskontoret til å utføre losse- og lastearbeid. Som EFTA-domstolen la til grunn ovenfor, synes boikotten og Rammeavtalen, som boikotten søker å oppnå tilslutning til, uløselig knyttet til hverandre.

118 Etter Rammeavtalen ville Holship bli bundet av fortrinnsrettsbestemmelsen, slik denne utøves av Administrasjonskontoret, som alle faste losse- og lastearbeidere ved Drammen havn er ansatt ved. Administrasjonskontoret ville bestemme om det har kapasitet til å utføre et oppdrag, eller om Holship tillates å benytte egne ansatte. Selv om Holship ikke ville

with funds, it would be obliged to pay the fees for the unloading and loading assignments that are carried out by AO's employees.

119 As has been submitted by ESA and the Commission, it appears that Holship may even encounter additional costs, since it may need to maintain resources to carry out unloading and loading operations itself if the AO declines an assignment for unloading and loading operations.

120 In light of the preceding considerations, the Court holds that a boycott such as the one at issue, aimed at procuring acceptance of a collective agreement providing for a system which includes a priority clause, is likely to discourage or even prevent the establishment of companies from other EEA States and thereby constitutes a restriction on the freedom of establishment under Article 31 EEA.

Justification

121 It is settled case law that restrictions on the freedom of establishment may be justified either by Article 33 EEA or, if applicable without discrimination on grounds of nationality, by overriding reasons of general interest (compare, for example, the ECJ in *Commission* v *Spain*, C576/13, EU:C:2014:2430, paragraph 47 and case law cited).

122 Collective bargaining may involve sensitive issues of balancing social policy objectives, such as protection of workers, with an effective functioning of the market. Collective bargaining and collective action are recognised as fundamental rights. The protection of workers has therefore been recognised as an overriding reason of general interest that may justify restrictions on the freedom of establishment (see Case E-2/11 *STX Norway and Others* [2012] EFTA

være forpliktet til å delta i ledelsen av Administrasjonskontoret eller til å tilføre det kapital, ville Holship være forpliktet til å betale avgiftene for losse- og lasteoppdrag som utføres av Administrasjonskontorets ansatte.

119 Som ESA og Kommisjonen har anført, fremgår det at Holship til og med ville kunne møte økte kostnader, siden selskapet kan måtte opprettholde ressurser til selv å forestå losse- og lasteoppgavene for det tilfelle at Administrasjonskontoret avslår en bestilling på losse- og lastearbeid.

120 I lys av ovenstående betraktninger legger EFTA-domstolen til grunn at en boikott som den saken gjelder, som tar sikte på å oppnå tilslutning til en tariffavtale som innebærer et system som omfatter en fortrinnsrettsbestemmelse, sannsynligvis vil vanskeliggjøre eller til og med hindre etablering av selskaper fra andre EØS-stater, og dermed utgjør en restriksjon på etableringsfriheten etter EØS-avtalen artikkel 31.

Rettferdiggjøring

121 Det er fast rettspraksis at restriksjoner på etableringsfriheten kan rettferdiggjøres etter EØS-avtalen artikkel 33 og, dersom restriksjonen får anvendelse uavhengig av nasjonalitet, i tvingende allmenne hensyn (jf. for eksempel EU-domstolen i *Kommisjonen* mot *Spania*, C576/13, EU:C:2014:2430 (avsnitt 47), og den rettspraksis som det vises til der).

122 Kollektive forhandlinger kan gjelde følsomme spørsmål der sosialpolitiske mål, som beskyttelse av arbeidstakere, må balanseres mot hensynet til det indre markeds virkemåte. Kollektive forhandlinger og kollektive tiltak er anerkjent som grunnleggende rettigheter. Beskyttelse av arbeidstakere har derfor blitt anerkjent som et tvingende allment hensyn som kan begrunne restriksjoner på etableringsretten (se sak E-2/11 *STX Norway m.fl.*, Sml. 2012 s. 4

Ct. Rep. 4, paragraph 81, and compare the ECJ in *Commission* v *Spain*, cited above, paragraph 50 and case law cited).

123 Fundamental rights form part of the unwritten principles of EEA law. The Court has held that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights (see Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23). The fundamental rights guaranteed in the EEA legal order are applicable in all situations governed by EEA law. Where overriding reasons in the public interest are invoked in order to justify measures which are liable to obstruct the exercise of the right of establishment, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights. Thus the national measures in question may fall under the exceptions provided for only if they are compatible with fundamental rights (see *Olsen and Others*, cited above, paragraph 226). It is for the referring court to assess whether certain overriding reasons in the public interest are compatible with fundamental rights in the light of Article 11 ECHR and the case law of the ECtHR (compare, for example, the ECtHR in *Sørensen and Rasmussen* v *Denmark*, cited above, paragraphs 54 and 58).

124 Whether a restrictive measure aims at protecting workers needs to be answered in light of these considerations. When determining the aim pursued by the boycott, the national court must therefore take into account the objective pursued by the overall system established through the collective agreement in question. In that regard, the boycott cannot be viewed in isolation from the agreement of which it seeks to procure acceptance.

125 The Court notes further that it is not sufficient that a measure of industrial action resorts to the legitimate aim of protection of workers in the abstract. It must rather be assessed if the measure at issue genuinely aims at the protection of workers. The absence of

(avsnitt 81), og for sammenligning EU-domstolen i *Kommisjonen* mot *Spania*, som omtalt over (avsnitt 50), og den rettspraksis som det vises til der).

123 Grunnleggende rettigheter utgjør en del av de uskrevne prinsipper i EØS-retten. EFTA-domstolen har lagt til grunn at bestemmelsene i EMK og dommene avsagt av EMD er viktige kilder når det gjelder å fastslå anvendelsesområdet for disse grunnleggende rettigheter (se sak E-2/03 Ásgeirsson, Sml. 2003 s. 185 (avsnitt 23)). De grunnleggende rettigheter som EØS-retten sikrer, gjelder i alle situasjoner der EØS-retten kommer til anvendelse. Dersom tvingende allmenne hensyn påberopes for å rettferdiggjøre tiltak som vil kunne hindre utøvelsen av etableringsadgangen, må denne rettferdiggjøring, som EØS-retten åpner for, tolkes i lys av EØS-rettens generelle prinsipper, særlig de grunnleggende rettigheter. Dermed kan de aktuelle nasjonale tiltak omfattes av de tillatte unntak bare dersom de er forenlige med de grunnleggende rettigheter (se *Olsen m.fl.*, som omtalt over (avsnitt 226)). Det tilkommer den anmodende domstol å vurdere om visse tvingende allmenne hensyn er forenlige med de grunnleggende rettigheter i lys av EMK artikkel 11 og EMDs rettspraksis (jf. for eksempel EMD i *Sørensen og Rasmussen* mot *Danmark*, som omtalt over (avsnitt 54 og 58)).

124 Om et restriktivt tiltak har som mål å beskytte arbeidstakere, må besvares i lys av disse betraktninger. Ved vurderingen av målet som søkes oppnådd med tiltaket, må den nasjonale domstol derfor ta hensyn til formålet som søkes oppnådd med det overordnede system etablert ved den aktuelle tariffavtale. I denne sammenheng kan boikotten ikke betraktes isolert fra avtalen som den søker å oppnå tilslutning til.

125 EFTA-domstolen legger videre til grunn at det ikke er tilstrekkelig at en arbeidskamp har et abstrakt legitimt mål om å beskytte arbeidstakere. Det må snarere vurderes om tiltaket saken gjelder, virkelig tar sikte på å beskytte arbeidstakere. Mangelen på en slik

such an assessment may create an environment where the measures allegedly taken with reference to the protection of workers primarily seek to prevent undertakings from lawfully establishing themselves in other EEA States (see, for comparison, AG Poiares Maduro in his Opinion in *Viking Line*, cited above, point 67 et. seq.).

126 It appears in the present case that the aggregate effects of the priority clause and the creation of the AO are not limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition. The AO system protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation. They are barred from performing the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement.

127 The right to collective action also covers situations where workers take collective measures in order to support other workers in their labour disputes with a view to promoting their interests in establishing a system of fair conditions of work and pay. However, from the information before the Court, there is nothing to suggest that some kind of labour dispute between Holship and its employees exists and that the boycott imposed aims at improving the working conditions of Holship's employees. The boycott is even to the detriment of Holship's employees and may touch upon fundamental rights of Holship, such as the negative right to freedom of association, and possibly that of its employees. Thus, it is of no significance for the assessment of the lawfulness of the restriction that Holship applies another collective agreement in relation to its own dockworkers.

vurdering kan skape en situasjon der tiltak som angivelig er truffet med henvisning til beskyttelsen av arbeidstakere, primært søker å hindre foretak i å etablere seg lovlig i andre EØS-stater (se for eksempel generaladvokat Poiares Maduro i hans uttalelse i *Viking Line*, som omtalt over (avsnitt 67 flg.)).

126 Det synes i den foreliggende sak som at den samlede virkning av fortrinnsrettsbestemmelsen og opprettelsen av Administrasjonskontoret ikke er begrenset til fastsettelsen eller forbedringen av arbeidsvilkår for arbeidere ved Administrasjonskontoret, og går lenger enn kollektive forhandlingers hovedformål og kjerneelementer og deres innebygde virkning på konkurransen. Systemet med administrasjonskontorer beskytter bare en begrenset gruppe arbeidstakere, på bekostning av andre arbeidstakere, uavhengig av de andre arbeidstakeres beskyttelsesnivå. Spesielt vil en boikott, som den saken gjelder, påvirke deres situasjon negativt. Holships arbeidstakere blir forhindret fra å utføre losse- og lastetjenester og kan til og med miste sitt arbeid om deres arbeidsgiver slutter seg til Rammeavtalen.

127 Retten til kollektive tiltak gjelder også i situasjoner der arbeidstakere iverksetter kollektive tiltak som støtte for andre arbeidstakere i deres arbeidstvister med sikte på å fremme deres interesser i å etablere en ordning med rimelige arbeids- og lønnsvilkår. Men ut fra de opplysninger EFTA-domstolen har, er det ikke noe som tyder på at det foreligger noen arbeidstvist mellom Holship og dets ansatte, eller at den varslede boikott tar sikte på å forbedre arbeidsvilkårene for Holships ansatte. Boikotten kan til og med være til ulempe for Holships ansatte og berøre Holships grunnleggende rettigheter, som den negative rett til foreningsfrihet, og muligens de ansattes. Det er derfor uten betydning for vurderingen av om restriksjonen er lovlig eller ikke, at Holship anvender en annen tariffavtale for sine egne losse- og lastearbeidere.

128 NTF and the Government of Norway have argued that the priority clause must be considered part of the fulfilment of Norway's obligations under the ILO Convention. However, it follows from Protocol 35 to the EEA Agreement that, in case of a conflict between national law implementing EEA law and other national provisions not implementing EEA law, the EFTA States shall introduce a statutory provision to the effect that national law implementing EEA law shall prevail. Therefore, a Contracting Party cannot make rights conferred by Article 31 EEA subject to the ILO Convention or other international agreements (see, to that effect, Case E1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 31).

129 In the present case, the conflicting provision does not follow from national legislation. It is part of a collective agreement. Consequently, EEA law applicable in this case must in any event prevail.

130 For the sake of completeness, it is recalled that for a restriction to be justified it does not simply suffice that it pursues a legitimate aim. A restrictive measure must be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules (compare the ECJ in *Commission* v *Spain*, cited above, paragraph 53 and case law cited).

131 It is for the referring court to determine, having regard to all the facts and circumstances before it and the guidance provided by the Court, whether the restrictive measure at issue can be justified.

128 NTF og Norges regjering har lagt til grunn at fortrinnsrettsbestemmelsen må anses som ledd i oppfyllelsen av Norges forpliktelser etter ILO-konvensjonen. Imidlertid følger det av protokoll 35 til EØS-avtalen at EFTA-statene, for tilfelle av konflikt mellom nasjonal lovgivning som gjennomfører EØS-retten og andre nasjonale bestemmelser som ikke gjennomfører EØS-retten, skal innføre en lovbestemmelse som sikrer at nasjonal lovgivning som gjennomfører EØS-retten, skal ha forrang. Derfor kan ikke en avtalepart gjøre rettigheter etter EØS-avtalen artikkel 31 betinget av ILO-konvensjonen eller andre internasjonale avtaler (se sak E1/04 *Fokus Bank*, Sml. 2004 s. 11 (avsnitt 31)).

129 I den foreliggende sak følger ikke den motstridende bestemmelse av nasjonal lovgivning. Den er del av en tariffavtale. Følgelig må den EØS-rett som får anvendelse i denne sak, uansett ha forrang.

130 For fullstendighets skyld pekes det på at dersom en restriksjon skal være rettferdiggjort, er det ikke uten videre nok at den fremmer et legitimt mål. Et restriktivt tiltak må være slik at det sikrer oppnåelsen av det tilsiktede mål og må ikke gå lenger enn det som er nødvendig for å nå dette mål. Med andre ord må det ikke være mulig å oppnå samme resultat med tiltak som er mindre inngripende (jf. EU-domstolen i *Kommisjonen* mot *Spania*, som omtalt over (avsnitt 53), og den rettspraksis som det vises til der).

131 Det tilkommer den anmodende domstol å vurdere, i betraktning av alle fakta og omstendigheter som er forelagt den, og den veiledning den gis av EFTAdomstolen, om det restriktive tiltak saken gjelder, kan rettferdiggjøres.

IV COSTS

132 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, 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 questions referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

1. **The exemption from the EEA competition rules that applies to collective agreements does not cover the assessment of a priority of engagement rule, such as the one at issue, or the use of a boycott against a port user in order to procure acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate company, such as the administrative office at issue, in place of using its own employees for the same work.**

2. **Articles 53 and 54 EEA may apply separately or jointly to a system such as the one at issue.**

IV SAKSOMKOSTNINGER

132 Omkostninger som er påløpt for Norges regjering, ESA og Kommisjonen, som har inngitt innlegg for EFTA-domstolen, kan ikke kreves dekket. Siden foreleggelsen for EFTA-domstolen utgjør ledd i behandlingen av saken som står for den nasjonale domstol, ligger det til denne domstol å ta en eventuell avgjørelse om saksomkostninger for partene.

På dette grunnlag avgir

EFTA-domstolen

som svar på spørsmålene forelagt den av Norges Høyesterett, følgende rådgivende uttalelse:

1. **Unntaket fra EØS-avtalens konkurranseregler som gjelder for tariffavtaler, omfatter ikke vurderingen av en regel om fortrinnsrett ved tildeling, som den denne sak gjelder, eller en boikott mot en havnebruker for å oppnå tilslutning til en slik tariffavtale, når tilslutningen innebærer at havnebrukeren fortrinnsvis må kjøpe losse- og lastetjenester fra et eget foretak, som Administrasjonskontoret som denne sak gjelder, fremfor å benytte sine egne ansatte til det samme arbeid.**

2. **EØS-avtalen artiklene 53 og 54 kan hver for seg eller sammen få anvendelse på et system som det saken gjelder.**

3. **Should a port, such as the one at issue, not be regarded as a substantial part of the EEA territory, identical or corresponding administrative office systems, which may exist in other ports, must be taken into account in order to determine whether a dominant position covers the territory of the EEA Agreement or a substantial part of it.**

4. **A boycott such as the one at issue, aimed at procuring acceptance of a collective agreement providing for a system which includes a priority clause, is likely to discourage or even prevent the establishment of companies from other EEA States and thereby constitutes a restriction on the freedom of establishment under Article 31 EEA.**

5. **It is of no significance for the assessment whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.**

6. **In a situation such as that in the main proceedings, it is of no significance for the assessment of the lawfulness of the restriction that the company, upon which the boycott is imposed, applies another collective agreement in relation to its own dockworkers.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Delivered in open court in Luxembourg on
***19 April 2016*.**

Gunnar Selvik
Registrar

Carl Baudenbacher
President

3. **Dersom en havn, som saken gjelder, ikke selv skulle anses som en vesentlig del av EØS, må det tas hensyn til like eller lignende systemer med administrasjonskontor som kan finnes i andre havner, for å vurdere om en dominerende stilling dekker EØSavtalens område eller en vesentlig del av det.**

4. **En boikott som den saken gjelder, som tar sikte på å oppnå tilslutning til en tariffavtale som innebærer et system som omfatter en fortrinnsrettsbestemmelse, vil sannsynligvis vanskeliggjøre eller til og med hindre etablering av selskaper fra andre EØS-stater, og utgjør dermed en restriksjon på etableringsretten etter EØSavtalen artikkel 31.**

5. **Det er uten betydning for vurderingen av om det foreligger en restriksjon, at bedriftens behov for losse- og lastetjenester skulle vise seg å være svært begrenset og/eller sporadisk.**

6. **I en situasjon som den hovedsaken gjelder, er det uten betydning for vurderingen av om restriksjonen er lovlig eller ikke, at bedriften som den varslede boikott er rettet mot, for sine egne losse- og lastearbeidere anvender en annen tariffavtale.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Avsagt i åpen rett i Luxembourg,
19. april 2016.

Gunnar Selvik
Justissekretær

Carl Baudenbacher
President

Report for the Hearing

in Case E-14/15

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

Holship Norge AS

v

Norsk Transportarbeiderforbund,

concerning the interpretation of the EEA Agreement, and in particular Articles 31, 53 and 54.

I INTRODUCTION

1 Norsk Transportarbeiderforbund (the Norwegian Transport Workers Union or "NTF") has notified a boycott of Holship Norge AS ("Holship") in order to procure its acceptance of a collective agreement, a provision of which grants priority of engagement for stevedore work to dockworkers registered at the Administration Office ("AO") at the Port of Drammen. Before the national court, NTF seeks an advance ruling as to the lawfulness of the boycott.

2 By a letter of 5 June 2015, registered at the Court as Case E-14/15 on 11 June 2015, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between NTF and Holship. By its request, the Supreme Court refers six questions.

Rettsmøterapport

i sak E-14/15

ANMODNING til Domstolen i henhold til artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Norges Høyesterett i en sak mellom

Holship Norge AS

og

Norsk Transportarbeiderforbund,

om fortolkningen av EØS-avtalen, særlig artiklene 31, 53 og 54.

I INNLEDNING

1 Norsk Transportarbeiderforbund ("NTF") har varslet en boikott av Holship Norge AS ("Holship") for å oppnå Holships tilslutning til en tariffavtale med en bestemmelse som gir fortrinnsrett til å utføre losse- og lastearbeid for losse- og lastearbeidere registrert ved Administrasjonskontoret for havnearbeid i Drammen ("Administrasjonskontoret"). Saken for den nasjonale domstol gjelder krav fra NTF om forhåndsavgjørelse om lovligheten av den varslede boikott.

2 Ved brev 5. juni 2015, registrert ved Domstolen 11. juni 2015 som sak E-14/15, fremsatte Norges Høyesterett en anmodning om en rådgivende uttalelse i en sak som står for den mellom NTF og Holship. I sin anmodning ber Høyesterett om svar på seks spørsmål.

3 The first three questions (A1, A2, and A3) seek to establish: (1) whether the exemption from the competition rules of the EEA Agreement for collective agreements extends to the use of a boycott against a port user in order to produce acceptance of a collective agreement when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate administration office instead of using its own employees for the same work; (2) if the exemption does not so extend, whether such a system should be assessed under Article 53 or Article 54 EEA; and (3) if the exemption does not so extend and such a system should be assessed under Article 53 or Article 54 EEA, whether the existence of an identical or corresponding system in other ports is to be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA.

4 The other three questions referred (B1, B2, and B3) seek to establish: (1) whether it is a restriction on the freedom of establishment pursuant to Article 31 EEA for a trade union to use a boycott in order to produce acceptance of a collective agreement by a company whose parent company is based in another EEA State when the collective agreement entails that the company must give preference to buying unloading and loading services from a separate administration office instead of using its own employees for this work; (2) whether, for the purpose of an assessment of whether a restriction exists, the fact that the company's need for unloading and loading services proves to be very limited and/or sporadic is relevant; and (3) if a restriction exists, whether it is of significance for the assessment of the lawfulness of that restriction that the company, in relation to its own dockworkers, applies another collective agreement negotiated between social partners in the State where the port is located when that collective agreement concerns matters other than unloading and loading work.

3 De tre første spørsmål (A.1, A.2 og A.3) søker å bringe på det rene: (1) om unntaket fra EØS-avtalens konkurranseregler som gjelder for tariffavtaler, kan omfatte bruk av boikott overfor en havnebruker for å oppnå tilslutning til en tariffavtale, når en slik tilslutning innebærer at havnebrukeren fortrinnsvis må kjøpe losse- og lastetjenester fra et særlig administrasjonskontor fremfor å benytte egne ansatte til det samme arbeid; (2) hvis unntaket ikke omfatter slik bruk av boikott, om et slikt system skal vurderes etter artikkel 53 eller artikkel 54 i EØS-avtalen; og (3) hvis unntaket ikke omfatter slik bruk av boikott og systemet skal vurderes etter artikkel 53 eller artikkel 54 i EØS-avtalen, om man ved vurderingen av om det foreligger en merkbar påvirkning på samhandelen innen EØS, må ta hensyn til at samme eller tilsvarende system finnes i andre havner.

4 De tre andre spørsmål (B.1, B.2 og B.3) søker å bringe på det rene: (1) om det utgjør en restriksjon av etableringsretten i henhold til EØS-avtalen artikkel 31 å benytte boikott fra en fagforenings side for å oppnå tilslutning til en tariffavtale fra en bedrift hvis morselskap er hjemmehørende i en annen EØS-stat, når tariffavtalen innebærer at bedriften fortrinnsvis må kjøpe losse- og lastetjenester fra et særlig administrasjonskontor fremfor å benytte sine egne ansatte til dette arbeid; (2) om det er av betydning for om det foreligger en restriksjon at bedriftens behov for losse- og lastetjenester eventuelt skulle vise seg å være svært begrenset og/eller sporadisk; og (3) om det, dersom det foreligger en restriksjon, er av betydning for vurderingen av om restriksjonen er lovlig eller ikke, at bedriften for sine egne losse- og lastearbeidere anvender en annen tariffavtale fremforhandlet mellom arbeidslivets parter i den stat havnen ligger, når denne tariffavtale gjelder et annet tariffområde enn losse- og lastearbeid.

II LEGAL BACKGROUND

EEA LAW

5 Article 31(1) EEA reads as follows:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*

6 The second paragraph of Article 34 EEA reads:

> *'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*

7 Article 53 EEA reads as follows:

> *1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention,*

II RETTSLIG BAKGRUNN

EØS-RETT

5 EØS-avtalen artikkel 31 nr. 1 lyder:

> *1. I samsvar med bestemmelsene i denne avtale skal det ikke være noen restriksjoner på etableringsadgangen for statsborgere fra en av EFs medlemsstater eller en EFTA-stat på en annen av disse staters territorium. Dette skal gjelde også adgangen til å opprette agenturer, filialer eller datterselskaper for så vidt angår borgere fra en av EFs medlemsstater eller en EFTA-stat som har etablert seg på en av disse staters territorium.*
>
> *Etableringsadgangen skal omfatte adgang til å starte og utøve selvstendig næringsvirksomhet og til å opprette og lede foretak, særlig selskaper som definert i artikkel 34 annet ledd, på de vilkår som lovgivningen i etableringsstaten fastsetter for egne borgere, med forbehold for bestemmelsene i kapittel 4.*

6 EØS-avtalen artikkel 34 annet ledd lyder:

> *Ved selskaper skal forstås selskaper i sivil- eller handelsrettslig forstand, herunder også kooperative selskaper, samt andre juridiske personer i offentlig- eller privatrettslig forstand, unntatt dem som ikke driver ervervsmessig virksomhet.*

7 EØS-avtalen artikkel 53 lyder:

> *1. Enhver avtale mellom foretak, enhver beslutning truffet av sammenslutninger av foretak og enhver form for samordnet opptreden som kan påvirke handelen mellom avtalepartene, og som har til formål eller virkning å hindre, innskrenke eller vri konkurransen innen det territorium som er omfattet av denne*

restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

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

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

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- *any agreement or category of agreements between undertakings;*
- *any decision or category of decisions by associations of undertakings;*
- *any concerted practice or category of concerted practices;*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

avtale, skal være uforenlige med denne avtales funksjon og forbudt, særlig slike som består i

a) å fastsette på direkte eller indirekte måte innkjøps- eller utsalgspriser eller andre forretningsvilkår,

b) å begrense eller kontrollere produksjon, avsetning, teknisk utvikling eller investeringer,

c) å dele opp markeder eller forsyningskilder,

d) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,

e) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden.

2. Avtaler eller beslutninger som er forbudt i henhold til denne artikkel, skal ikke ha noen rettsvirkning.

3. Det kan imidlertid erklæres at bestemmelsene i nr. 1 ikke skal anvendes på

- *avtaler eller grupper av avtaler mellom foretak,*
- *beslutninger eller grupper av beslutninger truffet av sammenslutninger av foretak, og*
- *samordnet opptreden eller grupper av slik opptreden,*

som bidrar til å bedre produksjonen eller fordelingen av varene eller til å fremme den tekniske eller økonomiske utvikling, samtidig som de sikrer forbrukerne en rimelig andel av de fordeler som er oppnådd, og uten

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

8 Article 54 EEA reads as follows:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

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

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

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

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

9 Article 59(2) EEA reads as follows:

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of

a) å pålegge vedkommende foretak restriksjoner som ikke er absolutt nødvendige for å nå disse mål, eller

b) å gi disse foretak mulighet til å utelukke konkurranse for en vesentlig del av de varer det gjelder.

8 EØS-avtalen artikkel 54 lyder:

Et eller flere foretaks utilbørlige utnyttelse av sin dominerende stilling innen det territorium som er omfattet av denne avtale, eller i en vesentlig del av det, skal være forbudt og uforenlig med denne avtales funksjon i den utstrekning den kan påvirke handelen mellom avtalepartene.

Slik utilbørlig utnyttelse kan særlig bestå i

a) å påtvinge, direkte eller indirekte, urimelige innkjøps- eller utsalgspriser eller andre urimelige forretningsvilkår,

b) å begrense produksjon, avsetning eller teknisk utvikling til skade for forbrukerne,

c) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,

d) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden.

9 EØS-avtalen artikkel 59 nr. 2 lyder:

2. Foretak som er blitt tillagt oppgaven å utføre tjenester av almen økonomisk betydning, eller som har karakter av et fiskalt monopol, skal være undergitt reglene i denne avtale, fremfor alt konkurransereglene, i den utstrekning anvendelsen av disse regler ikke rettslig eller faktisk hindrer dem i å utføre de særlige oppgaver

the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

NATIONAL LAW

THE BOYCOTT ACT

10 Section 2 of the Norwegian Boycott Act of 5 December 1947 No 1 ("the Boycott Act") lays down several conditions for a boycott to be lawful. The condition relevant for the present case is Section 2(a), according to which a boycott is unlawful when its purpose is unlawful or when it cannot achieve its goal without causing a breach of the law. Pursuant to Section 3, legal action may be instigated to determine whether a notified boycott is lawful.

THE FRAMEWORK AGREEMENT

11 The collective agreement relevant to this case is the Framework Agreement on a Fixed Pay Scheme for Dockworkers (*Rammeavtale om fastlønnssystem for losse- og lastearbeidere*) ("the Framework Agreement"). Initially entered into in 1976 and subsequently renewed every other year, it establishes a fixed pay scheme for dockworkers in the thirteen largest Norwegian ports, including the Port of Drammen.

12 Clause 2(1) of the Framework Agreement, the so-called priority of engagement clause, reads as follows:

For vessels of 50 tonnes dwt and more sailing from a Norwegian port to a foreign port or vice versa, the unloading and loading shall be carried out by dockworkers. Exempted is all unloading and loading at the company's own facilities where the company's own workers carry out the unloading and loading.

som er tillagt dem. Utviklingen av samhandelen må ikke påvirkes i et omfang som strider mot avtalepartenes interesser.

NASJONAL RETT

BOIKOTTLOVEN

10 Lov 5. desember 1947 nr. 1 om boikott ("boikottloven") § 2 oppstiller flere vilkår for at en boikott skal være lovlig. Vilkåret som er aktuelt for den foreliggende sak er § 2 bokstav a, som fastsetter at en boikott er rettsstridig når den har et rettsstridig formål eller ikke kan nå sitt mål uten å føre til et rettsbrudd. Etter § 3 kan det reises søksmål for å få avgjort om en varslet boikott er lovlig.

RAMMEAVTALEN

11 Den aktuelle tariffavtale er Rammeavtale om fastlønnssystem for losse- og lastearbeidere ("Rammeavtalen"). Rammeavtalen, som først ble inngått i 1976 og siden er fornyet annethvert år, etablerte et fastlønnssystem for losse- og lastearbeidere ved de 13 største havner i Norge, blant annet Drammen havn.

12 Rammeavtalen § 2 nr. 1, den såkalte bestemmelse om fortrinnsrett, lyder slik:

For fartøyer på 50 tonn dw. og derover som går fra norsk havn — utenlandsk havn eller omvendt, skal losse- og lastearbeidet utføres av losse- og lastearbeidere. Unntatt er all lossing og lasting ved bedriftens egne anlegg hvor bedriftens egne folk anvendes til lossing eller lasting.

ILO CONVENTION NO 137

13 Norway has been a signatory to the ILO Dock Work Convention, 1973 (No 137) ("the Convention") since it entered into force on 24 July 1975.

14 Article 2 of the Convention reads as follows:

1. It shall be national policy to encourage all concerned to provide permanent or regular employment for dockworkers in so far as practicable.

2. In any case, dockworkers shall be assured minimum periods of employment or a minimum income, in a manner and to an extent depending on the economic and social situation of the country and port concerned.

15 Article 3 of the Convention reads as follows:

1. Registers shall be established and maintained for all occupational categories of dockworkers, in a manner to be determined by national law or practice.

2. Registered dockworkers shall have priority of engagement for dock work.

3. Registered dockworkers shall be required to be available for work in a manner to be determined by national law or practice.

16 Article 7 of the Convention reads as follows:

The provisions of this Convention shall, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.

ILO-KONVENSJON NR. 137

13 Norge har vært tilsluttet ILO-konvensjon nr. 137 om havnearbeid (1973) ("Konvensjonen") siden den trådte i kraft 24. juli 1975.

14 Konvensjonen artikkel 2 lyder:

> *1. Det skal være vedkommende lands politikk å oppmuntre alle dem som berøres av dette til å skaffe havnearbeiderne fast eller regelmessig sysselsetting så langt det er mulig.*
>
> *2. I hvert fall skal havnearbeiderne sikres minimumsperioder med sysselsetting eller en minimumsinntekt, på en måte og i en utstrekning som avhenger av den økonomiske og sosiale tilstand i vedkommende land eller havn.*

15 Konvensjonen artikkel 3 lyder:

> *1. Det skal opprettes og ajourføres registre over alle yrkeskategorier av havnearbeidere på en måte som fastsettes ved nasjonal lovgivning eller praksis.*
>
> *2. Registrerte havnearbeidere skal ha fortrinnsrett ved tildeling av havnearbeid.*
>
> *3. Registrerte havnearbeidere plikter å være disponible for arbeid på den måte som nasjonal lovgivning eller praksis bestemmer.*

16 Konvensjonen artikkel 7 lyder:

> *Reglene i denne konvensjon skal gjøres gjeldende gjennom nasjonale lover eller forskrifter, i den utstrekning de ikke er gjort gjeldende gjennom tariffavtaler, voldgiftskjennelser eller på annen måte som er i samsvar med nasjonal praksis.*

III FACTS AND PROCEDURE

BACKGROUND

17 Holship is a Norwegian forwarding agent wholly owned by a Danish parent company. Its principal activity is the cleaning of fruit crates. Previously, Holship had utilised the services of the AO. Holship acquired a new customer around the beginning of 2013, leading to an increase in the company's activities in the Port of Drammen. As a result, Holship added four further terminal workers to its existing sole terminal worker.

18 Holship is party to a collective agreement with Norsk Arbeidsmandsforbund (the Norwegian General Workers Union). The scope of that collective agreement includes cleaning work, the principal activity of Holship. Holship has elected to apply the collective agreement for cleaning workers to its unloading and loading workers.

19 In the light of Holship's increased activity and use of its own terminal workers for unloading and loading work in the Port of Drammen, NTF sent a letter to Holship on 10 April 2013, demanding that the Framework Agreement be applied. Holship did not reply. NTF sent reminders and eventually gave notice of a boycott in letters of 26 April 2013 and 11 June 2013, the latter gave notice that legal action would be taken to obtain a decision regarding the lawfulness of the notified boycott.

20 NTF brought a case before Drammen District Court (Drammen tingrett) on 12 June 2013, seeking an order that the boycott notified in the letter of 11 June 2013 was lawful. On 19 March 2014, Drammen District Court gave a declaration that the notified boycott was lawful. Borgarting Court of Appeal (Borgarting lagmannsrett) reached the same conclusion in its judgment of 8 September 2014. Both the District Court and the Court of Appeal found that the

III FAKTUM OG SAKSGANG

BAKGRUNN

17 Holship er et norsk speditørfirma som er heleid av et dansk morselskap. Hovedvirksomheten er rengjøring av fruktkasser. Holship har tidligere brukt Administrasjonskontorets tjenester. Ved årsskiftet 2012/2013 fikk Holship en ny kunde, noe som medførte økt aktivitet for bedriften i Drammen havn. Holship ansatte da fire nye terminalarbeidere, som tillegg til den ene terminalarbeider som var ansatt fra før.

18 Holship har inngått tariffavtale med Norsk Arbeidsmandsforbund. Tariffavtalens virkeområde omfatter renholdsarbeid, som er Holships hovedvirksomhet. Holship har valgt å anvende renholdsoverenskomsten på losse- og lastearbeiderne.

19 På bakgrunn av Holships økte aktivitet og bruk av egne terminalarbeidere til losse- og lastearbeidet i Drammen havn, fremmet NTF i brev til Holship 10. april 2013 krav om at Rammeavtalen ble gjort gjeldende. Holship besvarte ikke brevet. NTF purret gjentatte ganger på svar og varslet til sist boikott i brev 26. april 2013 og 11. juni 2013. I sistnevnte brev varslet NTF også søksmål for å få avgjort berettigelsen av den varslede boikott.

20 NTF tok ut stevning for Drammen tingrett 12. juni 2013, med påstand om at boikotten varslet i brev 11. juni 2013 var lovlig. Drammen tingrett avsa 19. mars 2014 dom for at den varslede boikott var lovlig. Borgarting lagmannsrett kom i dom 8. september 2014 til samme resultat. Både tingretten og lagmannsretten la til grunn at fortrinnsretten etter Rammeavtalen falt inn under unntaket for arbeids- og ansettelsesvilkår i så vel EØS-avtalens konkurranseregler

priority of engagement clause under the Framework Agreement fell within the exemption relating to conditions of work and employment under EEA and Norwegian competition rules. Furthermore, the Court of Appeal found that the claim for a collective agreement did not conflict with Article 31 EEA (Article 31 EEA had not been invoked before the District Court).

21 Holship submitted an appeal to the Supreme Court. By decision and order of 14 January 2015, the Appeal Committee of the Supreme Court (*Høyesteretts ankeutvalg*) granted leave to appeal. On 11 June 2015, the Court received a request from the Supreme Court for an Advisory Opinion.

IV QUESTIONS

22 The following questions were referred to the Court:

On competition law:

(A1) Does the exemption from the competition rules of the EEA Agreement that applies to collective agreements, as this exemption is described inter alia in the advisory opinion of the EFTA Court in Case E-8/00 Landsorganisasjonen i Norge and NKF [2002] EFTA Ct. Rep. 114, cover the use of a boycott against a port user in order to produce acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate administration office as described in paragraphs 7 and 10 to 14 [of the Request], rather than to use its own employees for the same work?

(A2) If not, should such a system be assessed under Article 53 or Article 54 of the EEA Agreement?

som i norsk konkurranselovgivning. Lagmannsretten kunne videre ikke se at tariffkravet kom i konflikt med EØS-avtalen artikkel 31 (EØS-avtalen artikkel 31 var ikke anført for tingretten).

21 Holship anket til Høyesterett. Ved Høyesteretts ankeutvalgs beslutning og kjennelse 14. januar 2015 ble anken tillatt fremmet. Den 11. juni 2015 mottok EFTA-domstolen en anmodning fra Høyesterett om en rådgivende uttalelse.

IV SPØRSMÅL

22 Følgende spørsmål ble forelagt EFTA-domstolen:

Om konkurranseretten:

A.1 Faller det innenfor unntaket fra EØS-avtalens konkurranseregler som gjelder for tariffavtaler, slik dette unntaket fremgår blant annet av EFTA-domstolens rådgivende uttalelse i sak E-8/00 [*Landsorganisasjonen i Norge og NKF*, Sml. 2002 s. 114], å benytte boikott overfor en havnebruker for å oppnå tilslutning til en tariffavtale, når en slik tilslutning innebærer at havnebrukeren fortrinnsvis må kjøpe losse- og lastetjenester fra et eget administrasjonskontor slik som beskrevet i avsnitt 7 og 10 til 14 [i anmodningen], fremfor å benytte egne ansatte til det samme arbeidet?

A.2 Hvis ikke, skal et slikt system bedømmes etter artikkel 53 eller artikkel 54 i EØS-avtalen?

(A3) In that case, must the existence of an identical or corresponding system in other ports be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA?

On the freedom of establishment:

(B1) Is it a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement for a trade union to use a boycott in order to produce acceptance of a collective agreement by a company whose parent company is based in another EEA State, when the collective agreement entails that the company must give preference to buying unloading and loading services from a separate administration office having the characteristics described in paragraphs 10 to 14 [of the Request], rather than use its own employees for this work?

(B2) Would it be of significance for the assessment of whether a restriction exists, if the company's need for unloading and loading services proved to be very limited and/or sporadic?

(B3) If a restriction exists: Is it of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement negotiated between the social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work?

V WRITTEN OBSERVATIONS

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

A.3 Må man i så fall ved vurderingen av om det foreligger en merkbar påvirkning på samhandelen innen EØS ta hensyn til at samme eller tilsvarende system finnes i andre havner?

Om etableringsadgangen:

B.1 Utgjør det en restriksjon på etableringsadgangen i henhold til EØS-avtalen artikkel 31 å benytte boikott fra en fagforenings side for å oppnå tilslutning til en tariffavtale fra en bedrift hvis morselskap er hjemmehørende i en annen EØS-stat, når tariffavtalen innebærer at bedriften fortrinnsvis må kjøpe losse- og lastetjenester fra et eget administrasjonskontor med de kjennetegn som fremgår av avsnittene 10 til 14 [i anmodningen], fremfor å benytte sine egne ansatte til dette arbeidet?

B.2 Er det av betydning for om det foreligger en restriksjon at bedriftens behov for losse- og lastetjenester eventuelt skulle vise seg å være svært begrenset og/eller sporadisk?

B.3 Dersom det foreligger en restriksjon: Er det av betydning for vurderingen av om restriksjonen er lovlig eller ikke, at bedriften for sine egne losse- og lastearbeidere anvender en annen tariffavtale fremforhandlet mellom arbeidslivets parter i den stat havnen ligger, når denne tariffavtalen gjelder et annet tariffområde enn losse- og lastearbeid?

V SKRIFTLIGE INNLEGG

23 I medhold av artikkel 20 i Domstolens vedtekter og artikkel 97 i Domstolens rettergangsordning er skriftlige saksfremstillinger inngitt av:

- Holship, represented by Nicolay Skarning, Advocate;
- NTF, represented by Håkon Angell and Lornts Nagelhus, Advocates;
- The Norwegian Government, represented by Pål Wennerås, Advocate, the Attorney General of Civil Affairs, and Janne Tysnes Kaasin, Senior Adviser, Ministry of Foreign Affairs, acting as Agents;
- The EFTA Surveillance Authority ("ESA"), represented by Markus Schneider, Deputy Director, Maria Moustakali, Officer, Øyvind Bø, Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;
- The European Commission ("the Commission"), represented by Luigi Malferrari and Manuel Kellerbauer, Members of the Legal Service, acting as Agents.

VI SUMMARY OF THE ARGUMENTS SUBMITTED AND PROPOSED ANSWERS

HOLSHIP

24 Annexed to the written observations is a report by Professor Erling Hjelmeng (Attachment 1), which was excluded as evidence by the Supreme Court, and a presentation of Professor Hjelmeng's credentials (Attachment 2). Professor Hjelmeng's assessment and conclusion is endorsed.

QUESTIONS A1 – A3

25 Reliance is placed entirely upon the assessment and conclusion in Professor Hjelmeng's report. His conclusion is that: (i) the present

– Holship, representert ved advokat Nicolay Skarning,

– NTF, representert ved advokat Håkon Angell og advokat Lornts Nagelhus,

– Norges regjering, representert ved advokat Pål Wennerås, Regjeringsadvokaten, og seniorrådgiver Janne Tysnes, Utenriksdepartementet, som partsrepresentanter,

– EFTAs overvåkningsorgan ("ESA"), representert ved Markus Schneider, Deputy Director, Maria Moustakali, Officer, Øyvind Bø, Officer, og Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, som partsrepresentanter,

– Europakommisjonen ("Kommisjonen"), representert ved Luigi Malferrari og Manuel Kellerbauer, medlemmer av Kommisjonens juridiske tjeneste, som partsrepresentanter.

VI SAMMENDRAG AV FREMSATTE ARGUMENTER OG FORSLAG TIL SVAR

HOLSHIP

24 Vedlagt de skriftlige innlegg er en betenkning fra professor Erling Hjelmeng (vedlegg 1), som Høyesterett avviste som bevis, og en redegjørelse for professor Hjelmengs kvalifikasjoner (vedlegg 2). Professor Hjelmengs vurdering og konklusjon tiltredes.

SPØRSMÅL A.1 – A.3

25 Holship baserer seg helt og holdent på vurderingen og konklusjonen i professor Hjelmengs betenkning. Hans konklusjon er at (i) den

organisation of loading and unloading services confers an exclusive right upon the AO that is contrary to Article 53 EEA; and (ii) the imposition of a duty to hire personnel regardless of the need must be deemed to constitute an abuse of a dominant position contrary to Article 54 EEA.

QUESTIONS B1 – B3

26 Holship submits that the organisation of Norwegian ports is contrary to Article 31 EEA.

PROPOSED ANSWERS

27 Holship does not propose any specific answers to the questions referred.

NTF

28 Although the referring court has not posed any question concerning the applicability of Article 59(2) EEA, NTF finds it appropriate to submit observations on this provision, as its applicability will determine whether it is necessary to answer the questions referred.

29 NTF submits that Article 59(2) EEA applies. First, the AO is an undertaking of the kind defined in Article 59(2) EEA. The AO provides a service of general economic interest. The Framework Agreement has been entered into with undertakings located in the largest ports in Norway, which are important traffic junctions and serve most of the cargo to and from Norway that is transported by sea. A number of the functions of a port have been characterised by both the Court of Justice of the European Union ("the ECJ") and the Commission as services of general economic interest.

nåværende organisering av losse- og lastetjenesten, med den eksklusive rett som Administrasjonskontoret har, står i motstrid med EØS-avtalen artikkel 53, og videre at (ii) pålegget om å leie inn personell uavhengig av behovene må anses å være utilbørlig utnyttelse av dominerende stilling i strid med artikkel 54.

SPØRSMÅL B.1 – B.3

26 Holship anfører at organiseringen av norske havner er i strid med EØS-avtalen artikkel 31.

FORSLAG TIL SVAR

27 Holship fremsetter ikke noe bestemt forslag til svar på de forelagte spørsmål.

NTF

28 Selv om den anmodende domstol ikke har stilt noen spørsmål vedrørende anvendelsen av EØS-avtalen artikkel 59 nr. 2, finner NTF det hensiktsmessig å si noe om bestemmelsen ettersom vurderingen av om den kommer til anvendelse, avgjør om det er nødvendig å besvare spørsmålene.

29 NTF gjør gjeldende at EØS-avtalen artikkel 59 nr. 2 kommer til anvendelse. For det første er Administrasjonskontoret et foretak av den type det vises til i EØS-avtalen artikkel 59 nr. 2. Administrasjonskontoret yter en tjeneste av allmenn økonomisk betydning. Rammeavtalen er inngått med foretak som ligger i de største havner i Norge, som er viktige trafikknutepunkter og som håndterer det meste av godset som kommer inn og ut av Norge sjøveien. Både Den europeiske unions domstol ("EU-domstolen") og Kommisjonen har betegnet en rekke havnefunksjoner som tjenester av allmenn økonomisk betydning.

30 Second, the AO has been entrusted with the task of providing the service. Article 2 of the Convention imposes an obligation on States to assure dockworkers of a certain minimum income or minimum periods of employment, and Article 3(2) gives registered dockworkers a priority of engagement for dock work. Under the Convention, if the situation established by the Framework Agreement regarding priority of engagement cannot be maintained, this must be established by legislation or other public authority resolution.[1] The AO must be regarded as part of the services offered by the port to meet the requirements for safe and efficient port services, and, in this regard, acceptance of the Framework Agreement is a prerequisite.

31 Third, the AO's provision of the service is obstructed by the rules of the EEA Agreement. If priority of engagement is regarded as contrary to EEA law, there will no longer be a basis for maintaining permanently employed dockworkers who are given the necessary courses and training. The supply of assignments will be random, and the dockworkers will lose their basis for achieving predictable pay and employment conditions.

QUESTION A1

32 NTF argues that it is established EU and EEA law that, as a general rule, agreements between employer and employee organisations, even though they may entail restrictions of competition, fall outside the scope of the competition rules.[2] However, provisions of a collective agreement that pursue other, extraneous objectives or that

1 Reference is made to Section 40 of the Norwegian Act 19 of 2009 relating to Ports and Fairways.

2 Reference is made to Case E-8/00 *Landsorganisasjonen i Norge and and Others* v *Kommunes Sentralforbund and Others* [2002] EFTA Ct. Rep. 114, paragraph 44, as regards the EEA EFTA States, and Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paragraphs 59 to 64.

30 For det andre er Administrasjonskontoret tillagt oppgaven med å utføre tjenesten. Konvensjonen artikkel 2 pålegger statene en plikt til å sikre havnearbeidere en viss minimumsinntekt eller minimumsperioder med sysselsetting, og artikkel 3 nr. 2 gir registrerte havnearbeidere fortrinnsrett ved tildeling av havnearbeid. Konvensjonen fastsetter at dersom det ikke er mulig å opprettholde den situasjon som etableres ved Rammeavtalen for fortrinnsrett ved tildeling, skal denne sikres ved nasjonale lover eller forskrifter.[1] Administrasjonskontoret må betraktes som en del av de tjenester havnen tilbyr for å oppfylle kravene om sikre og effektive havnetjenester, og i så måte er tilslutning til Rammeavtalen en forutsetning.

31 For det tredje er reglene i EØS-avtalen til hinder for at Administrasjonskontoret kan yte tjenesten. Dersom fortrinnsrett anses å være i strid med EØS-retten, vil det ikke lenger være hjemmel for å ha fast ansatte havnearbeidere som får nødvendig kursing og opplæring. Tildelingen av oppdrag vil være tilfeldig, og havnearbeiderne vil miste grunnlaget for å oppnå forutsigbare lønns- og ansettelsesvilkår.

SPØRSMÅL A.1

32 NTF anfører at det er sikker rett innenfor EU og EØS at avtaler mellom arbeidsgiver- og arbeidstakerorganisasjoner som hovedregel ikke omfattes av konkurransereglene selv om de kan innebære konkurransebegrensninger.[2] Imidlertid kan bestemmelser i en tariffavtale som forfølger andre, utenforliggende mål, eller som i

1 Det vises til lov 17. april 2009 nr. 19 om havner og farvann § 40.

2 Det vises til sak E-8/00 *Landsorganisasjonen i Norge m.fl.* mot *Kommunenes Sentralforbund m.fl.*, Sml. 2002, s. 114 (avsnitt 44) når det gjelder EØS/EFTA-statene, og sak C-67/96 *Albany International BV* mot *Stichting Bedrijfspensioenfonds Textielindustrie,* Sml. 1999 s. I-5751 (avsnitt 59–64).

do not, in practice, improve conditions of work and employment may come within the scope of Article 53 EEA.[3]

33 According to NTF, there is no doubt that the Framework Agreement is a collective agreement entered into between social partners. It argues further that the content of a provision in a collective agreement must constitute a "suitable measure" in order to provide immunity under competition law.[4] Moreover, the Court has specified that the concept of conditions of work and employment "must be interpreted widely".

34 According to NTF, there is no doubt that the priority of engagement clause in the Framework Agreement pursues social policy objectives and contributes to securing and improving conditions of employment and work for dockworkers by providing them with stable working conditions and regulated pay and employment conditions. Moreover, the priority of engagement clause also ensures Norway's compliance with its international law obligations under the Convention.

35 NTF concludes with respect to Question A1 that the Framework Agreement's priority of engagement provision does not constitute an infringement of EEA competition rules.

QUESTION A2

36 With respect to Article 53 EEA, NTF limits itself to the submission that the circumstances of the present case do not give rise to an agreement between undertakings or any form of concerted practice

3 Reference is made to *Landsorganisasjonen i Norge*, cited above, point 1 of the operative part of the judgment, and Case C-413/13 *FNV Kunsten Informatie en Media* v *Staat der Nederlanden*, judgment of 4 December 2014, published electronically, paragraph 22 et seq.

4 Reference is made to *Albany*, cited above, paragraphs 59 and 60.

praksis ikke forbedrer arbeids- og ansettelsesvilkårene, komme inn under virkeområdet for EØS-avtalen artikkel 53.[3]

33 Ifølge NTF er det ingen tvil om at Rammeavtalen er en tariffavtale som er inngått mellom arbeidslivets parter. NTF anfører videre at innholdet i en bestemmelse i en tariffavtale må utgjøre et "egnet tiltak" for å kunne gi konkurranserettslig immunitet.[4] EFTA-domstolen har dessuten angitt at begrepet arbeids- og ansettelsesvilkår "må fortolkes bredt".

34 Ifølge NTF er det ingen tvil om at Rammeavtalens bestemmelse om fortrinnsrett forfølger sosialpolitiske mål og bidrar til å sikre og forbedre arbeids- og ansettelsesvilkårene for havnearbeidere, ved å gi dem stabile arbeidsvilkår og regulerte lønns- og ansettelsesvilkår. Videre sikrer fortrinnsrettsbestemmelsen også at Norge kan overholde sine folkerettslige forpliktelser etter Konvensjonen.

35 NTF trekker den slutning med hensyn til spørsmål A.1 at Rammeavtalens bestemmelse om fortrinnsrett ikke utgjør brudd på EØS-avtalens konkurranseregler.

SPØRSMÅL A.2

36 Når det gjelder EØS-avtalen artikkel 53, begrenser NTF seg til å anføre at omstendighetene i den foreliggende sak ikke innebærer noen avtale mellom foretak eller noen form for samordnet opptreden

3 Det vises til *Landsorganisasjonen i Norge*, som omtalt over, avsnitt 1 av slutningen, og sak C-413/13 *FNV Kunsten Informatie en Media* mot *Staat der Nederlanden*, dom 4. desember 2014, publisert elektronisk (avsnitt 22 flg.).

4 Det vises til *Albany*, som omtalt over (avsnitt 59 og 60).

as specified in that Article. Neither the workers, nor the NTF nor the employers can be regarded as undertakings for the purposes of that provision.[5] Moreover, a concerted practice of the type that Holship contends cannot be said to exist.[6]

37 With respect to Article 54 EEA, NTF contends that the AO cannot be regarded as an "undertaking" as defined therein and that, in any circumstance, the AO has not abused a dominant position.

38 According to NTF, the priority of engagement that follows from clause 2(1) of the Framework Agreement has been granted to individual dockworkers and not to the AO, which has been set up to manage and regulate the workforce in the port. The workers are formally employed at the AO. Furthermore, both the Staff Committee, which, pursuant to the Framework Agreement, has the authority to decide questions, and the administrative body, which is to handle the practical implementation, are composed of representatives of the employees and employers who are bound by the Framework Agreement. These same employers are also users of the services offered, and they are also generally referred to as employers in the collective agreement. In relation to the performance of the work, the dockworkers are subject to the port users' instructions in the same way as if they were employed there. The AO is therefore to be regarded as an administrative body for what is characterised as a "pool arrangement" in the Commission's Communication on a European Ports Policy.[7]

5 Reference is made to Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraphs 26 and 27, and to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 201 et seq.

6 Reference is made to Professor Hjelmeng's assessment annexed to Holship's written observations, p. 5.

7 Reference is made to the Commission's Communication on a European Ports Policy of 18 October 2007 (COM(2007) 616 final), paragraph 4.5.

i henhold til nevnte artikkel. Verken arbeidstakerne, NTF eller arbeidsgiverne kan betraktes som foretak etter nevnte bestemmelse.[5] Videre kan det ikke sies å foreligge noen samordnet opptreden av den type Holship påstår.[6]

37 Når det gjelder EØS-avtalen artikkel 54, gjør NTF gjeldende at Administrasjonskontoret ikke kan betraktes som et "foretak" etter definisjonen i EØS-avtalen, og at Administrasjonskontoret uansett ikke har misbrukt en dominerende stilling.

38 Ifølge NTF har fortrinnsretten som følger av Rammeavtalen artikkel 2 nr. 1, blitt gitt til individuelle havnearbeidere, ikke til Administrasjonskontoret, som ble etablert for å administrere og regulere arbeidsstyrken i havnen. Arbeidstakerne er formelt ansatt ved Administrasjonskontoret. Videre består både personalkomiteen, som i henhold til Rammeavtalen har myndighet til å avgjøre spørsmål, og administrasjonsorganet, som skal sørge for den praktiske gjennomføringen, av representanter for arbeidstakere og arbeidsgivere som er bundet av Rammeavtalen. De samme arbeidsgivere er også brukere av tjenestene som tilbys, og de omtales generelt også som arbeidsgivere i tariffavtalen. I forbindelse med utførelsen av arbeidet er havnearbeiderne underlagt havnebrukernes instrukser på samme måte som om de hadde vært ansatt der. Administrasjonskontoret må derfor betraktes som et administrasjonsorgan for det som betegnes som en "pool-ordning" i kommisjonsmeldingen om en europeisk havnepolitikk.[7]

5 Det vises til sak C-22/98 *Becu m.fl.*, Sml. 1999 s. I-5665 (avsnitt 26 og 27), uttalelse fra generaladvokat Jacobs i *Albany*, som sitert over (avsnitt 201 flg.).

6 Det vises til professor Hjelmengs vurdering vedlagt Holships skriftlige innlegg, s. 5.

7 Det vises til Kommisjonens melding om en europeisk havnepolitikk av 18. oktober 2007 (COM(2007) 616 final), avsnitt 4.5.

39 NTF argues that the present case has significant similarities with *Becu*, in which the ECJ held that a statutory priority of engagement for recognised stevedores to perform dock duties did not entail that special or exclusive rights had been granted to "undertakings".[8] Nor is it significant that the Belgian priority of engagement scheme at issue in *Becu* was not designed so that the dockworkers were formally employed by an employer other than the one for which the dock work was performed, nor that the scheme in *Becu* was statutory, unlike the situation in the present case where the arrangement follows from the Framework Agreement. There is also a similarity, though not as obvious, between the present case and *Porto di Genova*.[9] In that case, the exclusive rights were expressly granted to undertakings and not to dockworkers.

40 NTF contends that, as a consequence, the AO cannot be regarded as an "undertaking" and thus Article 54 EEA cannot have been infringed.

41 Further, NTF submits that a finding of an infringement under Article 54 EEA is conditional upon the abuse of a dominant position. In the assessment of whether there is any abuse, the market on which the AO has a dominant position must be defined, and it must be determined whether, in such a case, the performance of the activity can be regarded as constituting abuse. The AO hires out dockworkers, but does not itself provide stevedore services. Consequently, the AO does not operate on the market for loading and unloading services. This distinguishes the AO's activities from those of the dock work company in the judgment in *Silvano Raso*, where the

8 Reference is made to *Becu*, cited above, paragraphs 26 to 31.

9 Reference is made to Case C-179/90 *Merci convenzionali porto di Genova SpA* v *Siderurgica Gabrielli* SpA [1992] ECR I-5889.

39 NTF gjør gjeldende at den foreliggende sak har store likhetstrekk med *Becu*, der EU-domstolen la til grunn at selv om anerkjente havnearbeidere skulle ha en lovfestet fortrinnsrett til å utføre havneoppgaver, innebærer ikke dette at "foretak" er gitt særlige eller eksklusive rettigheter.[8] Det er heller ikke av betydning at den belgiske fortrinnsrettsordning tvisten i *Becu* gjaldt, ikke var utformet slik at havnearbeiderne formelt var ansatt av en annen arbeidsgiver enn den havnearbeidet ble utført for, og heller ikke at ordningen *Becu* gjaldt, var lovfestet, i motsetning til situasjonen i den foreliggende sak, der ordningen følger av Rammeavtalen. Det er også fellestrekk – selv om de ikke er like innlysende – mellom den foreliggende sak og *Porto di Genova*.[9] I saken der var de eksklusive rettigheter uttrykkelig gitt foretak, ikke havnearbeidere.

40 NTF gjør gjeldende at Administrasjonskontoret derfor ikke kan betraktes som et "foretak", og at det følgelig ikke foreligger brudd på EØS-avtalen artikkel 54.

41 NTF anfører videre at en konstatering av brudd på EØS-avtalen artikkel 54 forutsetter at det foreligger utilbørlig utnyttelse av dominerende stilling. En vurdering av om det foreligger utilbørlig utnyttelse, forutsetter en definisjon av det marked Administrasjonskontoret har en dominerende stilling på, og det må fastslås om utøvelsen av virksomheten i så tilfelle kan betraktes som utilbørlig utnyttelse. Administrasjonskontoret leier ut havnearbeidere, men yter ikke selv havnetjenester. Følgelig opererer ikke Administrasjonskontoret på markedet for laste- og lossetjenester. På denne måte skiller Administrasjonskontorets virksomhet seg fra virksomheten i havnearbeidsselskapet i dommen i

8 Det vises til *Becu*, som omtalt over (avsnitt 26–31).
9 Det vises til sak C-179/90 *Merci convenzionali porto di Genova SpA* mot *Siderurgica Gabrielli* SpA, Sml. 1992 s. I-5889.

importance of distinguishing between the market for labour and the market for services in the port was emphasised.[10]

42 NTF refers to *Silvano Raso* and *Höfner and Elser* as regards the question whether exclusive rights may, in themselves, constitute abuse.[11] It observes that the collective agreement system in Norwegian ports does not, however, establish a monopoly, but a priority of engagement. This means that labour capacity is not restricted, as port users are free to use other labour where the demand cannot be met by the AO.

43 NTF maintains that other elements specified in the Framework Agreement, such as the requirement for a minimum number of hours, the regulation of meal breaks and the obligation that a minimum of one dockworker must be assigned, fall outside the competition rules as they are not imposed by an undertaking.

QUESTION A3

44 NTF submits that this question must be answered in the affirmative, provided that the other conditions are met.

QUESTION B1

45 In relation specifically to Question B1, NTF argues that the referring court is imprecise on the point that the priority of engagement is not given to the AO, but to the dockworkers. The dockworkers thus have a priority of engagement to perform unloading and loading work independently of the AO. The task of the AO is to manage the

10 Reference is made by contrast to Case C-163/96 *Silvano Raso and Others* [1998] ECR I-533.
11 Reference is made to *Silvano Raso*, cited above, paragraph 27, and Case C-41/90 *Höfner and Fritz Elser* v *Macrotron GmbH* [1991] ECR I-1979.

Silvano Raso-saken, der det ble understreket hvor viktig det var å skille mellom arbeidsmarkedet og tjenestemarkedet i havnen.[10]

42 NTF viser til *Silvano Raso* og *Höfner og Elser* når det gjelder spørsmålet om eksklusive rettigheter som sådan kan utgjøre utilbørlig utnyttelse.[11] NTF bemerker at tariffavtalesystemet i norske havner imidlertid ikke etablerer noe monopol, men en fortrinnsrett. Dette innebærer at det ikke er restriksjoner på arbeidskraften, siden havnebrukerne fritt kan benytte annen arbeidskraft dersom Administrasjonskontoret ikke kan dekke etterspørselen.

43 NTF fastholder at andre punkter som er spesifisert i Rammeavtalen, som kravet om et minste timeantall, reguleringen av spisepauser og plikten til å tilsette minst én havnearbeider, ikke omfattes av konkurransereglene siden de ikke er pålagt av et foretak.

SPØRSMÅL A.3

44 NTF anfører at dette spørsmål må besvares bekreftende, forutsatt at de andre vilkår er oppfylt.

SPØRSMÅL B.1

45 Når det gjelder spørsmål B.1 spesielt, gjør NTF gjeldende at den anmodende domstol uttrykker seg upresist i punktet om at fortrinnsrett ikke gis til Administrasjonskontoret men til havnearbeiderne. Havnearbeiderne har dermed fortrinnsrett til å utføre losse- og lastearbeid uavhengig av Administrasjonskontoret.

10 Det vises til sak C-163/96 *Silvano Raso m.fl.*, Sml. 1998 s. I-533.

11 Det vises til *Silvano Raso*, som omtalt over (avsnitt 27), og sak C-41/90 *Höfner og Fritz Elser* mot *Macrotron GmbH*, Sml. 1991 s. I-1979.

priority of engagement, but it does not derive any rights from the Framework Agreement.

46 NTF submits that the present case has clear similarities with the subject-matter in *Becu*, in which it was found that the exclusive right for dockers to perform dock work did not constitute a special right or an exclusive right for an undertaking, as the right was granted to the workers.[12] Moreover, NTF argues that the AO must be considered a non-profit-making company and hence not included within the definition of "companies and firms" for the purposes of Article 34(2) EEA.[13]

47 NTF argues, therefore, that there is no restriction on the freedom of establishment or on the right to provide services.

QUESTION B2

48 NTF submits that Article 31 EEA does not prevent "nationality-neutral" regulation of business activities based on minimum intervention. In this regard, the Framework Agreement applies equally to all undertakings that carry on activities in Norwegian ports.

49 NTF argues that the priority of engagement clause did not limit Holship's opportunity to establish itself in Norway when it commenced its business activities in 1996. The priority of engagement rule does not prevent Holship from offering unloading and loading services, or from providing these services itself, as long as the priority of engagement for dockworkers is respected. Holship thus has access to the market for unloading and loading services.

12 Reference is made to *Becu*, cited above.

13 Reference is made to Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395, and Case C-113/13 *Azienda sanitaria locale n. 5 «Spezzino» and Others* v *San Lorenzo Soc. coop. sociale and Croce Verde Cogema cooperativa sociale Onlus*, judgment of 11 December 2014, published electronically.

Administrasjonskontorets oppgave er å administrere fortrinnsretten, men det har ingen rettigheter i kraft av Rammeavtalen.

46 NTF anfører at den foreliggende sak har klare likhetstrekk med tvistegjenstanden i *Becu*, der det ble slått fast at havnearbeidernes eksklusive rett til å utføre havnearbeid ikke utgjorde noen særlig eller eksklusiv rettighet for et foretak, ettersom det var arbeidstakerne som hadde denne rett.[12] NTF anfører videre at Administrasjonskontoret ikke kan anses å drive ervervsmessig virksomhet, og at det dermed ikke omfattes av definisjonen av selskaper etter EØS-avtalen artikkel 34 nr. 2.[13]

47 NTF fremholder at det derfor ikke foreligger noen restriksjon på etableringsadgangen eller på adgangen til å yte tjenester.

SPØRSMÅL B.2

48 NTF anfører at EØS-avtalen artikkel 31 ikke er til hinder for "nasjonalitetsnøytral" regulering av forretningsvirksomhet basert på minsteintervensjon. Hva dette angår, får Rammeavtalen lik anvendelse på alle foretak som driver virksomhet i norske havner.

49 NTF gjør gjeldende at bestemmelsen om fortrinnsrett ikke begrenset Holships mulighet til å etablere seg i Norge da det begynte sin forretningsvirksomhet i 1996. Regelen om fortrinnsrett hindrer ikke Holship i å tilby losse- og lastetjenester, eller i selv å yte disse tjenester, så lenge fortrinnsretten for havnearbeidere respekteres. Holship har dermed adgang til markedet for losse- og lastetjenester.

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12 Det vises til *Becu*, som omtalt over.

13 Det vises til sak C-70/95 *Sodemare SA, Anni Azzurri Holding SpA og Anni Azzurri Rezzato Srl mot Regione Lombardia*, Sml. 1997 s. I-3395, og sak C-113/13 *Azienda sanitaria locale n. 5 «Spezzino» m.fl.* mot *San Lorenzo Soc. coop. sociale og Croce Verde Cogema cooperativa sociale Onlus*, dom 11. desember 2014, publisert elektronisk.

50 NTF also submits that EEA States can regulate the performance of business activities and market access, without such regulation being regarded as a restriction under Article 31 EEA.[14] The work that is covered by the priority of engagement is very limited, as further handling of the cargo, after it has been put down onto the quay, is not covered. Consequently, only the most risky work operations are subject to the priority of engagement. The priority of engagement does not prevent Holship from gaining access to the market under effective and normal conditions, given that by far the main part of the work tasks connected with cargo handling are not covered by the priority of engagement.

51 NTF therefore concludes that this question has to be answered in the affirmative.

QUESTION B3

52 NTF maintains that the fact that Holship has entered into a collective agreement for another occupational group can hardly be of relevance in assessing the lawfulness of a restriction. Were the collective agreement for cleaning workers to be regarded as relevant to the assessment and also found to be of significance, the assessment of the lawfulness of collective agreements would differ depending on whether or not the undertaking is bound by a collective agreement. Such an effect would be contrary to fundamental rights, including the freedom of organisation and the right to take industrial action. The validity of those rights cannot be weakened by other occupational groups. Such an effect would be contrary to the principles of the collective agreement system and bargaining model that governs Norwegian working life. The

14 Reference is made to Case C-565/08 *Commission* v *Italy* [2011] ECR I-2101, paragraphs 50 and 51 and the case law cited.

50 NTF anfører videre at EØS-statene har anledning til å regulere utførelsen av forretningsvirksomhet og markedsadgang uten at slik regulering dermed anses som en restriksjon etter EØS-avtalen artikkel 31.[14] Arbeidet som fortrinnsretten gjelder for, er svært begrenset, ettersom videre godshåndtering, etter at godset er plassert på kai, ikke inngår i dette. Følgelig er det bare de mest risikofylte arbeidsoperasjoner som omfattes av fortrinnsretten. Fortrinnsretten hindrer ikke Holship i å få adgang til markedet på effektive og vanlige vilkår, gitt at langt den største del av arbeidsoppgavene i forbindelse med godshåndtering ikke omfattes av fortrinnsretten.

51 NTF konkluderer derfor med at dette spørsmål må besvares bekreftende.

SPØRSMÅL B.3

52 NTF fastholder at det faktum at Holship har inngått en tariffavtale for en annen yrkesgruppe, neppe kan være relevant for en vurdering av om en restriksjon er lovlig. Dersom renholdsoverenskomsten skulle anses som relevant for vurderingen og også ble funnet å være av betydning, ville vurderingen av en tariffavtales berettigelse avhenge av om foretaket er bundet av en tariffavtale eller ikke. En slik virkning ville være i strid med grunnleggende rettigheter, herunder organisasjonsfriheten og retten til arbeidskamp. Gyldigheten av disse rettigheter kan ikke svekkes av andre yrkesgrupper. En slik virkning ville være i strid med prinsippene for tariffavtalesystemet og forhandlingsmodellen som styrer norsk arbeidsliv. Det norske tariffavtalesystem er basert på og motsvarer

14 Det vises til sak C-565/08 *Kommisjonen* mot *Italia*, Sml. 2011 s. I-2101 (avsnitt 50 og 51), og den rettspraksis som det vises til der.

Norwegian collective agreement system is based on and corresponds to the freedom of organisation rooted in international conventions and human rights. An undertaking's conclusion of a collective agreement covering a different group of workers does not constitute a recognised restriction of the right to demand a collective agreement or to pursue such a demand via industrial action. Finally, NTF submits that the collective agreement entered into by Holship does not have regard to the special considerations contained in the Framework Agreement.

53 Based on the above, NTF submits that the question is to be answered in the negative.

PROPOSED ANSWERS

54 NTF proposes that the Court should provide the following answers to the questions referred:

(A1) The demand for a collective agreement and the notice of the use of a boycott, where acceptance of the collective agreement entails that the port user must give preference to hiring labour in the form of dockworkers, fall under the exemption from the competition rules of the EEA Agreement as this exemption has been defined in, inter alia, the advisory opinion of the EFTA Court in Case E-8/00.

In the alternative, and if Question A1 is answered in the affirmative, NTF proposes that the Court should answer Question A2 as follows:

(A2) Articles 53 and 54 are not applicable.

In the further alternative, and only if Questions A1 and A2 are both answered in the affirmative, NTF proposes that the Court should answer Question A3 as follows:

organisasjonsfriheten som er rotfestet i internasjonale konvensjoner og i menneskerettighetene. Om et foretak inngår en tariffavtale for en annen arbeidstakergruppe, betyr ikke dette at det foreligger en anerkjent restriksjon på retten til å kreve tariffavtale eller til å forfølge et slikt krav via arbeidskamp. Endelig anfører NTF at tariffavtalen som Holship inngikk, ikke tar hensyn til de særlige forhold som er omtalt i Rammeavtalen.

53 På grunnlag av det ovenstående mener NTF at spørsmålet må besvares benektende.

FORSLAG TIL SVAR

54 NTF anmoder EFTA-domstolen om å besvare spørsmålene på følgende måte:

A.1 Kravet om tariffavtale og varselet om å benytte boikott, der tilslutning til tariffavtalen innebærer at havnebrukeren fortrinnsvis må leie arbeidskraft i form av havnearbeidere, faller inn under unntaket fra EØS-avtalens konkurranseregler slik dette unntaket fremgår av blant annet EFTA-domstolens rådgivende uttalelse i sak E-8/00.

Subsidiært, og hvis spørsmål A.1 besvares bekreftende, anmoder NTF EFTA-domstolen om å besvare spørsmål A2 på følgende måte:

A.2 Artikkel 53 og 54 får ikke anvendelse.

Atter subsidiært, og bare hvis både spørsmål A.1 og A.2 besvares bekreftende, anmoder NTF EFTA-domstolen om å besvare spørsmål A.3 på følgende måte:

(A3) In the assessment of whether there is a noticeable effect on cross-border trade within the EEA, the existence of an identical or corresponding system in other ports must be taken into account.

On the freedom of establishment, NTF proposes the following answer:

(B1) The claim for a collective agreement and the subsequent notice of a boycott to produce acceptance of the collective agreement do not constitute a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement.

In the alternative, and if Question B1 is answered in the affirmative, NTF proposes that Questions B2 and B3 should be answered as follows:

(B2) It will be of significance for the assessment of whether a restriction exists that the company's need for unloading and loading services is limited and/or sporadic, and, moreover, it is for the referring court to assess whether the restriction meets the conditions stated in the grounds of this judgment.

(B3) It is without significance for the assessment of whether the restriction is lawful or not that the company, in relation to its own dockworkers, applies another collective agreement when that collective agreement concerns matters other than unloading and loading work.

THE NORWEGIAN GOVERNMENT

QUESTIONS A1 – A2

55 In relation to the right of collective action, the Norwegian Government notes that that right is recognised in various international instruments and has been characterised by the ECJ as a

A.3 Ved vurderingen av om det foreligger en merkbar påvirkning på samhandelen innen EØS må det tas hensyn til at samme eller tilsvarende system finnes i andre havner.

Med hensyn til etableringsadgangen foreslår NTF følgende svar:

B.1 Kravet om tariffavtale og etterfølgende varsel om boikott for å oppnå tilslutning til tariffavtalekravet utgjør ikke en restriksjon på etableringsretten i henhold til artikkel 31 i EØS-avtalen.

Subsidiært, og hvis spørsmål B.1 besvares bekreftende, mener NTF at spørsmål B.2 og B.3 bør besvares på følgende måte:

B.2 Det vil ha betydning for vurderingen av om det foreligger en restriksjon at bedriftens behov for losse- og lastetjenester er begrenset og/eller sporadisk og for øvrig tilkommer det den foreleggende rett å vurdere om restriksjonen oppfyller de betingelser som er anført i denne doms premisser.

B.3 Det er uten betydning for vurderingen av om restriksjonen er lovlig eller ikke at bedriften for sine egne losse- og lastearbeidere anvender en annen tariffavtale når denne tariffavtalen gjelder et annet tariffområde enn losse- og lastearbeid.

NORGES REGJERING

SPØRSMÅL A.1 – A.2

55 Når det gjelder retten til kollektive tiltak, bemerker Norges regjering at dette er en rett som er anerkjent i ulike internasjonale dokumenter, og som EU-domstolen har betegnet som en

fundamental right, forming an integral part of the general principles of EU law.[15]

56 The Norwegian Government maintains that collective agreements are excluded from the scope of Article 53 EEA subject to the satisfaction of two conditions. The first condition requires that the agreement is entered into within the context of collective bargaining between employers and employees.[16] It appears that this criterion is fulfilled in the present case.

57 The second condition requires that the agreement is intended to improve work and employment conditions.[17] In *Landsorganisasjonen i Norge* it was held that the protection of a collective agreement from the effect of Article 53 EEA cannot be upheld where the practical implementation of that agreement is intended to further extraneous interests.[18] In *Landsorganisasjonen i Norge* it was also held that the term "conditions of work and employment" must be interpreted broadly and that these broad categories included various matters improving the situation of workers.[19] A finding that a collective agreement contributes to improving work and employment conditions

15 Reference is made to Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, paragraphs 43 to 45, 77 to 79, and 86, and Case C-341/05 *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I11767, paragraphs 90 and 91.

16 Reference is made to *Albany*, cited above, paragraphs 59 and 60; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 67; Case C-222/98 *Hendrik van der Woude* v *Stichting Beatrixoord* [2000] ECR I-7111, paragraph 22; Case C437/09 *AG2R Prévoyance* v *Beaudout Père et Fils SARL* [2011] ECR I-973, paragraph 29, and *Landsorganisasjonen i Norge*, cited above, paragraph 49.

17 Reference is made to *Albany*, cited above, paragraphs 59 and 60; *Pavlov*, cited above, paragraph 67; *van der Woude*, cited above, paragraph 22; *AG2R Prévoyance*, cited above, paragraph 29; *FNV*, cited above, paragraph 23, and *Landsorganisasjonen i Norge*, cited above, paragraph 49.

18 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 56 and 59.

19 Ibid., paragraph 53.

grunnleggende rettighet, idet den utgjør en integrert del av EU-rettens generelle prinsipper.[15]

56 Norges regjering fastholder at tariffavtaler er unntatt fra virkeområdet til EØS-avtalen artikkel 53 dersom to vilkår er oppfylt. Det første vilkår er at avtalen er inngått innenfor rammen av kollektive forhandlinger mellom arbeidsgivere og arbeidstakere.[16] Dette kriterium synes å være oppfylt i den foreliggende sak.

57 Det andre vilkår er at avtalen har til formål å bedre arbeids- og ansettelsesvilkår.[17] I *Landsorganisasjonen i Norge* fant EFTA-domstolen at en tariffavtales vern mot virkningen av EØS-avtalen artikkel 53 ikke kan opprettholdes der den praktiske gjennomføring av avtalen har til formål å fremme utenforliggende interesser.[18] I *Landsorganisasjonen i Norge* ble det også lagt til grunn at begrepet arbeids- og ansettelsesvilkår må fortolkes bredt, og at disse brede kategorier omfattet ulike forhold som bedrer situasjonen for arbeidstakerne.[19] En konklusjon om at en tariffavtale bidrar til å bedre arbeids- og ansettelsesvilkårene blir ikke rokket ved selv om

15 Det vises til sak C-438/05 *International Transport Workers' Federation og Finnish Seamen's Union* mot *Viking Line ABP og OÜ Viking Line Eesti*, Sml. 2007 s. I-10779 (avsnitt 43–45, 77–79 og 86), og sak C-341/05 *Laval un Partneri Ltd* mot *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetare-förbundets avdelning 1, Byggettan og Svenska Elektrikerförbundet*, Sml. 2007 s. I11767 (avsnitt 90 og 91).

16 Det vises til *Albany*, som omtalt over (avsnitt 59 og 60); forente saker C-180/98 til C-184/98 *Pavlov m.fl.* mot *Stichting Pensioenfonds Medische Specialisten*, Sml. 2000 s. I-6451 (avsnitt 67); sak C-222/98 *Hendrik van der Woude* mot *Stichting Beatrixoord*, Sml. 2000 s. I-7111 (avsnitt 22); sak C437/09 *AG2R Prévoyance* mot *Beaudout Père et Fils SARL*, Sml. 2011 s. I-973 (avsnitt 29), og *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 49).

17 Det vises til *Albany*, som omtalt over (avsnitt 59 og 60); *Pavlov*, som omtalt over (avsnitt 67); *van der Woude*, som omtalt over (avsnitt 22); *AG2R Prévoyance*, som omtalt over (avsnitt 29); *FNV*, som omtalt over (avsnitt 23), og *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 49).

18 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 56 og 59).

19 Samme sted (avsnitt 53).

is not called into question by the fact that it designates a single entity administering the system in question, thereby excluding any possibility of affiliation to competing service providers.[20] As long as the contested provisions actually pursue the objective that places them outside of the scope of Article 53 EEA, any resulting restriction of competition is accepted.[21] The Norwegian Government finally alleges that the judgment in *Albany* did not take into account the third condition that is to be found in the Opinion delivered in that case.[22]

58 On that basis, the Norwegian Government submits that it is for the national court to examine the purpose of the Framework Agreement and whether it pursues social objectives by improving work and employment conditions for dockworkers or other objectives. The referring court draws attention to clause 2(1) of the Framework Agreement on priority of engagement and states that that clause has been regarded as fulfilling Norway's obligations under the Convention, in particular Article 3(2) thereof. The aims and content of the Convention thus provides relevant context. Norway refers in particular to preamble, its first, fourth and fifth recitals and Articles 2(1) and 3(2) of the Convention. Moreover, Article 7 clarifies that the obligations laid down in the Convention may be implemented *inter alia* by collective agreements. Report III (Part 1B) of the International Labour Organisation (2002) sheds further light on the relevant provisions of the Convention.[23] In this context, the Norwegian Government observes

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20 Reference is made to *AG2R Prévoyance*, cited above, paragraphs 32 to 36 and the case law cited, and *Landsorganisasjonen i Norge*, cited above, paragraphs 72 and 73.

21 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 73.

22 Reference is made to Advocate General Jacobs in his Opinion in *Albany*, cited above, point 193, the Opinion of Advocate General Mengozzi in *AG2R Prévoyance*, cited above, point 43; and the Opinion of Advocate General Fenelly in *van der Woude*, cited above, point 32.

23 Reference is made to Report III (Part 1B) of the International Labour Organisation, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 90th Session 2002, paragraphs 130 to 133, 137, and 139.

den utpeker ett enkelt foretak til å administrere det aktuelle system, og derved utelukker enhver mulighet for å knytte til seg konkurrerende tjenesteytere.[20] Så lenge de omtvistede bestemmelser faktisk forfølger et mål som gjør at de ikke omfattes av EØS-avtalen artikkel 53, må enhver konkurransebegrensning dette medfører aksepteres.[21] Den norske regjering gjør endelig gjeldende at dommen i *Albany* ikke tok hensyn til det tredje vilkår som ble oppstilt i generaladvokatens uttalelse i saken.[22]

58 På dette grunnlag anfører Norges regjering at det er den nasjonale domstol som må vurdere formålet for Rammeavtalen og om den forfølger sosiale mål ved å bedre arbeids- og ansettelsesvilkårene for havnearbeidere eller andre mål. Den anmodende domstol viser til Rammeavtalen § 2.1 om fortrinnsrett ved tildeling og fastslår at bestemmelsen har vært ansett å oppfylle Norges forpliktelser etter Konvensjonen, særlig artikkel 3 nr. 2. Konvensjonens formål og innhold utgjør dermed den relevante kontekst. Norge viser spesielt til første, fjerde og femte betraktning i fortalen og Konvensjonen artikkel 2 nr. 1 og 3 nr. 2. I artikkel 7 gjøres det videre klart at forpliktelsene fastsatt i Konvensjonen kan gjøres gjeldende blant annet gjennom tariffavtaler. Rapport III (del 1B) fra Den internasjonale arbeidsorganisasjonen (2002) kaster ytterligere lys over de relevante bestemmelser i Konvensjonen.[23] I denne forbindelse bemerker Norges regjering at EU- og EØS-retten anerkjenner at krav

20 Det vises til *AG2R Prévoyance*, som omtalt over (avsnitt 32–36), og den rettspraksis som det vises til der, og *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 72 og 73).

21 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 73).

22 Det vises til generaladvokat Jacobs' uttalelse i *Albany*, som omtalt over (avsnitt 193), generaladvokat Mengozzis uttalelse i *AG2R Prévoyance*, som omtalt over (avsnitt 43), og generaladvokat Fenellys uttalelse i sak C-222/98 *van der Woude*, som omtalt over (avsnitt 32).

23 Det vises til Rapport III (del 1B) fra Den internasjonale arbeidsorganisasjonen (ILO), "Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 90th Session 2002", avsnitt 130–133, 137 og 139.

that EU and EEA law recognise requirements concerning minimum income and stable employment as directly contributing to the improvement of conditions of work and employment.[24]

59 The Norwegian Government notes that the request refers to the judgment of the referring court in *Sola Havn*.[25] According to that judgment, the Framework Agreement aims to give dockworkers security of employment and pay by setting up dock work offices that provide the dockworkers with terms of permanent employment and minimum rates of pay, both of which are facilitated by granting dockworkers priority of engagement. Moreover, it appears that the criteria for employment are non-discriminatory and any dockworker is eligible to apply for employment in the dock work offices.

60 The Norwegian Government maintains further that it is for the national court to undertake the examination whether or not the provisions of the Framework Agreement fall outside of Article 53 EEA.[26] In its submission, a finding that the Framework Agreement and the priority of engagement provided for in clause 2(1) contribute to improving conditions of work and employment for dockworkers and fall therefore outside the application of Article 53 EEA would not be called into question by the fact that the priority of engagement for dockworkers, administered by the AO as designated by the collective agreement, restricts port users from carrying out loading and unloading themselves or acquiring such services from other entities.[27]

24 Reference is made to Case C-212/04 *Konstantinos Adeneler and Others* v *Ellinikos Organismos Galaktos* [2006] ECR I6057, paragraphs 61 and 64; Case C-268/06 *Impact* v *Minister for Agriculture and Food and Others* [2008] ECR I-2483, paragraph 85 and 86; Joined Cases C-378/07 to C-380/07 *Kiriaki Angelidaki and Others* v *Organismos Nomarchiakis Autodioikisis Rethymnis* and *Charikleia Giannoudi* v *Dimos Geropotamou* [2009] ECR I-3071, paragraphs 104 and 105, and Case C-144/04 *Werner Mangold* v *Rüdiger Helm* [2005] ECR I9981, paragraph 64.

25 Reference is made to the judgment of the Supreme Court in Rt. 1997 p. 334 (*Sola Havn*).

26 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 58.

27 Reference is made to *AG2R Prévoyance*, cited above, paragraphs 32 to 36 and the case law cited, and *Landsorganisasjonen i Norge*, cited above, paragraphs 72 and 73.

som gjelder minsteinntekt og fast arbeid, bidrar direkte til å forbedre arbeids- og ansettelsesvilkår.[24]

59 Norges regjering bemerker at anmodningen viser til anmodende domstols dom i saken *Sola Havn*.[25] Ifølge dommen har Rammeavtalen til formål å gi havnearbeidere et sikkert arbeid og en sikker lønn ved å etablere losse- og lastekontorer som gir havnearbeiderne fast ansettelse og minstelønn, og begge disse formål vil fremmes ved å gi havnearbeidere fortrinnsrett ved tildeling. Videre synes kriteriene for ansettelse ikke å innebære forskjellsbehandling, og alle havnearbeidere kan søke om ansettelse på losse- og lastekontorene.

60 Norges regjering gjør videre gjeldende at det er opp til den nasjonale domstol å vurdere om bestemmelsene i Rammeavtalen faller utenfor EØS-avtalen artikkel 53 eller ikke.[26] Regjeringen fastholder i sitt innlegg at en konklusjon om at Rammeavtalen og fortrinnsretten fastsatt i § 2.1 bidrar til å forbedre arbeids- og ansettelsesvilkårene for havnearbeidere og derfor faller utenfor EØS-avtalen artikkel 53, svekkes ikke av det faktum at fortrinnsretten for havnearbeidere, administrert av Administrasjonskontoret slik dette er utpekt av tariffavtalen, forhindrer havnebrukerne fra selv å utføre lasting og lossing eller få slike tjenester utført av andre foretak.[27]

24 Det vises til sak C-212/04 *Konstantinos Adeneler m.fl.* mot *Ellinikos Organismos Galaktos*, Sml. 2006 s. I6057 (avsnitt 61 og 64); sak C-268/06 *Impact* mot *Minister for Agriculture and Food m.fl.*, Sml. 2008 s. I-2483 (avsnitt 85 og 86); forente saker C-378/07 til C-380/07 *Kiriaki Angelidaki m.fl.* mot *Organismos Nomarchiakis Autodioikisis Rethymnis* og *Charikleia Giannoudi* mot *Dimos Geropotamou*, Sml. 2009 s. I-3071 (avsnitt 104 og 105), og sak C-144/04 *Werner Mangold* mot Rüdiger Helm, Sml. 2005 s. I9981 (avsnitt 64).

25 Det vises til Høyesteretts dom, Rt. 1997 s. 334 (*Sola Havn*).

26 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 58).

27 Det vises til *AG2R Prévoyance*, som omtalt over (avsnitt 32–36), og den rettspraksis som det vises til der, og *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 72 og 73).

61 Moreover, the Norwegian Government claims that the exemption from Article 53 EEA should also apply in relation to Article 54 EEA. It concedes that there is case law which could imply that Article 54 EEA can apply to undertakings set up under a collective agreement even though the agreement itself is exempt from Article 53 EEA. The facts of these cases, however, call into question the general applicability of that case law. All but one of the cases decided thus far have concerned collective agreements rendered universally applicable through State intervention.[28] In *van der Woude*, a case which did not concern the conferral of special or exclusive rights within the meaning of Article 106 of the Treaty on the Functioning of the European Union ("TFEU"), claims were nevertheless entertained that Article 102 TFEU had been infringed.[29] But that judgment did not shed much light on the applicability of Article 102 TFEU.[30] Further, the ECJ noted that the issue of whether unfair pricing or trading conditions *de facto* occurred and whether that would constitute an abuse of a dominant position fell outside of the scope of those proceedings.[31] These observations are directly transposable to the present proceedings.

62 The Norwegian Government submits further that a boycott action aimed at compelling a company to become affiliated to a collective agreement, such as that at issue in the present proceedings, could only raise questions with regard to Article 54 EEA if the entity concerned, merely by exercising the rights conferred upon it by the collective agreement, is led to abuse its dominant position or where

28 Reference is made to *Albany*, cited above; Joined Cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming BV* v *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialien* [1999] ECR I-6025; *Drijvende Bokken*, cited above, and *AG2R Prévoyance*, cited above.
29 Reference is made to *van der Woude*, cited above.
30 Ibid., paragraph 31.
31 Ibid.

61 Videre påstår Norges regjering at unntaket fra EØS-avtalen artikkel 53 også burde gjelde for EØS-avtalen artikkel 54. Regjeringen vedgår at det finnes rettspraksis som kan innebære at EØS-avtalen artikkel 54 kan få anvendelse på foretak som er etablert etter en tariffavtale, selv om avtalen som sådan er unntatt fra EØS-avtalen artikkel 53. De faktiske forhold i disse saker stiller imidlertid spørsmål ved om denne rettspraksis får generell anvendelse. Alle saker som er avgjort så langt, bortsett fra én, har dreid seg om tariffavtaler som har blitt allmenngjort gjennom statlig inngripen.[28] I *van der Woude*-saken, som ikke gjaldt innrømmelse av særlige eller eksklusive rettigheter som definert i artikkel 106 i traktaten om Den europeiske unions virkemåte ("TEUV"), kom det likevel frem påstander om at TEUV artikkel 102 var blitt brutt.[29] Men dommen kastet ikke mye lys over virkeområdet for TEUV artikkel 102.[30] Videre bemerket EU-domstolen at spørsmålet om urimelige pris- eller handelsvilkår faktisk forekom, og om dette ville utgjøre utilbørlig utnyttelse av en dominerende stilling, falt utenfor rammen av saken.[31] Disse bemerkninger er direkte overførbare på den foreliggende sak.

62 Norges regjering anfører videre at en boikottaksjon som tar sikte på å tvinge et selskap til å slutte seg til en tariffavtale, slik den foreliggende sak gjelder, bare kan reise spørsmål med hensyn til EØS-avtalen artikkel 54 dersom det berørte foretak, alene ved å utøve de rettigheter det får gjennom tariffavtalen, ledes til å misbruke sin dominerende stilling, eller dersom disse rettigheter er

28 Det vises til *Albany*, som omtalt over; forente saker C-115/97 til C-117/97 *Brentjens' Handelsonderneming BV* mot *Stichting Bedrijftspensioenfonds voor de Handel in Bouwmaterialien*, Sml. 1999 s. I-6025; *Drijvende Bokken*, som omtalt over, og *AG2R Prévoyance*, som omtalt over.

29 Det vises til *van der Woude*, som omtalt over.

30 Samme sted (avsnitt 31).

31 Samme sted.

such rights are liable to create a situation in which that undertaking is led to commit such abuses.[32] Such questions could perhaps arise if the entity concerned is manifestly incapable of satisfying the demand prevailing on the market for such activities.[33]

63 The Norwegian Government argues further that the present case, as in *van der Woude*, does not invite an in-depth assessment of the potential applicability of Article 54 EEA. The request does not disclose any information indicating that the system laid down in the Framework Agreement has induced the AO to abuse any dominant position it might have or that services provided by it do not meet the needs of the port users. With regard to the former aspect, dock work offices are non-profit bodies jointly set up by the organisations representing management and labour. In relation to the second aspect, the request states that a key element of the collective agreement is to ensure priority of engagement for dockworkers, which would suggest that it only applies insofar as the dock work offices have capacity to fulfil the assignments in question.

QUESTION B1

64 The Norwegian Government notes that an agreement or activity being excluded from the scope of EEA competition rules does not entail that it also falls outside the scope of the four freedoms.[34] The present case concerns a company established in 1996 which is wholly owned by a Danish parent company. Insofar as the Danish company is involved on a continuous basis in the economic life of Norway, the

32 Reference is made to *Albany*, cited above, paragraph 93; *van der Woude*, cited above, paragraph 30, and *AG2R Prévoyance*, cited above, paragraph 68.
33 Reference is made to *Albany*, cited above, paragraph 95, and *AG2R Prévoyance*, cited above, paragraph 69.
34 Reference is made to *Viking Line*, cited above, paragraphs 53, 54 and 60 to 66.

egnet til å skape en situasjon der foretaket ledes til slikt misbruk.[32] Slike spørsmål kunne kanskje være relevante dersom det berørte foretak åpenbart er ute av stand til å etterkomme etterspørselen på markedet for slik virksomhet.[33]

63 Norges regjering gjør videre gjeldende at, i likhet med *van der Woude*, innbyr ikke den foreliggende sak til noen grundigere vurdering av om EØS-avtalen artikkel 54 eventuelt kan komme til anvendelse. Anmodningen inneholder ingen opplysninger som tyder på at systemet i Rammeavtalen har ledet Administrasjonskontoret til å misbruke en dominerende stilling det måtte ha, eller på at dets tjenester ikke oppfyller havnebrukernes behov. Når det gjelder det førstnevnte aspekt, driver ikke losse- og lastekontorer ervervsmessig virksomhet, og de er etablert i fellesskap av partene i arbeidslivet. Når det gjelder det andre aspekt, opplyses det i anmodningen at et sentralt element i tariffavtalen er å sikre fortrinnsrett for losse- og lastearbeidere, noe som må innebære at dette bare gjelder i den utstrekning losse- og lastekontorene har kapasitet til å utføre de aktuelle oppdrag.

SPØRSMÅL B.1

64 Norges regjering bemerker at selv om en avtale eller virksomhet ikke er omfattet av EØS-avtalens konkurranseregler, innebærer ikke det at den ikke er omfattet av de fire friheter.[34] Den foreliggende sak gjelder et selskap etablert i 1996 som er heleid av et dansk morselskap. I den utstrekning det danske selskap deltar på en vedvarende måte i Norges

32 Det vises til *Albany*, som omtalt over (avsnitt 93); *van der Woude*, som omtalt over (avsnitt 30), og *AG2R Prévoyance*, som omtalt over (avsnitt 68).
33 Det vises til *Albany*, som omtalt over (avsnitt 95), og *AG2R Prévoyance*, som omtalt over (avsnitt 69).
34 Det vises til *Viking Line*, som omtalt over (avsnitt 53, 54 og 60–66).

situation falls within the provisions on freedom of establishment, and not those concerning services.[35]

65 The Norwegian Government contends that it is for the national court to determine whether the use of a boycott constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

QUESTION B3

66 The Norwegian Government notes that, despite the Commission's proposals, there is no secondary legislation that harmonises market access to port services.[36] In a rather recent proposal, the Commission has, this time, steered clear of cargo handling in the port, which is expressly excluded from the proposed regulation.[37]

67 In relation to the application of Article 31 EEA, the Norwegian Government argues that a mechanical application of the reasoning in *Commission* v *Spain* must be ruled out.[38] It maintains that the contested rules in *Commission* v *Spain* went beyond protection of workers insofar as they required a cargo handling undertaking to participate in, and contribute to the share of capital of, a public limited company for the management of port cargo handlers. The cargo handling undertakings were also required to take workers from the port cargo handlers into employment, which was exacerbated by

35 Reference is made to *Sodemare*, cited above, paragraph 24 and the case law cited.

36 Reference is made to the proposal for a directive on market access to port services of 13 February 2001 (COM(2001) 35 final), and to the proposal for a directive on market access to port services of 13 October 2004 (COM(2004) 654 final). Reference is also made to the Report of the European Parliament (A6-0410/2005), Compromise 13 at p. 17.

37 Reference is made to the proposal for a Regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports of 23 May 2013 (COM(2013) 296 final), in particular Article 11.

38 Reference is made to Case C-576/13 *Commission* v *Spain*, judgment of 11 December 2014, published electronically.

økonomiske liv, omfattes denne situasjon av bestemmelsene om etableringsadgangen, ikke av bestemmelsene om tjenester.[35]

65 Norges regjering anfører at det er den nasjonale domstol som skal vurdere om bruk av boikott utgjør en restriksjon på etableringsretten etter EØS-avtalen artikkel 31.

SPØRSMÅL B.3

66 Norges regjering bemerker at til tross for hva Kommisjonen har foreslått, finnes det ingen sekundærlovgivning som harmoniserer markedsadgangen for havnetjenester.[36] I et ganske ferskt regelverksforslag styrte Kommisjonen klar av godshåndtering i havn, som er uttrykkelig utelukket i forslaget.[37]

67 Når det gjelder anvendelsen av EØS-avtalen artikkel 31, gjør Norges regjering gjeldende at en mekanisk anvendelse av resonnementet i *Kommisjonen* mot *Spania* må utelukkes.[38] Regjeringen fastholder at de omtvistede regler i *Kommisjonen* mot *Spania* gikk lengre enn å beskytte arbeidstakerne i den utstrekning de forutsatte at spedisjonsfirmaet måtte delta i, og bidra til aksjekapitalen i, et allmennaksjeselskap som skulle administrere losse- og lastearbeiderne i havnen. Spedisjonsfirmaene ble også pålagt å benytte ansatte fra losse- og lastekontoret, et krav som ble skjerpet

35 Det vises til *Sodemare*, som omtalt over (avsnitt 24), og den rettspraksis som det vises til der.

36 Det vises til forslaget til direktiv om adgang til markedet for havnetjenester av 13. februar 2001 (COM(2001) 35 final), og til forslaget til direktiv om adgang til markedet for havnetjenester av 13. oktober 2004 (COM(2004) 654 final). Det vises også til Europaparlamentets rapport (A6-0410/2005), Kompromiss 13 på s. 17.

37 Det vises til forslaget til europaparlaments- og rådsforordning om fastsettelse av en ramme for adgang til markedet for havnetjenester og for finansiell åpenhet i havner av 23. mai 2013 (COM(2013) 296 final), særlig artikkel 11.

38 Det vises til sak C-576/13 *Kommisjonen* mot *Spania*, dom 11. desember 2014, publisert elektronisk.

requirements to employ a certain number of workers regardless of need. Furthermore, the contested rules formed part of a general statutory framework regulating national ports and a predominant objective of those rules was to ensure the consistency, continuity, and quality of port services, which in turn was deemed necessary to ensure security in the ports.[39] The nature and purpose of the contested rules indicated that the relevant provisions had not been drafted with worker protection in mind. By contrast, the present case concerns conditions of work and employment laid down by organisations representing management and labour and regarded as fulfilling Norway's commitments under the Convention. The nature and purpose of the contested rules are thus different.

68 The Norwegian Government claims that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the EEA Agreement and further that the protection of workers is an overriding reason of public interest.[40] It is for the national court to ascertain whether the objectives pursued by NTF concern the protection of workers.

69 The Norwegian Government argues that even if collective action taken by a trade union could reasonably be deemed to fall within the objective of protecting workers, such a view would no longer be tenable if it is established that the jobs or conditions of employment at issue are not jeopardised or under serious threat.[41] This would be the case, in particular, if it transpired that the application of another collective agreement referred to by the national court in Question B3 was, from a legal point of view, as binding as the terms of the

39 Ibid., paragraph 55.
40 Reference is made to *Viking Line*, cited above, paragraphs 77 to 79, and *Laval*, cited above, paragraphs 40, 42, 90 and 91.
41 Reference is made to *Viking Line*, cited above, paragraph 81.

av kravet om å tilsette et visst antall arbeidere uten hensyn til behov. Videre inngikk de omtvistede regler i en generell, lovfestet ramme for regulering av nasjonale havner, og et hovedmål for reglene var å sikre konsistens, kontinuitet og kvalitet i havnetjenestene, noe som i sin tur ble ansett som nødvendig for å ivareta sikkerheten i havnene.[39] De omtvistede reglers karakter og formål tyder på at de ikke var blitt utarbeidet for å beskytte arbeidstakerne. Den foreliggende sak, derimot, dreier seg om arbeids- og ansettelsesvilkår som er fastsatt av organisasjoner som representerer partene i arbeidslivet, og som anses å oppfylle Norges forpliktelser etter Konvensjonen. Dermed har de omtvistede regler en annen karakter og et annet formål.

68 Norges regjering gjør gjeldende at retten til å iverksette kollektive tiltak for å beskytte arbeidstakere er et rettmessig hensyn som i prinsippet berettiger en restriksjon på en av de grunnleggende rettigheter som sikres i EØS-avtalen, og videre at beskyttelse av arbeidstakere er et tvingende allment hensyn.[40] Det er opp til den nasjonale domstol å bringe på det rene om målene NTF har, gjelder beskyttelse av arbeidstakere.

69 Norges regjering hevder at selv om et kollektivt tiltak iverksatt av en fagforening nok kan anses å falle inn under målet om å beskytte arbeidstakere, ville et slikt standpunkt ikke lenger være holdbart dersom det godtgjøres at de jobber eller ansettelsesvilkår saken gjelder, ikke er i fare eller blir alvorlig truet.[41] Dette ville spesielt være tilfelle om det kom frem at anvendelsen av en annen tariffavtale, som den nasjonale domstol viser til i spørsmål B.3, rettslig sett var like bindende som vilkårene i den tariffavtale det

39 Samme sted (avsnitt 55).

40 Det vises til *Viking Line*, som omtalt over (avsnitt 77–79), og *Laval*, som omtalt over (avsnitt 40, 42, 90 og 91).

41 Det vises til *Viking Line*, som omtalt over (avsnitt 81).

collective agreement to which the collective action relates and if it was of such a nature as to provide a guarantee that the terms of that collective agreement would be maintained.[42]

70 The Norwegian Government contends that it appears that the collective agreement Holship entered into as a party does not concern conditions of work and employment for dockworkers, but concerns cleaning work. It follows that, on becoming a party to that agreement, Holship did not enter into legal commitments relating to conditions of work and employment for dockworkers. Holship, of its own accord, has chosen to employ the conditions of that collective agreement to employment relationships outside of its scope. It therefore appears that the application of another collective agreement referred to by the national court in Question B3, from a legal point of view, is not as binding as the terms of the collective agreement to which the trade union seeks to induce Holship to become a party.

71 As for the second part of the question, the Norwegian Government submits that the collective agreement to which Holship is party concerns, in particular, minimum rates of pay. The Framework Agreement, however, covers not only minimum rates of pay but also conditions concerning permanent employment for dockworkers, both of which are intrinsically linked to priority of engagement for employed dockworkers. Hence, even if the commitment undertaken by Holship were to be considered legally binding, its undertaking is in any event not of a nature as to provide a guarantee that the terms of the Framework Agreement would be maintained.

42 Reference is made to *Viking Line*, cited above, paragraph 82; on the nature of collective agreements reference is made to Case C-45/09 *Gisela Rosenbladt* v *Oellerking Gebäudereinigungsges. mbH* [2010] ECR I-9391, paragraph 41 and the case law cited; and on the flexibility available to the parties to a collective agreement reference is made to Joined Cases C-297/10 and C298/10 *Sabine Hennings* v *Eisenbahn-Bundesamt* and *Land Berlin* v *Alexander Mai* [2011] ECR I7965, paragraph 66 and the case law cited.

kollektive tiltak gjaldt, og om den var av en slik karakter at den ga garanti for at vilkårene i denne tariffavtale ville bli overholdt.[42]

70 Ifølge Norges regjering synes det som om den tariffavtale Holship som part inngikk, ikke gjelder arbeids- og ansettelsesvilkår for havnearbeidere, men gjelder renholdsarbeid. Det følger av dette at når Holship inngikk denne avtale, påtok ikke selskapet seg noen juridiske forpliktelser med hensyn til arbeids- og ansettelsesvilkår for havnearbeidere. Holship valgte av seg selv å anvende vilkårene i tariffavtalen på ansettelsesforhold som lå utenfor dens virkeområde. Det synes derfor som at anvendelsen av en annen tariffavtale, som den nasjonale domstol viser til i spørsmål B.3, juridisk sett ikke er like bindende som vilkårene i den tariffavtale som fagforeningen prøver å få Holship til å inngå.

71 Når det gjelder andre del av spørsmålet, anfører Norges regjering at den tariffavtale Holship har inngått, fremfor alt gjelder minstelønn. Rammeavtalen omfatter imidlertid ikke bare minstelønn, men også vilkår som angår fast ansettelse av havnearbeidere, og begge disse forhold er uløselig knyttet til fortrinnsretten for ansatte havnearbeidere. Selv om den forpliktelse Holship påtok seg skulle være juridisk bindende, vil den likevel ikke i noe tilfelle ha en slik karakter at den gir noen garanti for at vilkårene i Rammeavtalen ville bli overholdt.

42 Det vises til *Viking Line*, som omtalt over (avsnitt 82); vedr. tariffavtalers karakter vises det til sak C-45/09 *Gisela Rosenbladt* mot *Oellerking Gebäudereinigungsges. mbH*, Sml. 2010 s. I-9391 (avsnitt 41), og den rettspraksis som det vises til der; og vedr. den fleksibilitet partene i en tariffavtale har, vises det til forente saker C-297/10 og C298/10 *Sabine Hennings* mot *Eisenbahn-Bundesamt* og *Land Berlin* mot *Alexander Mai*, Sml. 2011 s. I7965 (avsnitt 66), og den rettspraksis som det vises til der.

72 Further, the Norwegian Government notes that it remains to be ascertained within the context of the broad discretion enjoyed by the social partners in the field of social and employment policy and the importance attached to collective agreement in the regulation of work and employment conditions whether the means used to achieve the protection of dockworkers are suitable and necessary.

73 In relation to the appropriateness of the action taken by NTF for attaining the objective pursued, the Norwegian Government notes that, according to settled case law, collective action is one of the main ways in which trade unions protect the interests of their members.[43] The European Court of Human Rights has held that, alongside the right to negotiate and enter into collective agreements,[44] collective action is also protected by Article 11 of the European Convention on Human Rights.[45]

74 On the question whether the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, the Norwegian Government claims that it is for the national court to examine, first, whether, under the national rules and law on collective agreements applicable to that action, NTF had other means at its disposal less restrictive of the relevant freedom to successfully conclude collective negotiation with Holship and, if so, whether it exhausted such means before giving notice of boycott action.[46]

43 Reference is made to *Viking Line*, cited above, paragraph 86.
44 Reference is made to the judgment of the European Court of Human Rights of 12 November 2008 in Case *Demir and Baykara* v *Turkey* [GC], no. 34503/97, ECHR 2008-V.
45 Reference is made to the judgments of the European Court of Human Rights of 21 April 2009 in *Enerju Yapi-Yol Sen* v *Turkey,* No. 68959/01, unreported, and 27 November 2014 in *Hrvatski lijecnicki sindikat* v *Croatia*, No.36701/09, unreported.
46 Reference is made to *Viking Line*, cited above, paragraph 87.

72 Norges regjering anfører videre at det gjenstår å bringe på det rene, i lys av den brede skjønnsmyndighet arbeidslivets parter nyter innen sosial- og sysselsettingspolitikken og hvor viktige tariffavtalene er for å regulere arbeids- og ansettelsesvilkår, om midlene som benyttes for å oppnå beskyttelse for havnearbeiderne, er egnede og nødvendige.

73 Når det gjelder spørsmålet om NTFs tiltak var egnet til å oppnå målet, anfører Norges regjering at etter fast rettspraksis er kollektive tiltak et av hovedmidlene fagforeninger benytter for å beskytte sine medlemmers interesser.[43] Den europeiske menneskerettighetsdomstol har funnet at sammen med forhandlingsretten og retten til å inngå tariffavtaler[44], er retten til kollektive tiltak også sikret i artikkel 11 i Den europeiske menneskerettskonvensjon.[45]

74 Med hensyn til spørsmålet om det kollektive tiltak hovedsaken gjelder, går lengre enn det som er nødvendig for å nå det tilsiktede mål, gjør Norges regjering gjeldende at det er den nasjonale domstol som må undersøke om NTF etter nasjonale lover og regler som kommer til anvendelse på tiltaket, hadde andre midler til rådighet som ville vært mindre inngripende for den aktuelle frihet, med sikte på å inngå en tariffavtale med Holship, og i så tilfelle om NTF utnyttet alle slike midler før foreningen varslet boikott.[46]

43 Det vises til *Viking Line*, som omtalt over (avsnitt 86).
44 Det vises til Den europeiske menneskerettighetsdomstols dom 12. november 2008 i saken *Demir og Baykara* mot *Tyrkia* [GK], sak 34503/97, EMD 2008-V.
45 Det vises til Den europeiske menneskerettighetsdomstols dom 21. april 2009 i saken *Enerju Yapi-Yol Sen* mot *Tyrkia,* sak 68959/01, ikke i Sml., og 27. november 2014 i saken *Hrvatski lijecnicki sindikat* mot *Kroatia*, sak 36701/09, ikke i Sml.
46 Det vises til *Viking Line*, som omtalt over (avsnitt 87).

75 With regard to the necessity of the boycott action aimed at inducing affiliation to a collective agreement in order to protect the conditions of work and employment of its members,[47] the Norwegian Government maintains that the national court must assess whether there are less restrictive measures which, in an equally effective manner, could achieve the acknowledged aim. This assessment must take into account, consistent with the commitment of the undertaking concerned,[48] whether any alternative measure is of a nature as to provide a guarantee that the terms of the collective agreement would be maintained.

PROPOSED ANSWERS

76 The Norwegian Government proposes that the Court should provide the following answers to the questions referred:

(1) Articles 3, 53, and 54 EEA do not preclude a decision by a national court recognising the lawfulness of a boycott action aimed at inducing accession to a collective agreement, such as that at issue in the main proceedings, if the collective agreement contributes to improving work and employment conditions.

(2) It is for the national court to determine, on the basis of all the relevant factual circumstances and the legal considerations [set out in the Norwegian Government's written observations], whether it constitutes a restriction within the meaning of Article 31 EEA for a trade union in an EEA State, through boycott actions, to attempt to compel a subsidiary of an undertaking established in another EEA State to accede to a collective agreement and to apply the terms set out in that agreement.

47 For the acknowledgment that such aim falls within the objective of protecting workers reference is made to *Viking Line*, cited above, paragraphs 80 to 84.

48 Ibid., paragraphs 81 and 82.

75 Når det gjelder nødvendigheten av en boikottaksjon for å oppnå tilslutning til en tariffavtale for å beskytte medlemmenes arbeids- og ansettelsesvilkår,[47] fastholder Norges regjering at den nasjonale domstol må vurdere om det finnes mindre inngripende tiltak som ville vært like effektive for å oppnå det tilsiktede mål. I tråd med den forpliktelse det berørte foretak har inngått,[48] må en slik vurdering ta hensyn til om eventuelle alternative tiltak er av en slik karakter at de kan gi en garanti for at vilkårene i tariffavtalen vil bli overholdt.

FORSLAG TIL SVAR

76 Norges regjering anmoder EFTA-domstolen om å besvare de forelagte spørsmål på følgende måte:

1) EØS-avtalen artikkel 3, 53 og 54 er ikke til hinder for at en nasjonal domstol kan anse en boikottaksjon som lovlig når den har som mål å oppnå tilslutning til en tariffavtale, som den hovedsaken gjelder, dersom tariffavtalen bidrar til å bedre arbeids- og ansettelsesvilkår.

2) Det er opp til den nasjonale domstol å vurdere, på grunnlag av alle relevante faktiske omstendigheter og juridiske betraktninger [som redegjort for i det skriftlige innlegg fra Norges regjering], om det utgjør en restriksjon i henhold til EØS-avtalen artikkel 31 dersom en fagforening i en EØS-stat gjennom boikottaksjoner prøver å tvinge et datterselskap av et foretak etablert i en annen EØS-stat til å inngå en tariffavtale og anvende vilkårene fastsatt i tariffavtalen.

47 At dette mål faller inn under målet om å beskytte arbeidstakere, bekreftes i *Viking Line*, som omtalt over (avsnitt 80–84).

48 Samme sted (avsnitt 81 og 82).

(3) A restriction within the meaning of Article 31 EEA may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective. It is immaterial in this context whether the company concerned applies a different collective agreement outside of its material scope, unless it thereby has undertaken a commitment which is, from [a] legal point of view, as binding as the terms of the collective agreement to which the collective action relates and if it is of such a nature as to provide a guarantee that the terms of the latter collective agreement are maintained.

ESA

QUESTION A1

77 At the outset, ESA notes that the request does not explicitly address Article 59(1) EEA and contends that the Court should not address the provision either, as the request by the referring court has not identified any facts allowing the conclusion that the AOs have been granted any special or exclusive rights by the Norwegian Government.

78 In relation to Question A1 and the exclusion of collective agreements from Article 101 TFEU and Article 53 EEA, ESA refers to the findings in *Albany*[49] and *Landsorganisasjonen i Norge*[50] and the conditions set

49 Reference is made to *Albany*, cited above, paragraph 60; *Brentjens'*, cited above; Case C-219/97 *Maatschappij Drijvende Bokken BV* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] I-6121; *Pavlov*, cited above, and *van der Woude*, cited above.

50 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 44.

3) En restriksjon i henhold til EØS-avtalen artikkel 31 kan i prinsippet være begrunnet i tvingende allmenne hensyn, for eksempel beskyttelse av arbeidstakere, dersom restriksjonen er egnet til å sikre oppnåelse av det legitime mål som forfølges, og ikke går lenger enn det som er nødvendig for å nå dette mål. Det er uvesentlig i denne sammenheng om det berørte selskap anvender en annen tariffavtale utenfor dens materielle virkeområde, med mindre det derved påtar seg en forpliktelse som det kollektive tiltaket gjelder, og denne er av en slik karakter at den gir garanti for at vilkårene i sistnevnte tariffavtale opprettholdes.

ESA

SPØRSMÅL A.1

77 Innledningsvis bemerker ESA at anmodningen ikke uttrykkelig gjelder EØS-avtalen artikkel 59 nr. 1. ESA gjør gjeldende at EFTA-domstolen heller ikke bør se på denne bestemmelse, siden anmodningen fra den anmodende domstol ikke identifiserer noen faktiske forhold som underbygger konklusjonen om at Administrasjonskontoret var gitt noen særlige eller eksklusive rettigheter av Norges regjering.

78 Når det gjelder spørsmål A.1 og utelukkelsen av tariffavtaler fra virkeområdet til TEUV artikkel 101 og EØS-avtalen artikkel 53, viser ESA til betraktningene i *Albany*[49] og *Landsorganisasjonen i Norge*[50] og

49 Det vises til *Albany*, som omtalt over (avsnitt 60); *Brentjens'*, som omtalt over; sak C-219/97 *Maatschappij Drijvende Bokken BV* mot *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, Sml. 1999 s. I-6121; *Pavlov*, som omtalt over, og *van der Woude*, som omtalt over.

50 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 44).

out therein.[51] Both conditions must be fulfilled for the agreement to fall outside the scope of Article 53 EEA.[52] ESA submits that the application of the first condition is not contentious in the present case and it will focus on the second condition.

79 ESA submits that neither the Court nor the ECJ have, to date, had the opportunity to consider a priority of engagement clause such as that at issue in the main proceedings but case law may offer some general guidance.[53]

80 Since there are certain limits on how broadly the notion "conditions of work" can be construed, it is not sufficient to consider merely whether the broad objective of a collective agreement seeks to improve the conditions of work and employment. Instead, ESA maintains that the provisions of an agreement must be assessed individually and, if they are directed towards other purposes, those provisions or those that do not, in practice, operate to improve such conditions, may fall within the scope of Article 53 EEA.[54] In that assessment, account must be taken of the form and content of the agreement and its various provisions, the circumstances under which they were negotiated, the parties to the agreement, and its actual effect.[55]

81 Applying this guidance to the present case, ESA claims that the priority of engagement clause, as sought to be enforced by means of the proposed boycott notified by NTF, does not fulfil the second condition for three reasons. First, the priority of engagement clause would effectively be extended to undertakings that do not have

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51 Reference is made to *Landsorganisasjonen i Norge*, paragraphs 49 and 50, and *Albany*, cited above, paragraphs 59 and 60.
52 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 50.
53 Ibid., paragraph 53.
54 Ibid., paragraphs 51, 55, 56 and 59.
55 Ibid., paragraph 52.

vilkårene som angis der.[51] Begge vilkår må være oppfylt for at avtalen skal falle utenfor virkeområdet for EØS-avtalen artikkel 53.[52] ESA gjør gjeldende at det i den foreliggende sak ikke er omstridt at det første vilkår kommer til anvendelse, og vil derfor rette oppmerksomheten mot det andre vilkår.

79 ESA gjør gjeldende at verken EFTA-domstolen eller EU-domstolen noen gang har hatt anledning til å vurdere en bestemmelse om fortrinnsrett som den hovedsaken gjelder, men rettspraksis kan gi en viss generell veiledning.[53]

80 Siden det er visse grenser for hvor bredt begrepet arbeidsvilkår kan forstås, er det ikke nok bare å vurdere om en tariffavtales generelle mål er å forbedre arbeids- og ansettelsesvilkårene. ESA fastholder tvert imot at bestemmelsene i en avtale må vurderes enkeltvis, og at om bestemmelsene har andre formål, kan disse bestemmelser eller de som i praksis ikke bidrar til å bedre slike vilkår, falle inn under virkeområdet for EØS-avtalen artikkel 53.[54] I denne vurdering må det tas hensyn til avtalens form og innhold og dens ulike bestemmelser, omstendighetene som de ble fremforhandlet under, hvem som er parter i avtalen, samt dens faktiske virkning.[55]

81 Med bakgrunn i denne veiledning anfører ESA at fortrinnsrettsbestemmelsen, slik den søkes håndhevet gjennom den planlagte boikott varslet av NTF, ikke oppfyller det andre vilkår, av tre grunner. For det første ville dette innebære at fortrinnsrettsbestemmelsen faktisk ville bli utvidet til også å gjelde

51 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 49 og 50) og *Albany*, som omtalt over (avsnitt 59 og 60).
52 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 50).
53 Samme sted (avsnitt 53).
54 Samme sted (avsnitt 51, 55, 56 og 59).
55 Samme sted (avsnitt 52).

employees protected by the Framework Agreement. In turn, the priority of engagement clause would not merely address the labour relationship, but would, in contrast to previous cases,[56] also impose obligations on third parties, such as Holship. The earlier cases dealt with collective agreements that were binding only on employers of workers protected by those agreements. Their exemption from EEA competition law was justified because they ensured a balance between employers and their employees because that balance should be established unimpeded by such rules.[57] However, this justification does not apply where collective agreements apply to undertakings that do not employ workers protected by the agreements.[58]

82 Second, ESA claims that to extend the strand of case law that excludes collective agreements from Articles 53 and 54 EEA carries a risk that trade associations could circumvent those articles by concluding collective agreements containing provisions that restrict competition, without there being any social policy justification for that restriction.

83 Third, ESA contends that, although the priority of engagement clause is arguably of benefit to the employees of the AO, it is detrimental for other workers, such as those employed by Holship. In this regard, the exclusion of collective agreements from the scope of EEA competition law should not be extended to agreements that protect a limited group of workers to the detriment of other workers.[59]

56 Reference is made to *Albany*, cited above; *AG2R Prévoyance*, cited above, and *van der Woude*, cited above.

57 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 34 and 35.

58 Further reference is made to the test set out by Advocate General Jacobs in his Opinion in *Albany*, cited above, point 193, and to *Landsorganisasjonen i Norge*, cited above, paragraph 53.

59 Reference is made to the judgment of the Supreme Court of Norway in *Sola Havn*, cited above.

foretak som ikke har ansatte som er beskyttet av Rammeavtalen. Dermed ville fortrinnsrettsbestemmelsen ikke bare gjelde arbeidsforholdet, men i motsetning til tidligere saker[56] også pålegge tredjemann forpliktelser, for eksempel Holship. Tidligere saker har handlet om tariffavtaler som bare var bindende for arbeidsgivere hvis arbeidstakere var beskyttet av avtalene. Når de var unntatt fra EØS-avtalens konkurranseregler, var dette begrunnet i at de sikret en balanse mellom arbeidsgivere og deres arbeidstakere og fordi denne balanse burde opprettes uten hinder av disse regler.[57] Imidlertid kommer denne begrunnelse ikke til anvendelse der tariffavtalen gjelder for foretak som ikke har arbeidstakere som er beskyttet av avtalen.[58]

82 For det andre gjør ESA gjeldende at å utvide den del av rettspraksis som utelukker tariffavtaler fra EØS-avtalen artiklene 53 og 54, innebærer risiko for at bransjeorganisasjonene kan omgå artiklene ved å inngå tariffavtaler som inneholder bestemmelser som begrenser konkurransen, uten at det er noen sosialpolitisk begrunnelse for en slik begrensning.

83 For det tredje anfører ESA at fortrinnsrettsbestemmelsen, selv om det kan hevdes at den er til fordel for Administrasjonskontorets ansatte, er til skade for andre arbeidstakere, for eksempel de som er ansatt hos Holship. I så måte bør ikke utelukkelsen av tariffavtaler fra virkeområdet for EØS-avtalens konkurranseregler gjelde for avtaler som beskytter en begrenset gruppe arbeidstakere på bekostning av andre arbeidstakere.[59]

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56 Det vises til *Albany*, som omtalt over; *AG2R Prévoyance*, som omtalt over, og *van der Woude*, som omtalt over.

57 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 34 og 35).

58 Det vises videre til testen beskrevet av generaladvokat Jacobs i hans uttalelse i *Albany*, som omtalt over (avsnitt 193), og til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 53).

59 Det vises til Norges Høyesteretts dom i *Sola Havn*, som omtalt over.

QUESTIONS A2 AND A3

84 ESA argues that the main question in relation to Article 54 EEA is whether the use of a boycott in a situation such as the present case constitutes an abuse of a dominant market position.

85 In its assessment for the purposes of Article 54 EEA, ESA submits first that the AO constitutes an undertaking.[60] A dock work undertaking enjoying the exclusive right to organise dock work for third parties, as well as a dock work company having the exclusive right to perform dock work must be regarded as an undertaking.[61] Under the system established by the Framework Agreement, the right of priority of engagement to carry out unloading and loading work in the ports is vested in a separate legal entity, the AO, to the benefit of the dockworkers it employs and thus not vested in individual workers. Furthermore, the employees of the AO carry out loading and unloading assignments against fees set by and payable to the AO upon orders placed with the AO. The fact that the AOs lacks a profit motive does not, according to case law, affect its status as an undertaking.[62]

86 As regards the assessment of the existence of a dominant position in a substantial part of the EEA territory, ESA provisionally assumes, in the absence of adequate information from the referring court, that the market is limited to the provision of stevedoring services in the Port of Drammen. However, this is ultimately for the referring court to determine. ESA argues, given the apparent lack of alternative

60 Reference is made to Article 1 of Protocol 22 EEA, and Joined Cases E-4/10, E-6/10 and E-7/10 *Principality of Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 54.
61 Reference is made to *Porto di Genova*, cited above, paragraph 9.
62 Reference is made to *Albany*, cited above, paragraph 85.

SPØRSMÅL A.2 OG A.3

84 ESA gjør gjeldende at hovedspørsmålet i forbindelse med EØS-avtalen artikkel 54 er om bruken av boikott i en situasjon som i den foreliggende sak utgjør utilbørlig utnyttelse av en dominerende stilling på markedet.

85 I sin vurdering i forhold til EØS-avtalen artikkel 54 gjør ESA først gjeldende at Administrasjonskontoret er et foretak.[60] Et havnearbeidsforetak som nyter en eksklusiv rettighet til å organisere havnearbeid for tredjemann, og et havnearbeidsselskap som har en eksklusiv rettighet til å utføre havnearbeid, må betraktes som et foretak.[61] I henhold til systemet som etableres ved Rammeavtalen, ligger fortrinnsretten til å utføre losse- og lastearbeid i havnene hos en egen juridisk person, Administrasjonskontoret, til fordel for de havnearbeidere som er ansatt der, og tilhører altså ikke enkeltarbeidstakere. Videre utfører Administrasjonskontorets ansatte losse- og lasteoppdrag mot et vederlag som er fastsatt av og betales til Administrasjonskontoret for ordrer plassert hos Administrasjonskontoret. Det faktum at Administrasjonskontoret ikke har et profittmotiv, påvirker ifølge rettspraksis ikke dets status som foretak.[62]

86 Når det gjelder vurderingen av om det foreligger en dominerende stilling i en vesentlig del av EØS-territoriet, forutsetter ESA foreløpig, i mangel av tilstrekkelige opplysninger fra den anmodende domstol, at markedet er begrenset til ytelse av losse- og lastetjenester i Drammen havn. Dette er det imidlertid opp til den anmodende domstol å vurdere. Gitt den tilsynelatende mangel på

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60 Det vises til artikkel 1 i protokoll 22 til EØS-avtalen og forente saker E-4/10, E-6/10 og E-7/10 *Fyrstedømmet Liechtenstein m.fl.* mot *ESA*, Sml. 2011 s. 16 (avsnitt 54).

61 Det vises til *Porto di Genova*, som omtalt over (avsnitt 9).

62 Det vises til *Albany*, som omtalt over (avsnitt 85).

sources of relevant stevedoring services in the port of Drammen and the existence of the priority of engagement clause, that the AO may enjoy a dominant position on the assumed relevant market. It observes, however, that the crucial question is whether that dominant position is held in a substantial part of the territory covered by the EEA Agreement. In that regard, ESA makes reference to case law according to which the notion of a "substantial part thereof" refers also to "the pattern and volume of the production and consumption of the said product as well as to the habits and economic opportunities of vendors and purchasers".[63] Moreover, even if a dominant company does not reach the threshold itself, there may be an EEA interest in a situation involving a network of undertakings which enjoy dominance in markets that together constitute a substantial part of the territory covered by the EEA Agreement.[64]

87 As regards the notion of abuse for the purposes of Article 54 EEA, ESA submits that the request leaves open the question whether the AO has initiated or taken part in boycotts. This is a matter of fact which must be appraised by the referring court. However, the Court may provide guidance on how a boycott ought to be assessed.

88 ESA submits that abuse is a legal notion that must be examined in light of economic considerations.[65] It maintains that clauses with

63 Reference is made to Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Coöperatieve Vereniging "Suiker Uni" UA and Others* v *Commission* [1975] ECR 1663, paragraph 371, and *Porto di Genova*, cited above, paragraph 15.

64 Reference is made to Case C-323/93 Société Civile Agricole du *Centre d'insémination de la Crespelle* v *Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077, paragraph 17.

65 Reference is made to Case E-4/05 *HOB-vín* v *The Icelandic State and Åfengis- og tóbaksverslum rikisins (the State Alcohol and Tobacco Company of Iceland)* [2006] EFTA Ct. Rep. 4, paragraph 51, and Case E15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraph 126.

alternative kilder til relevante tjenester i Drammen havn og eksistensen av fortrinnsrettsbestemmelsen, anfører ESA at Administrasjonskontoret kan ha en dominerende stilling på det antatt berørte marked. ESA anfører imidlertid at det avgjørende spørsmål er om nevnte dominerende stilling gjelder en vesentlig del av det territorium som er omfattet av EØS-avtalen. I denne anledning viser ESA til rettspraksis, der begrepet "vesentlig del av det" også viser til "mønster og volum for produksjon og forbruk av nevnte produkt så vel som selgernes og kjøpernes vaner og økonomiske muligheter".[63] Videre, selv om et dominerende selskap selv ikke kommer over terskelen, kan en situasjon der et nettverk av foretak dominerer markeder som samlet sett utgjør en vesentlig del av det territorium som er omfattet av EØS-avtalen, være relevant i forhold til EØS-avtalen.[64]

87 Når det gjelder begrepet utilbørlig utnyttelse etter EØS-avtalen artikkel 54, gjør ESA gjeldende at anmodningen lar det stå åpent om Administrasjonskontoret har tatt initiativet til eller deltatt i boikott. Dette er et faktisk forhold som må vurderes av den anmodende domstol. Imidlertid kan EFTA-domstolen gi veiledning til hvordan en boikott bør vurderes.

88 ESA gjør gjeldende at utilbørlig utnyttelse er et juridisk begrep som må vurderes i lys av økonomiske betraktninger.[65] ESA fastholder at

63 Det vises til forente saker 40/73 til 48/73, 50/73, 54/73 til 56/73, 111/73, 113/73 og 114/73 *Coöperatieve Vereniging "Suiker Uni" UA m.fl.* mot *Kommisjonen*, Sml. 1975 s. 1663 (avsnitt 371), og *Porto di Genova*, som omtalt over (avsnitt 15).

64 Det vises til sak C-323/93 *Centre Société Civile Agricole du Centre d'insémination de la Crespelle* mot *Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne*, Sml. 1994 s. I-5077 (avsnitt 17).

65 Det vises til sak E-4/05 *HOB-vín* mot *Staten Island og Åfengis- og tóbaksverslum rikisins (Islands statlige alkohol- og tobakksselskap)*, Sml. 2006 s. 4 (avsnitt 51); og sak E15/10 *Posten Norge* mot *ESA*, Sml. 2012 s. 246 (avsnitt 126).

similar effects to the priority engagement clause at issue here were already considered in *Hoffmann-La Roche*.[66] Consequently, if it constitutes an abuse to tie a customer by means of such a clause, it must also amount to an abuse for a dominant undertaking to initiate a boycott against a purchaser in order to obtain acceptance by the purchaser of such a clause. This must apply in particular where a substantial part of the market is already tied to the dominant firm and where acceptance of the clause by another undertaking would reinforce the foreclosure of the market.

89 ESA stresses further that the referring court must also examine whether the behaviour of the AO can be objectively justified and submits that, in the present case, it is unlikely that the anti-competitive behaviour at issue could be justified on the basis that the behaviour protects the workers of the AO. In this regard, ESA relies on its observations relating to collective agreements seeking to protect workers employed by other undertakings. Further, the anti-competitive behaviour by the AO could not be justified on the basis that the Framework Agreement is regarded as fulfilling Norway's obligations under the Convention.[67] Nor could the AO invoke Article 59(2) EEA in its defence, as the stevedoring services it provides do not constitute services of a general economic interest within the meaning of that provision.[68]

66 Reference is made to Case 85/76 *Hoffmann-La Roche & Co. AG* v *Commission* [1979] ECR 215, paragraph 89.

67 Reference is made to the Direct Request adopted by the ILO Committee of Experts on the Application of Conventions and Recommendations in 1997, published in the 86th Session of the International Labour Conference (1998).

68 Reference is made to *Albany*, cited above, paragraph 27.

bestemmelser med tilsvarende virkning som den fortrinnsrettsbestemmelse denne sak gjelder, allerede var tema i *Hoffmann-La Roche*.[66] Følgelig, hvis det å binde en kunde ved hjelp av en slik bestemmelse er utilbørlig utnyttelse, må det også være utilbørlig utnyttelse dersom et dominerende foretak tar initiativ til en boikott mot en kjøper med sikte på å oppnå kjøperens tilslutning til en slik bestemmelse. Dette må særlig være tilfelle dersom en vesentlig del av markedet allerede er bundet til det dominerende foretak og et annet foretaks tilslutning til bestemmelsen ville forsterke utestengingen fra markedet.

89 ESA understreker videre at den anmodende domstol også må undersøke om Administrasjonskontorets atferd kan begrunnes objektivt, og gjør gjeldende at det i den foreliggende sak er usannsynlig at den konkurransebegrensende atferd saken gjelder, kan begrunnes med henvisning til at atferden beskytter Administrasjonskontorets ansatte. Om dette viser ESA til sine anførsler angående tariffavtaler som har som mål å beskytte arbeidstakere ansatt i andre foretak. Videre kan ikke Administrasjonskontorets konkurransebegrensende atferd begrunnes i det forhold at Rammeavtalen anses å oppfylle Norges forpliktelser etter Konvensjonen.[67] Administrasjonskontoret kan heller ikke påberope seg EØS-avtalen artikkel 59 nr. 2 siden de losse- og lastetjenester det yter, ikke utgjør tjenester av allmenn økonomisk betydning etter bestemmelsen.[68]

66 Det vises til sak 85/76 *Hoffmann-La Roche & Co. AG* mot *Kommisjonen*, Sml. 1979 s. 215 (avsnitt 89).

67 Det vises til den direkte anmodning vedtatt av ILOs ekspertkomité (CEACR) i 1997, offentliggjort på ILOs 86. arbeidskonferanse (1998).

68 Det vises til *Albany*, som omtalt over (avsnitt 27).

90 As regards the assessment of whether there is an effect on trade between the EEA States,[69] ESA contends that the referring court should take account of identical or corresponding systems in other ports.[70] The system at the Port of Drammen forms an integral part of the larger system established by the Framework Agreement. The effect of this system as a whole may therefore be taken into account by the national court in its assessment of whether there is an appreciable effect on competition. The request also refers to another system of priority of engagement established in fourteen other ports in Norway by another collective agreement concluded by the same parties. This agreement also forms part of the economic context in which the Framework Agreement exists, and should be taken into account, provided that it contributes to the restrictive effects on competition.

91 ESA submits further that the threshold for meeting the test on effect on trade is not particularly high.[71] Further, the criterion referred to in *Coöperatieve Vereniging "Suiker Unie"* v *Commission*[72] in another context may be of use in the assessment at hand. In the present case, there is a sufficient degree of probability to conclude that the clause may affect trade between EEA States, not least because of the fact

69 Reference is made, for example, to Case C-440/11 P *Commission* v *Stichting Administratiekantoor Portielje*, judgment of 11 July 2013, published electronically, paragraph 99; Joined Cases C-215/96 and C-216/96 *Carlo Bagnasco and Others* v *Banco Popolare di Novara soc. coop. arl (BPN) and Others* [1999] ECR I-135, paragraph 47, and Case E7/01 *Hegelstad Eindomsselskap Arvid B. Hegelstad and Others* v *Hydro Texaco AS* [2002] EFTA Ct. Rep. 310, paragraph 40.

70 Reference is made to *Hegelstad Eindomsselskap Arvid B. Hegelstad and Others*, cited above, paragraph 40, and Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] ECR I-935, paragraph 14. Further reference is made to the Opinion of Advocate General Bot in Joined Cases C125/07 P, C133/07 P, C135/07 P and C137/07 P *Erste Group Bank AG and Others* v *Commission* [2009] ECR I-8681, points 143 to 148 and the case law cited.

71 Reference is made to Case C-242/95 *GT-Link A/S* v *De Danske Statsbaner* [1997] ECR I-4449, paragraph 45, and *Silvano Raso*, cited above, paragraph 26.

72 Reference is made to *Suiker Unie*, cited above, paragraph 371.

90 Når det gjelder vurderingen av om samhandelen mellom EØS-statene blir påvirket,[69] gjør ESA gjeldende at den anmodende domstol bør ta hensyn til at samme eller tilsvarende systemer finnes i andre havner.[70] Systemet i Drammen havn er en integrert del av et større system opprettet ved Rammeavtalen. Ved vurderingen av om det foreligger en merkbar påvirkning på konkurransen, kan den nasjonale domstol derfor ta hensyn til virkningen av dette system sett under ett. Anmodningen viser også til et annet fortrinnsrettssystem som finnes i fjorten andre havner i Norge, og som ble opprettet ved en annen tariffavtale inngått av de samme parter. Denne avtale inngår dessuten i den samme økonomiske sammenheng som Rammeavtalen, og bør tas hensyn til i den grad den bidrar til å begrense konkurransen.

91 ESA gjør videre gjeldende at terskelen for å bestå testen for påvirkning på handelen, ikke er spesielt høy.[71] Kriteriet det vises til i *Coöperatieve Vereniging "Suiker Unie"* mot *Kommisjonen*[72] i en annen sammenheng, kan for øvrig være til hjelp i vurderingen. I den foreliggende sak er sannsynligheten tilstrekkelig høy til at man kan konkludere med at bestemmelsen kan påvirke samhandelen mellom EØS-stater, ikke minst fordi de tretten største havner i Norge er

69 Det vises for eksempel til sak C-440/11 P *Kommisjonen* mot *Stichting Administratiekantoor Portielje*, dom 11. juli 2013, publisert elektronisk (avsnitt 99); forente saker C-215/96 og C-216/96 *Carlo Bagnasco m.fl.* mot *Banco Popolare di Novara soc. coop. arl (BPN) m.fl.*, Sml. 1999 s. I-135 (avsnitt 47), og sak E7/01 *Hegelstad Eindomsselskap Arvid B. Hegelstad m.fl.* mot *Hydro Texaco AS*, Sml. 2002 s. 310 (avsnitt 40).

70 Det vises til *Hegelstad Eindomsselskap Arvid B. Hegelstad m.fl.*, som omtalt over (avsnitt 40), og sak C-234/89 *Stergios Delimitis* mot *Henninger Bräu AG*, Sml. 1991 s. I-935 (avsnitt 14). Det vises videre til uttalelse fra generaladvokat Bot i forente saker C125/07 P, C133/07 P, C135/07 P og C137/07 P *Erste Group Bank AG m.fl.* mot *Kommisjonen*, Sml. 2009 s. I-8681 (avsnitt 143–148), og den rettspraksis som det vises til der.

71 Det vises til sak C-242/95 *GT-Link A/S* mot *De Danske Statsbaner*, Sml. 1997 s. I-4449 (avsnitt 45), og *Silvano Raso*,som omtalt over (avsnitt 26).

72 Det vises til *Suiker Unie*, som omtalt over (avsnitt 371).

that the thirteen largest ports in Norway are covered by the priority of engagement clause and that it applies to all ships of fifty tonnes dwt and more sailing between one of those ports and a port in another EEA State.

92 Accordingly, ESA argues that, although it is not mandatory to do so, identical and corresponding systems in other ports may be taken into account in the assessment of whether there is an appreciable effect on trade between the EEA States.

93 As regards the application of Article 53 EEA in the case at issue, ESA notes that for the Framework Agreement to be covered it has to be determined whether any other parties to that agreement constitute an undertaking within the meaning of the provision. The referring court could examine whether members of the Confederation of Norwegian Enterprise (*Næringslivets Hovedorganisasjon*) ("NHO") and the Norwegian Logistics and Freight Association (*NHO Logistikk og Transport*) ("NHO Logistics and Freight") are parties to that agreement. Alternatively, the referring court could examine whether the decision by NHO and NHO Logistics and Freight to conclude that the Framework Agreement falls within the scope of Article 53 EEA as a decision by an association of undertakings.[73]

94 If the Framework Agreement is considered to fall within Article 53 EEA on the basis of one of the alternatives above, it is then for the national court to appraise whether the agreement has as its object or effect the prevention, restriction, or distortion of competition. In the present case, ESA contends that a breach of Article 53 EEA seems unlikely, given that there is no explicit basis in the Framework Agreement for boycotting third parties and that the employee side alone have initiated the boycott.

73 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraphs 68 to 70.

omfattet av fortrinnsrettsbestemmelsen, og den gjelder alle skip på 50 tonn dw. og derover som seiler mellom en av disse havner og en havn i en annen EØS-stat.

92 På denne bakgrunn gjør ESA gjeldende at selv om det ikke er obligatorisk, kan det i vurderingen av om samhandelen mellom EØS-statene blir merkbart påvirket, tas hensyn til at samme og tilsvarende systemer finnes i andre havner.

93 Når det gjelder anvendelsen av EØS-avtalen artikkel 53 i den foreliggende sak, anfører ESA at for at Rammeavtalen skal omfattes, må det fastslås om noen av de andre parter i avtalen utgjør foretak etter denne bestemmelse. Den anmodende domstol kan undersøke om medlemmer av Næringslivets Hovedorganisasjon ("NHO") og NHO Logistikk og Transport er parter i avtalen. Alternativt kan den anmodende domstol undersøke om NHOs og NHO Logistikk og Transports beslutning om å inngå Rammeavtalen faller inn under virkeområdet til EØS-avtalen artikkel 53, som en beslutning truffet av en sammenslutning av foretak.[73]

94 Dersom vurderingen blir at Rammeavtalen omfattes av EØS-avtalen artikkel 53 på grunnlag av ett av alternativene over, må den nasjonale domstol vurdere om avtalen har til formål eller virkning å hindre, innskrenke eller vri konkurransen. I den foreliggende sak anfører ESA at det er lite sannsynlig at det foreligger et brudd på EØS-avtalen artikkel 53, ettersom det ikke finnes noen uttrykkelig hjemmel i Rammeavtalen for å boikotte tredjemann, og det var arbeidstakersiden alene som tok initiativ til boikotten.

73 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 68–70).

95 ESA contends, moreover, that any restriction of competition under Article 53(1) EEA may be weighed against its claimed pro-competitive effects in the context of Article 53(3) EEA.[74] In that regard, those who seek to rely upon that provision must demonstrate that the conditions for obtaining an exemption are satisfied.[75]

QUESTION B1

96 ESA submits that in order to assess whether the boycott at issue in the present proceedings amounts to a restriction on the freedom of establishment, it is necessary to consider first whether the collective action, in this case the boycott, constitutes a measure within the scope of Article 31 EEA. It asserts that under *Viking Line* the right to take collective action is restricted and cannot be relied upon when it is contrary to national or EEA law, in this case, therefore, when it is contrary to Article 31 EEA.

97 It follows, in ESA's view, that Article 31 EEA should be interpreted as meaning that it confers rights on private undertakings, which may be relied on against a trade union in circumstances such as those in the main proceedings. Should the Court consider the *Viking Line* case law not to apply in the present case and the national court holds the notified boycott to be lawful under national law, the boycott itself may constitute a "national measure" within the scope of Article 31 EEA.[76]

74 Reference is made to Joined Cases T-374/94, T-375/94, T-384/94, and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136.

75 Reference is made to Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services* v *Commission* [2009] ECR I-9291, paragraph 82.

76 Reference is made to Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others* v *QC Leisure and Others* and *Karen Murphy* v *Media Protection Services Ltd* [2011] ECR I-9083, paragraph 88.

95 ESA gjør videre gjeldende at enhver konkurransebegrensning etter EØS-avtalen artikkel 53 nr. 1 kan vurderes opp mot tiltakets påståtte konkurransefremmende virkning etter EØS-avtalen artikkel 53 nr. 3.[74] Skal man støtte seg på denne bestemmelse, blir det nødvendig å vise at vilkårene for å oppnå unntak er oppfylt.[75]

SPØRSMÅL B.1

96 ESA gjør gjeldende at for å kunne vurdere om boikotten denne sak gjelder, utgjør en restriksjon på etableringsretten, er det nødvendig først å vurdere om det kollektive tiltak, i dette tilfelle boikotten, utgjør et tiltak som omfattes av EØS-avtalen artikkel 31. ESA fastholder at retten til å iverksette kollektive tiltak etter *Viking Line* følgelig er begrenset, og ikke kan benyttes dersom det er i strid med nasjonal lovgivning eller EØS-retten, i dette tilfelle EØS-avtalen artikkel 31.

97 Slik ESA ser det, følger det av dette at EØS-avtalen artikkel 31 bør tolkes slik at den gir private foretak rettigheter som de kan benytte mot en fagforening under omstendigheter tilsvarende dem hovedsaken gjelder. Skulle EFTA-domstolen komme til at rettspraksis fra *Viking Line* ikke får anvendelse på den foreliggende sak og den nasjonale domstol finne den varslede boikott lovlig etter nasjonal lovgivning, kan selve boikotten utgjøre et "nasjonalt tiltak" etter EØS-avtalen artikkel 31.[76]

74 Det vises til forente saker T-374/94, T-375/94, T-384/94 og T-388/94 *European Night Services m.fl.* mot *Kommisjonen*, Sml. 1998 s. II-3141 (avsnitt 136).

75 Det vises til forente saker C-501/06 P, C-513/06 P, C-515/06 P og C-519/06 P *GlaxoSmithKline Services* mot *Kommisjonen*, Sml. 2009 s. I-9291 (avsnitt 82).

76 Det vises til forente saker C-403/08 og C-429/08 *Football Association Premier League Ltd m.fl.* mot *QC Leisure m.fl.* og *Karen Murphy* mot *Media Protection Services Ltd*, Sml. 2011 s. I-9083 (avsnitt 88).

98 However, if the boycott in question is regarded as private action and not a national measure, ESA maintains that Article 31 EEA may still be applicable, as the fundamental freedoms may also apply in circumstances where the State abstains from adopting the measures required in order to deal with obstacles to the fundamental freedom which are not caused by the State.[77] It follows from case law[78] that actions by private individuals, economic operators, and organisations in the territory of the EEA States, which are liable to obstruct undertakings from exercising the freedom of establishment, are just as likely to hinder or render less attractive the exercise of the fundamental freedoms as a positive act by the State. Therefore, if the referring court finds the boycott lawful under national law, in ESA's view, this implies that Norway has not taken the measures necessary to ensure that the freedom of establishment is fully respected.

99 As regards the existence of a restriction on the freedom of establishment,[79] ESA submits that the present case concerns a Danish company, which exercised its right of establishment by setting up a Norwegian forwarding agent (Holship). It must therefore be assessed whether the boycott in question is liable to pose an obstacle to operators from other EEA States to exercise their freedom of establishment.

77 Reference is made to Case 269/83 *Commission* v *France* [1985] ECR 837, paragraphs 30 to 32.

78 Reference, in relation to the free movement of goods, is made to Case C-573/12 Ålands vindkraft AB v *Energimyndigheten*, judgment of 1 July 2014, published electronically, paragraph 74.

79 Reference is made to Case E-2/06 *ESA* v *Kingdom of Norway* [2007] EFTA Ct. Rep. 164, paragraph 64 and Case E-9/11 *ESA* v *Kingdom of Norway* [2012] EFTA Ct. Rep. 442, paragraph 82; in addition, reference is made to Case C-327/12 *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e furniture* v *SOA Nazionale Costruttori*, judgment of 12 December 2013, published electronically, paragraph 45 and the case law cited.

98 Men dersom den aktuelle boikott betraktes som et privat tiltak og ikke et nasjonalt tiltak, vil ESA fastholde at EØS-avtalen artikkel 31 fortsatt kan komme til anvendelse, ettersom de grunnleggende friheter også kan få anvendelse under omstendigheter der staten avstår fra å treffe de tiltak som er nødvendige for å håndtere hindringer for den grunnleggende frihet som ikke staten har forårsaket.[77] Det følger av rettspraksis[78] at tiltak iverksatt av privatpersoner, markedsdeltakere og organisasjoner på EØS-statenes territorium, som er egnet til å hindre foretak i å utøve etableringsadgangen, har like stor sannsynlighet for å hindre utøvelsen av de grunnleggende rettigheter eller gjøre den mindre interessant, som et faktisk tiltak fra statens side. Dersom den anmodende domstol finner at boikotten er lovlig etter nasjonal lovgivning, innebærer dette derfor etter ESAs oppfatning at Norge ikke har truffet de tiltak som er nødvendige for å sikre at etableringsadgangen blir fullt respektert.

99 Når det gjelder tilstedeværelsen av en restriksjon på etableringsadgangen,[79] anfører ESA at den foreliggende sak gjelder et dansk selskap som har utøvd sin etableringsrett til å opprette et norsk speditørfirma (Holship). Det må derfor vurderes om den aktuelle boikott er egnet til å hindre markedsdeltakere fra andre EØS-stater i å utøve sin etableringsadgang.

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77 Det vises til sak 269/83 *Kommisjonen* mot *Frankrike,* Sml. 1985 s. 837 (avsnitt 30–32).

78 Det vises, med hensyn til det frie varebytte, til sak C-573/12 Ålands vindkraft AB mot *Energimyndigheten*, dom 1. juli 2014, publisert elektronisk (avsnitt 74).

79 Det vises til sak E-2/06 *ESA* mot *Kongeriket Norge*, Sml. 2007 s. 164 (avsnitt 64), og sak E-9/11 *ESA* mot *Kongeriket Norge*, Sml. 2012 s. 442 (avsnitt 82); dessuten vises det til sak C-327/12 *Ministero dello Sviluppo economico og Autorità per la vigilanza sui contratti pubblici di lavori, servizi e furniture* mot *SOA Nazionale Costruttori*, dom 12. desember 2013, publisert elektronisk (avsnitt 45), og den rettspraksis som det vises til der.

100 ESA submits that the recent case of *Commission* v *Spain*[80] addressed the issue whether a priority of engagement clause for dockworkers, similar to the obligation in the Framework Agreement in the present case, amounted to a restriction on the freedom of establishment.[81] It was held that although the obligations imposed by the port regime applied equally both to national operators and to those from other Member States, they could still hinder the latter category of operators in establishing themselves in Spanish ports to pursue the activity of cargo handling.[82]

101 ESA argues further that restrictions on the freedom of establishment exist where measures can make it more difficult for undertakings from other EEA States to carry out their economic activity and to compete more effectively with undertakings established on a stable basis in the EEA State concerned.[83] In the present case, the priority of engagement clause contained in the Framework Agreement is liable to have economic consequences for economic operators such as Holship. If the boycott successfully induces Holship to enter the Framework Agreement and to buy unloading and loading services at the applicable rates set by the AO, this would entail a double cost for Holship, as it already employs workers for this purpose. The use of a boycott to impose the Framework Agreement on Holship under the circumstances may also result in changes to the company's existing employment structures and recruitment policies. If Holship is forced to join the Framework Agreement then this may render the exercise of the freedom of establishment less attractive. The boycott thus constitutes a restriction contrary to Article 31 EEA. As regards a possible justification of the restriction, ESA submits that NTF has

80 Reference is made to *Commission* v *Spain*, cited above.
81 Ibid., paragraph 38.
82 Ibid., cited above, paragraph 37.
83 Reference is made to *SOA Nazionale Costruttori*, cited above, paragraph 57 and the case law cited, and *Laval*, cited above, paragraph 99.

100 ESA anfører at den nylig avgjorte sak *Kommisjonen* mot *Spania*[80] gjaldt spørsmålet om en fortrinnsrettsbestemmelse for havnearbeidere – tilsvarende forpliktelsen i Rammeavtalen i den foreliggende sak – utgjorde en restriksjon på etableringsadgangen.[81] Det ble lagt til grunn at selv om forpliktelsene havneregimet påla, like meget gjaldt nasjonale operatører som operatører fra andre medlemsstater, kunne de likevel hindre den sistnevnte kategorien operatører i å etablere seg i spanske havner for å drive godshåndtering.[82]

101 ESA gjør gjeldende at det vil foreligge restriksjoner på etableringsadgangen dersom tiltak kan gjøre det vanskeligere for foretak fra andre EØS-stater å drive økonomisk virksomhet og konkurrere mer effektivt mot foretak etablert på fast basis i den aktuelle EØS-stat.[83] I den foreliggende sak er fortrinnsrettsbestemmelsen i Rammeavtalen egnet til å få økonomiske konsekvenser for markedsdeltakere som Holship. Dersom boikotten lykkes med å få Holship til å slutte seg til Rammeavtalen og til å kjøpe losse- og lastetjenester til gjeldende satser fastsatt av Administrasjonskontoret, ville dette medføre en dobbel kostnad for Holship, siden det allerede har ansatt arbeidstakere for dette formål. Bruken av boikott, for å tvinge Rammeavtalen på Holship under disse omstendigheter, kan også føre til endringer i selskapets nåværende ansettelsesstruktur og rekrutteringspolitikk. Dersom Holship tvinges til å slutte seg til Rammeavtalen, kan dette gjøre utøvelsen av etableringsadgangen mindre interessant. Boikotten utgjør dermed en restriksjon i strid med EØS-avtalen artikkel 31. Når det gjelder en mulig

80 Det vises til *Kommisjonen* mot *Spania*, som omtalt over.
81 Samme sted (avsnitt 38).
82 Samme sted, som omtalt over (avsnitt 37).
83 Det vises til *SOA Nazionale Costruttori*, som omtalt over (avsnitt 57), og den rettspraksis som det vises til der, og *Laval*, som omtalt over (avsnitt 99).

not argued that any of the grounds listed in Article 33 EEA or any overriding reason in the public interest applies in the present case. NTF argues, however, that there are overriding public interest grounds for the claim that Holship should accept the Framework Agreement, namely to guarantee the pay and working conditions of permanently employed dockworkers. NTF argues further that this is in accordance with Article 3(2) of the Convention.

102 With regard to the Convention, ESA contends that EEA States must, when implementing international agreements, such as the Convention, ensure that they comply with the obligations arising from EEA law. Moreover, Article 3(2) of the Convention does not require the introduction of a *de facto* monopoly or prevent the introduction of competition on the market for stevedoring services. The Court has already held that international law cannot be relied upon as a justification for derogations from obligations under EEA law where international law is permissive rather than mandatory.[84]

103 As regards the aim of protecting dockworkers, ESA submits that the Court has already recognised that the social protection of workers may constitute an overriding reason in the public interest.[85] While it is, in principle, for the national courts to ascertain whether the objectives pursued by NTF via collective action concern the protection of workers,[86] the Court may provide guidance on the interpretation of this notion of EEA law in the circumstances.

84 Reference is made to Case E-1/02 *ESA* v *Kingdom of Norway* [2003] EFTA Ct. Rep. 1, paragraph 58.

85 Reference is made to *Principality of Liechtenstein and Others* v *ESA*, cited above, paragraph 32, and Case E-2/11 *STX Norway Offshore AS m.fl.* v *Staten v Tariffnemnda* [2012] EFTA Ct. Rep. 4, paragraph 81 and the case law cited.

86 Reference is made to Case E-16/10 *Philip Morris Norway AS* v *Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Ct. Rep. 330, paragraph 78; Case E-3/*06 Ladbrokes Ltd* v *The Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Ct. Rep. 86, paragraph 43, and *Viking Line*, cited above, paragraph 80.

rettferdiggjøring av restriksjonen, gjør ESA gjeldende at NTF ikke har anført at noen av grunnene angitt i EØS-avtalen artikkel 33 eller tvingende allmenne hensyn kommer til anvendelse i den foreliggende sak. NTF gjør imidlertid gjeldende at kravet om at Holship bør godta Rammeavtalen, er begrunnet i tvingende allmenne hensyn, nemlig å sikre lønns- og arbeidsvilkårene til fast ansatte losse- og lastearbeidere. NTF gjør videre gjeldende at dette er i samsvar med Konvensjonen artikkel 3 nr. 2.

102 Når det gjelder Konvensjonen, hevder ESA at EØS-statene, når de gjennomfører internasjonale avtaler, som Konvensjonen, må sikre at de overholder de forpliktelser som følger av EØS-retten. Konvensjonen artikkel 3 nr. 2 forutsetter videre ikke at det innføres noe faktisk monopol og hindrer heller ikke at det innføres konkurranse på markedet for losse- og lastetjenester. EFTA-domstolen har allerede lagt til grunn at folkeretten ikke kan påberopes som begrunnelse for unntak fra forpliktelsene etter EØS-retten i tilfeller der folkeretten er valgfri snarere enn obligatorisk.[84]

103 Når det gjelder målet om å beskytte havnearbeidere, gjør ESA gjeldende at EFTA-domstolen allerede har erkjent at sosial trygghet for arbeidstakere kan være et tvingende allment hensyn.[85] Selv om det i prinsippet er den nasjonale domstol som skal bringe på det rene om målene NTF forfølger gjennom et kollektivt tiltak, gjelder beskyttelse av arbeidstakere,[86] kan EFTA-domstolen gi veiledning med hensyn til hvordan dette EØS-rettslige begrep skal fortolkes

84 Det vises til sak E-1/02 *ESA* mot *Kongeriket Norge*, Sml. 2003 s. 1 (avsnitt 58).

85 Det vises til *Fyrstedømmet Liechtenstein m.fl.* mot *ESA*, som omtalt over (avsnitt 32), og sak E-2/11 *STX Norway Offshore AS m.fl.* mot *Staten v/Tariffnemnda*, Sml. 2012 s. 4 (avsnitt 81), og den rettspraksis som det vises til der.

86 Det vises til sak E-16/10 *Philip Morris Norway AS* mot *Staten v/Helse- og omsorgsdepartementet*, Sml. 2011 s. 330 (avsnitt 78); sak E-3/*06 Ladbrokes Ltd* mot *Staten v/Landbruks- og matdepartementet*, Sml. 2007 s. 86 (avsnitt 43), og *Viking Line*, som omtalt over (avsnitt 80).

Moreover, according to ESA, it follows from *Laval*[87] that the right to take collective action can be a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms.[88] However, it was also found in *Laval* that, as regard the specific obligations linked to the signature of the collective agreement for the building sector which the trade unions sought to impose on undertakings established in other Member States by way of collective action such as that at issue in the case, the obstacle which that collective action forms cannot be justified with regard to such an objective.[89]

104 ESA contends that NTF intends to use the boycott to impose the Framework Agreement on Holship. Holship has four employees for loading and unloading. However, the request does not explain why dockworkers at the AO require greater protection than Holship's dockworkers. Furthermore, the employees of Holship are covered by a different collective agreement, which protects the working conditions of those workers. The boycott does not, therefore, aim at securing the working conditions for workers who are not covered by a collective agreement and whose rights are not protected.

105 In light of the above, ESA contends that the restriction imposed on the freedom of establishment by the boycott in the present case cannot be justified by Article 33 EEA or any overriding reason in the public interest.

106 ESA is also doubtful that the collective action in this case actually pursues a legitimate aim as it appears to aim at protecting the working conditions and pay of one group of workers with an

87 Reference is made to *Laval*, cited above.

88 Reference is made to Case C-112/00 *Schmidberger Internationale Transporte und Planzüge* v *Republic of Austria* [2003] ECR I-5659, paragraph 74; *Viking Line*, cited above, paragraph 77 and the case law cited, and *Commission* v *Spain,* cited above, paragraph 50.

89 Reference is made to *Laval*, cited above, paragraph 107.

under de foreliggende omstendigheter. Etter ESAs syn følger det dessuten av *Laval*[87] at retten til å iverksette kollektive tiltak kan være et rettmessig hensyn som i prinsippet berettiger en restriksjon på en av de grunnleggende rettigheter.[88] Imidlertid ble det i *Laval* også til grunn at når det gjelder de særlige forpliktelser som er knyttet til undertegnelsen av en tariffavtale for byggesektoren som fagforeningene prøvde å pålegge foretak etablert i en annen medlemsstat gjennom kollektive tiltak som det tiltak hovedsaken gjelder, kan ikke den hindring det kollektive tiltak utgjør, begrunnes i forhold til et slikt mål.[89]

104 ESA gjør gjeldende at NTF har til hensikt å bruke boikotten for å påtvinge Holship Rammeavtalen. Holship har fire ansatte som driver med losse- og lastearbeid. Imidlertid forklares det ikke i anmodningen hvorfor Administrasjonskontorets havnearbeidere trenger større beskyttelse enn Holships havnearbeidere. Dessuten er de ansatte i Holship omfattet av en annen tariffavtale, som beskytter disse arbeidstakeres arbeidsvilkår. Boikotten tar dermed ikke sikte på å sikre arbeidsvilkårene for arbeidstakere som ikke er omfattet av en tariffavtale, og hvis rettigheter ikke er beskyttet.

105 I betraktning av det ovenstående gjør ESA gjeldende at restriksjonen som boikotten i den foreliggende sak utgjør for etableringsretten, ikke kan begrunnes i EØS-avtalen artikkel 33 eller i noen tvingende allmenne hensyn.

106 ESA stiller seg også tvilende til om det kollektive tiltak i denne sak faktisk forfølger et legitimt mål, siden det synes å ha som mål å beskytte arbeids- og lønnsvilkårene for en gruppe arbeidstakere som

87 Det vises til *Laval*, som omtalt over.

88 Det vises til sak C-112/00 *Schmidberger Internationale Transporte und Planzüge* mot *Republikken Østerrike*, Sml. 2003 s. I-5659 (avsnitt 74); *Viking Line*, som omtalt over (avsnitt 77), og den rettspraksis som det vises til der, og *Kommisjonen* mot *Spania,* som omtalt over (avsnitt 50).

89 Det vises til *Laval*, som omtalt over (avsnitt 107).

advantage over another group of workers. Moreover, the boycott may intend to protect one group of workers to the detriment of other workers, since if Holship enters into the Framework Agreement it may render their own loading and unloading workers unnecessary.

107 ESA adds that if the Court considers the boycott in question to pursue a legitimate aim, the measure still needs to be proportionate.[90] It is established that collective action may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members.[91] In accordance with *Viking Line*,[92] it is for the national court to examine whether or not NTF had other means at its disposal which were less restrictive of the freedom of establishment in order to induce Holship to enter the Framework Agreement, and whether NTF had exhausted those means prior to initiating such action.

108 ESA argues that the boycott is not proportionate, as the aim of protecting dockworkers could be achieved by means that are less restrictive on the freedom of establishment. The dockworkers in the Port of Drammen could be organised in a pool of dockworkers operating as an agency for temporary work, from which the companies in the port are free to hire workers permanently or temporarily to cover their needs for unloading and loading services.[93] Furthermore, according to the request, most companies operating in the port are dependent on the services of the AO.

90 Reference is made, for example, to *Principality of Liechtenstein and Others* v *ESA*, cited above, paragraph 32, and Case E-9/11 *ESA* v *Kingdom of Norway*, cited above, paragraph 83.
91 Reference is made to *Viking Line*, cited above, paragraph 86.
92 Ibid., paragraph 87.
93 Reference is made to *Commission* v *Spain*, cited above, paragraph 27.

hadde et fortrinn i forhold til en annen gruppe arbeidstakere. Videre kan hensikten med boikotten være å beskytte en gruppe arbeidstakere på bekostning av andre arbeidstakere, for hvis Holship inngår Rammeavtalen, kan dette gjøre deres egne losse- og lastearbeidere overflødige.

107 ESA legger til at dersom EFTA-domstolen anser at den aktuelle boikott har et legitimt mål, må tiltaket fortsatt være forholdsmessig.[90] Det er fast rettspraksis at et kollektivt tiltak, under de særlige omstendigheter som foreligger i en sak, kan være en av de viktigste måtene fagforeninger kan beskytte sine medlemmers interesser på.[91] I henhold til *Viking Line*[92] er det den nasjonale domstol som skal undersøke om NTF hadde andre midler til rådighet som ville vært mindre inngripende for etableringsadgangen, for å få Holship til å slutte seg til Rammeavtalen, og om NTF hadde benyttet disse midler før kollektive tiltak ble iverksatt.

108 ESA gjør gjeldende at boikotten ikke var forholdsmessig, ettersom målet om å beskytte havnearbeidere kunne ha blitt nådd ved hjelp av midler som er mindre inngripende for etableringsadgangen. Havnearbeiderne i Drammen havn kunne vært organisert i en havnearbeiderpool som kunne fungert som et byrå for midlertidige arbeidsoppdrag, og som selskapene i havnen fritt kunne ha leid inn arbeidstakere fra på permanent eller midlertidig basis for å dekke sine behov for losse- og lastetjenester.[93] Videre er de fleste selskaper som driver virksomhet i havnen, ifølge anmodningen, avhengige av Administrasjonskontorets tjenester.

90 Det vises for eksempel til *Fyrstedømmet Liechtenstein m.fl.* mot *ESA*, som omtalt over (avsnitt 32), og sak E-9/11 *ESA* mot *Kongeriket Norge*, som omtalt over (avsnitt 83).

91 Det vises til *Viking Line*, som omtalt over (avsnitt 86).

92 Samme sted (avsnitt 87).

93 Det vises til *Kommisjonen* mot *Spania*, som omtalt over (avsnitt 27).

QUESTION B2

109 ESA submits that whether the measure has any, or only very little, actual effect on the freedom of establishment does not change the fact that the measure constitutes a restriction which should be prohibited unless it is justified under Article 33 EEA (or any other overriding reason of public interest) and respects the principle of proportionality. There is no *de minimis* rule applying to the freedom of establishment.[94] As such, even if the collective action in question has no or little restrictive effect on the freedom of establishment, it is still an obstacle to the fundamental freedom unless justified on the grounds explained above. It follows that it has no significance for the assessment of whether a restriction exists if the company's need for unloading and loading services proves to be very limited and/or sporadic.

QUESTION B3

110 ESA contends that the fact that Holship's workers are already covered by another collective agreement is relevant for the assessment of the lawfulness of the restriction on the freedom of establishment. NTF cannot justify the boycott with reference to the protection of workers' conditions and pay as long as the priority of engagement clause applies regardless of whether the company is party to another collective agreement which may provide equal or even higher protection for its employees.[95] The boycott does not pursue a legitimate aim when that aim appears to provide one group of workers with an advantage over another. Hence, it is of significance for the assessment of the lawfulness of the restriction that Holship

94 Reference is made to Case C-170/05 *Denkavit Internationaal BV and Denkavit France SARL* v *Ministre de l'Économie, des Finances et de l'Industrie* [2006] ECR I-11949, paragraph 50 and the case law cited.

95 Reference is made to *Viking Line*, cited above, paragraph 89.

SPØRSMÅL B.2

109 ESA gjør gjeldende at spørsmålet om tiltaket har noen eller bare en svært liten faktisk innflytelse på etableringsretten, ikke endrer på det faktum at tiltaket utgjør en restriksjon som bør være forbudt med mindre det er begrunnet etter EØS-avtalen artikkel 33 (eller i et annet tvingende allment hensyn) og overholder forholdsmessighetsprinsippet. Det finnes ingen *de minimis*-regel som får anvendelse for etableringsretten.[94] Selv om det aktuelle kollektive tiltak som sådan har liten eller ingen begrensende virkning på etableringsadgangen, utgjør det likevel en hindring for den grunnleggende frihet med mindre det er rettferdiggjort som anført over. Det følger av dette at det er uvesentlig for vurderingen av om det foreligger en restriksjon, at bedriftens behov for losse- og lastetjenester viser seg å være svært begrenset og/eller sporadisk.

SPØRSMÅL B.3

110 ESA gjør gjeldende at det faktum at Holships ansatte allerede er omfattet av en annen tariffavtale, er relevant for vurderingen av lovligheten av restriksjonen på etableringsadgangen. NTF kan ikke begrunne boikotten med henvisning til beskyttelsen av arbeidstakernes vilkår og lønn så lenge bestemmelsen om fortrinnsrett gjelder uten hensyn til om selskapet er part i en annen tariffavtale som kan gi de ansatte like god eller til og med bedre beskyttelse.[95] Boikotten har ikke et legitimt mål når målet synes å gi en gruppe arbeidstakere fortrinn fremfor en annen. Følgelig er det av betydning for vurderingen av om restriksjonen er lovlig eller ikke, at Holship anvender en annen tariffavtale, selv om

94 Det vises til sak C-170/05 *Denkavit Internationaal BV og Denkavit France SARL* mot *Ministre de l'Économie, des Finances et de l'Industrie*, Sml. 2006 s. I-11949 (avsnitt 50), og den rettspraksis som det vises til der.

95 Det vises til *Viking Line*, som omtalt over (avsnitt 89).

applies another collective agreement even if that collective agreement concerns matters other than unloading and loading work.

PROPOSED ANSWERS

111 ESA proposes that the Court should provide the following answers to the referred questions:

(A1) The use of a boycott against a port user in order to produce acceptance of a collective agreement, which entails that the port user must give preference to buying unloading and loading services from a separate AO in the port, rather than use its own employees for the same work, is not covered by the exclusion from the competition rules of the EEA Agreement of agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment.

(A2) The system of a collective agreement and a boycott as that described in point 1 may be assessed under Articles 53 and 54 EEA.

(A3) In the assessment under Articles 53 and 54 EEA of whether there is a noticeable effect on trade between Contracting Parties, account may be taken of the existence of identical or corresponding systems in other ports.

(B1) It constitutes a restriction on the freedom of establishment pursuant to Article 31 EEA for a trade union to use a boycott against a company in order to produce acceptance of a collective agreement, which contains a priority of engagement requiring the company to give preference to buying unloading and loading services rather than using its own employees for this work.

(B2) It is not of significance for the assessment of whether a restriction exists, if the company's need for unloading and loading services proved to be very limited and/or sporadic.

sistnevnte tariffavtale gjelder andre tariffområder enn losse- og lastearbeid.

FORSLAG TIL SVAR

111 ESA anmoder EFTA-domstolen om å besvare de forelagte spørsmål på følgende måte:

A.1 Bruken av boikott mot en havnebruker for å oppnå tilslutning til en tariffavtale som innebærer at havnebrukeren fortrinnsvis må kjøpe losse- og lastetjenester fra et eget Administrasjonskontor i havnen fremfor å benytte sine egne ansatte til dette arbeid, faller ikke inn under unntaket fra EØS-avtalens konkurranseregler for avtaler inngått innenfor rammen av kollektive forhandlinger mellom partene i arbeidslivet som tar sikte på å forbedre arbeids- og ansettelsesvilkår.

A.2 Systemet med tariffavtale og boikott som beskrevet i punkt 1, kan bedømmes etter EØS-avtalen artiklene 53 og 54.

A.3 I vurderingen etter EØS-avtalen artiklene 53 og 54 av om det foreligger en merkbar påvirkning på samhandelen mellom avtalepartene, kan man ta hensyn til at samme eller tilsvarende system finnes i andre havner.

B.1 Det utgjør en restriksjon på etableringsretten etter EØS-avtalen artikkel 31 dersom en fagforening bruker boikott mot et selskap for å oppnå tilslutning til en tariffavtale med en fortrinnsrettsbestemmelse som krever at selskapet fortrinnsvis må kjøpe losse- og lastetjenester fremfor å benytte sine egne ansatte til dette arbeid.

B.2 Det er ikke av betydning for vurderingen av om det foreligger en restriksjon at bedriftens behov for losse- og lastetjenester viser seg å være svært begrenset og/eller sporadisk.

(B3) It is of significance for the assessment of whether the restriction is lawful or not, that the company, in relation to its own dockworkers, applies another collective agreement between social partners in the State where the port is located, when that collective agreement concerns matters other than unloading and loading work.

THE COMMISSION

QUESTIONS A1 – A3

112 The Commission submits that agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside of Article 101(1) TFEU.[96]

113 The Commission argues that, in relation to Question A1, account should be taken of all the circumstances of the case, *inter alia*, of the fact that Holship's employees do not benefit from the collective agreement in question, but are covered by another collective agreement which has been applied to loading and unloading workers.

114 The Commission submits further that the ECJ has not exhaustively defined the conditions under which collective negotiations between management and labour must, by virtue of their nature and purpose, be regarded as falling outside the scope of EU competition rules. The notion of improving conditions of work and employment remains vague. This notion must be interpreted in light of the fact that, as the Court has held, the result arrived at by the ECJ in its case law is based on the balancing of concerns relating to the effective

96 Reference is made to *AG2R Prévoyance*, cited above, paragraph 29; *Albany*, cited above, paragraphs 59 and 60; *Brentjens'*, cited above; *Drijvende Bokken*, cited above; *Pavlov*, cited above, and *van der Woude*, cited above.

B.3 Det er av betydning for vurderingen av om restriksjonen er lovlig eller ikke, at bedriften for sine egne losse- og lastearbeidere anvender en annen tariffavtale fremforhandlet mellom arbeidslivets parter i den stat havnen ligger, når denne tariffavtale gjelder et annet tariffområde enn losse- og lastearbeid.

KOMMISJONEN

SPØRSMÅL A.1 – A.3

112 Kommisjonen gjør gjeldende at avtaler inngått innenfor rammen av kollektive forhandlinger mellom partene i arbeidslivet, som tar sikte på å forbedre arbeids- og ansettelsesvilkår, har en karakter og et formål som gjør at de må anses å falle utenfor virkeområdet til TEUV artikkel 101 nr. 1.[96]

113 Når det gjelder spørsmål A.1, anfører Kommisjonen at alle omstendigheter i saken bør tas i betraktning, blant annet det faktum at Holships ansatte ikke er omfattet av den aktuelle tariffavtale men av en annen tariffavtale som har fått anvendelse på losse- og lastearbeidere.

114 Kommisjonen gjør videre gjeldende at EU-domstolen ikke har definert alle vilkår for at kollektive forhandlinger mellom partene i arbeidslivet har en karakter og et formål som gjør at de må anses å falle utenfor virkeområdet til EUs konkurranseregler. Begrepet forbedre arbeids- og ansettelsesvilkår forblir vagt. Begrepet må fortolkes i lys av det faktum at – som EFTA-domstolen har lagt til grunn – det resultat EU-domstolen har kommet til i sin rettspraksis, er basert på en balansering av hensynet til det indre markeds

96 Det vises til *AG2R Prévoyance*, som omtalt over (avsnitt 29); *Albany*, som omtalt over (avsnitt 59 og 60); *Brentjens'*, som omtalt over; *Drijvende Bokken*, som omtalt over; *Pavlov*, som omtalt over, og *van der Woude*, som omtalt over.

functioning of the internal market with the pursuit of social policy objectives such as the importance of promoting a harmonious and balanced development of economic activities, and a high level of employment and social protection.[97] Further, the ECJ's case law is not monolithic.[98] Even in the *Albany* line of case law, the ECJ, when formulating the exemption at issue, used the term "generally". This indicates that, under certain circumstances, clauses in collective agreements are not exempted from EU competition rules.

115 The Commission argues that it follows that collective agreements between management and labour must not always be sheltered from competition rules.[99] The Court has also stated that it is not sufficient that the parties to the agreement are a labour union and an employer or an association of employers, or that a collective bargaining agreement can generally be characterised as having the nature and purposes of a typical collective agreement, to conclude that a collective agreement falls outside the scope of application of competition rules.[100] Moreover, the Commission draws attention to one criterion suggested by Advocate General Jacobs for the delimitation of the collective bargaining immunity from competition rules.[101]

116 The Commission submits that a collective agreement between management and labour to the disadvantage of third parties not participating in the negotiation should only exceptionally be exempted from the scope of EEA competition rules. Otherwise, such

97 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 37, and to Article 151 TFEU.

98 Reference is made to *Porto di Genova*, cited above; Case C-18/93 *Corsica Ferries* v *Corpo dei piloti del porto di Genova* [1994] ECR I-1783, and *Silvano Raso*, cited above.

99 Reference is made to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 186.

100 Reference is made to *Landsorganisasjonen i Norge*, cited above, paragraph 50.

101 Reference is made to the Opinion of Advocate General Jacobs in *Albany*, cited above, point 193.

virkemåte og sosiale hensyn, som betydningen av å fremme en harmonisk og balansert utvikling av økonomiske aktiviteter og et høyt sysselsettingsnivå og et høyt nivå av sosial trygghet.[97] EU-domstolens rettspraksis er videre ikke ensartet.[98] Selv i rettspraksis etter *Albany* har EU-domstolen i sin formulering av det aktuelle unntak brukt ordet "generelt". Dette viser at bestemmelser i tariffavtaler under visse omstendigheter ikke er unntatt fra EUs konkurranseregler.

115 Kommisjonen anfører at det følger av dette at tariffavtaler mellom partene i arbeidslivet ikke alltid må skjermes mot konkurransereglene.[99] EFTA-domstolen har også uttalt at det ikke er tilstrekkelig for å slutte at en tariffavtale faller utenfor konkurransereglenes virkeområde, at partene i avtalen er en fagforening og en arbeidsgiver eller en arbeidsgiverforening, eller at en tariffavtale generelt kan anses å ha samme karakter og formål som en typisk tariffavtale.[100] Kommisjonen henleder videre oppmerksomheten mot et kriterium foreslått av generaladvokat Jacobs for å avgrense tariffavtalers konkurranserettslige immunitet.[101]

116 Kommisjonen gjør gjeldende at en tariffavtale mellom partene i arbeidslivet, som er til ulempe for tredjemann som ikke har deltatt i forhandlingene, bare unntaksvis bør unntas fra anvendelsen av EØS-avtalens konkurranseregler. Ellers kunne slike tariffavtaler blitt

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97 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 37), og til TEUV artikkel 151.

98 Det vises til *Porto di Genova*, som omtalt over; sak C-18/93 *Corsica Ferries* mot *Corpo dei piloti del porto di Genova*, Sml. 1994 s. I-1783, og *Silvano Raso*, som omtalt over.

99 Det vises til uttalelse fra generaladvokat Jacobs i *Albany*, som omtalt over (avsnitt 186).

100 Det vises til *Landsorganisasjonen i Norge*, som omtalt over (avsnitt 50).

101 Det vises til uttalelse fra generaladvokat Jacobs i *Albany*, som omtalt over (avsnitt 193).

collective agreements could be concluded to circumvent the application of Articles 53 and 54 EEA and, respectively, of Articles 101 and 102 TFEU and, ultimately, be used as a vehicle to distort unfettered undertakings to the disadvantage, in particular, of customers or competitors of the undertaking(s) negotiating such agreement with it employees. The Commission acknowledges that in individual cases collective agreements have been found to fall outside the scope of application of competition rules although their rules were applied on a mandatory basis to undertakings not parties to the collective agreement.[102] However, such rulings can only be understood in light of the fact that the collective agreements in question also aimed at improving the working conditions of employees whose employers were not party to the collective agreements. In the present case, and by way of contrast, the Framework Agreement negotiated between NTF, on behalf of employees, and the employers' confederation NHO ensures stable employment and decent pay to the benefit of Drammen dockworkers employed by the Administration Office but workers employed by other companies might lose their jobs or see their working conditions otherwise deteriorate. Indeed, their employers might not be able to afford incurring the double costs resulting from the employment of workers that are not allowed to load or unload goods in Norwegian ports. This is a crucial difference between the present case and the line of case law where the collective agreements contributed to improving the working conditions of all employees in the sectors concerned.[103] Moreover, the Commission argues that the social objective of the Treaty or the EEA Agreement cannot be invoked to shelter from competition rules collective agreements that aim at

102 Reference is made to *AG2R Prévoyance*, cited above, and *Albany*, cited above, in which, in the Commission's assessment, the ECJ accepted that affiliation to an insurance scheme/schemes for supplementary reimbursement of healthcare costs could be made compulsory for third parties who were not parties to the collective agreement.

103 Reference is made to *AG2R Prévoyance*, cited above, and *Albany*, cited above.

inngått for å omgå anvendelsen av henholdsvis EØS-avtalen artiklene 53 og 54 og TEUV artiklene 101 og 102, og i siste instans brukes som et middel til å skape en ulempe for ubundne foretak, og særlig for kunder eller konkurrenter av det eller de foretak som inngår slike avtaler med sine ansatte. Kommisjonen vedgår at det i enkelte tilfelle har blitt lagt til grunn at en tariffavtale kan falle utenfor konkurransereglenes virkeområde selv om foretak som ikke var parter i tariffavtalen, var tvunget til å følge tariffavtalens regler.[102] Imidlertid kan slike avgjørelser bare forstås i lys av det faktum at de aktuelle tariffavtaler også tok sikte på å forbedre arbeidsvilkårene for ansatte hvis arbeidsgivere ikke var part i tariffavtalene. I den foreliggende sak derimot, sikrer Rammeavtalen som ble fremforhandlet mellom NTF, på vegne av de ansatte, og NHO, fast ansettelse og en anstendig lønn for havnearbeidere i Drammen som var ansatt i Administrasjonskontoret, mens arbeidstakere ansatt i andre selskaper kunne miste jobben eller få dårligere arbeidsvilkår på andre måter. Faktisk er det ikke sikkert at arbeidsgiverne deres har mulighet til å bære de doble kostnader som følger av at de har ansatt arbeidstakere som ikke har tillatelse til å losse eller laste gods i norske havner. Dette er den avgjørende forskjell mellom den foreliggende sak og den rekke av rettspraksis der tariffavtaler har bidratt til å forbedre arbeidsvilkårene for alle ansatte i den aktuelle sektor.[103] Kommisjonen gjør videre gjeldende at traktatens eller EØS-avtalens sosiale mål ikke kan påberopes for å verne tariffavtaler mot konkurransereglene når tariffavtalene har som mål å forbedre arbeidsvilkårene for visse arbeidstakere på

102 Det vises til *AG2R Prévoyance*, som omtalt over, og *Albany*, som omtalt over, der EU-domstolen etter Kommisjonens vurdering gikk med på at medlemskap i en forsikringsordning/tilleggshelseforsikrings-ordning kunne gjøres obligatorisk for tredjemann som ikke var part i tariffavtalen.

103 Det vises til *AG2R Prévoyance*, som omtalt over, og *Albany*, som omtalt over.

improving the working conditions of certain workers to the disadvantage of others where both work in the same sector and generally merit the same social protection.

117 If it is determined that the Framework Agreement is not generally exempted from the application of competition rules, the Commission observes in relation to Question A2 that Articles 53 and 54 EEA apply only to undertakings.[104] Since dockworkers are, for the duration of the relationship for which they perform dock work, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockworkers do not themselves constitute an undertaking within the meaning of EU competition law.[105] Furthermore, a person's status as a worker is not affected by the fact that that person, whilst being linked to an undertaking by a relationship of employment, is linked to the other workers of that undertaking by a relationship of association.[106] Accordingly, NTF is not an undertaking within the meaning of EEA competition rules. By contrast, the AO is more than a mere association of workers, given that it has legal personality and employs the dockworkers registered in Drammen and does not simply act on their behalf in negotiation with employers. With regard to dock work companies that employ stevedores and offer services to users of a port, the ECJ has found that a dock work undertaking enjoying the exclusive right to organise dock work for third parties as well as a dock work company having the exclusive right to perform dock work must be regarded as undertakings to which exclusive rights have been granted by the State.[107]

104 Reference is made to *Pavlov*, cited above, paragraph 74.
105 Reference is made to *Becu*, cited above, paragraph 26.
106 Reference is made to *Becu*, cited above, paragraph 28, and *Porto di Genova*, cited above, paragraph 13.
107 Reference is made to *Porto di Genova*, cited above, paragraph 9.

bekostning av andre, når alle arbeider i samme sektor og generelt fortjener samme sosiale trygghet.

117 Om man kommer frem til at Rammeavtalen ikke generelt er unntatt fra anvendelsen av konkurransereglene, anfører Kommisjonen til spørsmål A.2 at EØS-avtalen artiklene 53 og 54 bare får anvendelse på foretak.[104] Siden havnearbeidere er innlemmet i de berørte foretak og dermed utgjør en økonomisk enhet med hvert av dem i den perioden de utfører havnearbeid, utgjør ikke havnearbeiderne selv noe foretak i henhold til EUs konkurranseregelverk.[105] Videre påvirkes ikke en persons status som arbeidstaker av det faktum at han, samtidig som han er tilknyttet et foretak gjennom et ansettelsesforhold, er tilknyttet de andre arbeidstakere i samme foretak ved å være medlem av samme organisasjon.[106] Følgelig er NTF ikke et foretak i henhold til EØS-avtalens konkurranseregler. Men Administrasjonskontoret er mer enn en organisasjon av arbeidstakere, for det er en juridisk person og ansetter havnearbeidere registrert i Drammen og opptrer ikke bare på deres vegne i forhandlinger med arbeidsgivere. Når det gjelder losse- og lasteforetak som ansetter losse- og lastearbeidere og tilbyr tjenester til brukerne av en havn, har EU-domstolen lagt til grunn at et losse- og lasteforetak som nyter en eksklusiv rettighet til å organisere havnearbeid for tredjemann, og et losse- og lasteforetak som har en eksklusiv rettighet til å utføre havnearbeid, må anses som foretak som har blitt gitt eksklusive rettigheter av staten.[107]

104 Det vises til *Pavlov*, som omtalt over (avsnitt 74).
105 Det vises til *Becu*, som omtalt over (avsnitt 26).
106 Det vises til *Becu*, som omtalt over (avsnitt 28), og *Porto di Genova*, som omtalt over (avsnitt 13).
107 Det vises til *Porto di Genova*, som omtalt over (avsnitt 9).

118 The Commission submits that the above case law applies to the present case and that the non-profit character of the AO is irrelevant, given that non-profit entities can offer goods or services on a market and hence can be an undertaking within the meaning of the competition rules.[108] The AO conducts economic activities in offering stevedore services against a fee, thereby competing with other actual or potential market players who might wish to offer similar services. Accordingly, the Commission claims that, when rendering loading or unloading services against a fee, the AO is an undertaking within the meaning of Articles 53 and 54 EEA.

119 In relation to Question A3 and the "effect on trade",[109] the Commission claims, in the present case, given that the Framework Agreement establishes a priority of engagement rule and fixes wages to the benefit of dockworkers employed by AOs in all major ports in Norway, there seems to be a sufficient degree of probability that the practices applied in the context of that agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between EEA States. The fact that trade in goods from other EEA States is involved in the present case is also relevant in the assessment of this issue. Moreover, the parent company of Holship is established in a different EEA State (Denmark). Finally, the Port of

108 Reference is made to Joined Cases 209/78 to 215/78 *Heintz van Landewyck SARL and Others* v *Commission* [1980] ECR 3125, paragraph 88, *Höfner and Elser*, cited above, paragraphs 21 to 23, and Case C-475/99 *Firma Ambulanz Glöckner* v *Landkreis Südwestpfalz* [2001] ECR I-8089, paragraph 67.

109 Reference is made to Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia* y *Crédito, SL* v *Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125, paragraph 34 and the case law cited; Case C439/11 P *Ziegler SA* v *Commission*, judgment of 11 July 2013, published electronically, paragraph 92 et seq; *Erste Group Bank and Others*, cited above, paragraph 36, and Case C-219/95 Ferriere Nord SpA v Commission [1997] ECR I-4411, paragraph 19.

118 Kommisjonen gjør gjeldende at ovennevnte rettspraksis kommer til anvendelse på den foreliggende sak, og at spørsmålet om Administrasjonskontoret driver ervervsmessig virksomhet eller ikke er irrelevant, ettersom selskaper som ikke driver ervervsmessig virksomhet kan tilby varer eller tjenester på et marked og følgelig være et foretak i henhold til konkurransereglene.[108] Administrasjonskontoret driver økonomisk virksomhet ved å tilby losse- og lastetjenester mot en avgift og konkurrerer derved med andre faktiske eller potensielle markedsaktører som kan ønske å tilby lignende tjenester. På bakgrunn av dette gjør Kommisjonen gjeldende at når Administrasjonskontoret yter losse- eller lastetjenester mot en avgift, er det et foretak i henhold til EØS-avtalen artiklene 53 og 54.

119 Når det gjelder spørsmål A.3 og "påvirkning på samhandelen",[109] gjør Kommisjonen gjeldende at det i den foreliggende sak – ettersom Rammeavtalen etablerer en regel om fortrinnsrett og fastsetter lønnen for havnearbeidere ansatt ved Administrasjonskontoret i alle større havner i Norge – ser ut til å være tilstrekkelig sannsynlig at praksisen med bakgrunn i denne avtale kan ha en direkte, indirekte, faktisk eller potensiell påvirkning på mønsteret for samhandelen mellom EØS-statene. Det faktum at handelen med varer fra andre EØS-stater er et element i den foreliggende sak, er også relevant for vurderingen av dette spørsmål. Dessuten er Holships morselskap etablert i en annen EØS-stat (Danmark). Endelig er Drammen havn

108 Det vises til forente saker 209/78 til 215/78 *Heintz van Landewyck SARL m.fl.* mot *Kommisjonen*, Sml. 1980 s. 3125 (avsnitt 88), *Höfner og Elser*, som omtalt over (avsnitt 21–23), og sak C-475/99 *Firma Ambulanz Glöckner* mot *Landkreis Südwestpfalz*, Sml. 2001 s. I-8089 (avsnitt 67).

109 Det vises til sak C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia* y *Crédito, SL* mot *Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, Sml. 2006 s. I-11125 (avsnitt 34), og den rettspraksis som det vises til der; sak C439/11 P *Ziegler SA* mot *Kommisjonen*, dom 11. juli 2013, publisert elektronisk (avsnitt 92 flg.); *Erste Group Bank m.fl.*, som omtalt over (avsnitt 36), og sak C-219/95 *Ferriere Nord SpA* mot *Kommisjonen*, Sml. 1997 s. I-4411 (avsnitt 19).

Drammen is one of the largest in Norway.[110] In other cases regarding ports their importance for inter-state trade has been emphasised.[111]

120 The Commission adds that even if the Port of Drammen were considered to be too small to be of importance for trade between EEA States, the cumulative effect of the priority of engagement rules applying in all major ports in Norway in accordance with the Framework Agreement would still lead to the conclusion that the practices in question may affect trade between EEA States. Indeed, in order to assess whether several practices impede access to a market, it is also necessary to examine the nature and extent of those practices in their totality, comprising all similar contracts.[112] It is clear from the case law, the Commission adds, that the effect on trade between EEA States of agreements between which a direct link exists and which form an integral part of a whole must be examined together.[113]

121 The Commission contends that the Court may give answers to issues relevant for the solution of the case pending before the national court,[114] such as whether certain practices infringe Articles 53 and 54 EEA.

122 With respect to Article 53 EEA, the Commission claims that the collective agreement appears to be an agreement between

110 Reference is made to ESA's letter of 3 March 2014 rejecting the complaint in Case No 73856, p. 4.

111 Reference is made to *Porto di Genova*, cited above, paragraph 41, and *Silvano Raso*, cited above, paragraph 26.

112 Reference is made to *Stergios Delimitis*, cited above, paragraph 19.

113 Reference is made to Joined Cases T-259/02 to T-264/02 and T271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II5169, paragraph 168, and Case T77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraphs 126, 142 and 143.

114 Reference is made to Case C-280/91 *Finanzamt Kassel-Goethestrasse* v *Viessmann KG* [1993] ECR I971.

en av de største havner i Norge.[110] I andre saker som har omhandlet havner, har man vektlagt havnens betydning for samhandelen mellom statene.[111]

120 Kommisjonen legger til at selv om man hadde vurdert Drammen havn som for liten til å være av betydning for samhandelen mellom EØS-statene, ville den sammenlagte virkningen av fortrinnsrettsreglene i alle større havner i Norge på grunnlag av Rammeavtalen fortsatt føre til den konklusjon at denne praksis kan påvirke samhandelen mellom EØS-statene. For å kunne vurdere om en praksis hindrer adgangen til et marked, er det faktisk også nødvendig å undersøke praksisens karakter og samlede omfang, alle lignende kontrakter inkludert.[112] Kommisjonen tilføyer at det fremgår klart av rettspraksis at virkningen på samhandelen mellom EØS-statene av avtaler som det er en direkte forbindelse mellom, og som utgjør en integrert del av et hele, må undersøkes samlet.[113]

121 Kommisjonen gjør gjeldende at EFTA-domstolen kan gi svar på spørsmål som er relevante for å løse den sak som står for den nasjonale domstol,[114] som hvorvidt visse praksiser er i strid med EØS-avtalen artiklene 53 og 54.

122 Når det gjelder EØS-avtalen artikkel 53, hevder Kommisjonen at tariffavtalen synes å være en avtale mellom foretak som har som mål

110 Det vises til ESAs brev av 3. mars 2014 med avvisning av klage i sak nr. 73856, s. 4.

111 Det vises til *Porto di Genova*, som omtalt over (avsnitt 41), og *Silvano Raso*, som omtalt over (avsnitt 26).

112 Det vises til *Stergios Delimitis*, som omtalt over (avsnitt 19).

113 Det vises til forente saker T-259/02 til T-264/02 og T271/02 *Raiffeisen Zentralbank Österreich m.fl.* mot *Kommisjonen*, Sml. 2006 s. II5169 (avsnitt 168), og sak T77/94 *VGB m.fl.* mot *Kommisjonen*, Sml. 1997 s. II-759 (avsnitt 126, 142 og 143).

114 Det vises til sak C-280/91 *Finanzamt Kassel-Goethestrasse* mot *Viessmann KG,* Sml. 1993 s. I971.

undertakings which has as its object the distortion of competition by fixing prices, sharing markets, and limiting or controlling markets. In order to establish a breach of Article 53 EEA resulting from horizontal agreements between AOs in different Norwegian ports it would need to be examined whether the latter are actual, or at least potential, competitors. Other AOs could not be said to be competitors as it would generate disproportionate additional costs for an AO established in one port to render, through its registered dockworkers, loading or unloading services in another port. The relevant geographic market concerned by the priority of engagement rules is thus local (the individual Norwegian ports covered by the Framework Agreement).[115]

123 As regards Article 54 EEA, the Commission submits that the product/services market consists of the provision of stevedoring services in ports. It leaves open the question whether the Port of Drammen in itself constitutes a substantial part of the territory covered by the EEA.[116] Rather, the priority of engagement rules applying in all major ports of Norway, which are linked through the Framework Agreement, have to be considered as covering cumulatively a substantial part of the common market.

124 The Commission argues that, by its conduct, the AO is trying to force a customer to take its services although it does not want and does not need them, and that this behaviour is abusive.[117] Moreover, given that the majority on the AO's Board are representatives of the employers (the ship operators already based in the Port of Drammen), the AO finds itself in a situation of conflicting interests.

115 Reference is made to *Silvano Raso*, cited above, paragraph 26.
116 Reference is made to *Porto di Genova*, cited above, paragraph 15, and *Silvano Raso*, cited above, paragraph 26.
117 Reference is made to *Porto di Genova*, paragraphs 19 and 20, and to *Höfner and Elser*, cited above.

å vri konkurransen ved å fastsette priser, dele markeder og begrense eller kontrollere markeder. For å kunne fastslå om det foreligger brudd på EØS-avtalen artikkel 53 som følge av horisontale avtaler mellom administrasjonskontorer i ulike norske havner, ville man måtte undersøke om disse siste er reelle, eller i det minste potensielle, konkurrenter. Andre administrasjonskontorer kan ikke anses som konkurrenter da det ville medføre uforholdsmessig store kostnader for et administrasjonskontor etablert i én havn å yte losse- eller lastetjenester i en annen havn gjennom sine registrerte havnearbeidere. Det relevante geografiske marked som fortrinnsrettsreglene gjelder, er altså lokalt (den enkelte norske havn som er omfattet av Rammeavtalen).[115]

123 Når det gjelder EØS-avtalen artikkel 54, gjør Kommisjonen gjeldende at produkt-/tjenestemarkedet består av ytelsen av losse- og lastetjenester i havner. Kommisjonen lar det stå åpent om Drammen havn som sådan utgjør en vesentlig del av det territorium som er omfattet av EØS-avtalen.[116] Fortrinnsrettsreglene som gjelder i alle større havner i Norge, som er knyttet sammen gjennom Rammeavtalen, må anses til sammen å dekke en vesentlig del av det felles marked.

124 Kommisjonen gjør gjeldende at Administrasjonskontoret ved sin atferd prøver å tvinge en kunde til å leie dets tjenester selv om den ikke ønsker det og ikke trenger disse tjenester, og at denne atferd er utilbørlig.[117] Videre, siden flesteparten av medlemmene av Administrasjonskontorets styre er representanter for arbeidsgiversiden (skipsoperatørene som allerede er basert i Drammen havn), befinner Administrasjonskontoret seg i en

115 Det vises til *Silvano Raso*, som omtalt over (avsnitt 26).
116 Det vises til *Porto di Genova*, som omtalt over (avsnitt 15), og *Silvano Raso*, som omtalt over (avsnitt 26).
117 Det vises til *Porto di Genova* (avsnitt 19 og 20) og til *Höfner og Elser*, som omtalt over.

These ship operators are the direct competitors of Holship. In the Commission's view, this may be taken into account when establishing an abuse of a dominant position.[118]

125 The Commission submits that the question that ought to be asked is whether the behaviour of the AO can be objectively justified.[119] The social objective of the Treaty cannot be invoked in favour of rules that aim to improve the working conditions of certain workers to the disadvantage of others. Even if the national court takes a different view, according to the Commission, the boycott carried out by the AO and the priority engagement rule in the Framework Agreement that the boycott seeks to enforce still go beyond what is necessary to protect the rights of employees.

QUESTIONS B1 – B3

126 The Commission argues, with reference to case law, in particular to *Viking Line*,[120] that the boycott, i.e. the collective action in question, falls, in principle, within the scope of Article 31 EEA. If the

118 Reference is made to *Silvano Raso*, cited above, paragraph 28, and Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v *Elliniko Dimosio* [2008] ECR I-4863, paragraphs 51 to 52.

119 Reference is made to Case C-209/10 *Post Danmark A/S* v *Konkurrencerådet*, published electronically, paragraphs 40-41 and the case law cited.

120 Reference is made to *Viking Line*, cited above, paragraphs 33, 35, 60 to 62, and 65, and to *Laval*, cited above; Case 36/74 *B.N.O. Walrave and L.J.N. Koch* v *Association Union Cycliste Internationale and Others* [1974] ECR 1405, paragraph 17; Case 13/76 *Gaetano Donà* v *Mario Mantero* [1976] ECR 1333, paragraph 17; Case C-117/91 *Jean-Marc Bosman* v *Commission* [1991] ECR I4837, paragraph 82; Case C265/95 *Commission* v *France* [1997] ECR I-6959; Joined Cases C-51/96 and C-191/97 *Christelle Deliège* v *Ligue francophone de judo et disciplines associées ASBL* [2000] ECR I2549, paragraph 47; Case C281/98 *Roman Angonese* v *Cassa di Risparmio di Bolzano SpA* [2000] ECR I4139, paragraph 31; Case C309/99 *J. C. J. Wouters and Others* v *Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I1577, paragraph 120; and *Schmidberger*, cited above.

interessekonflikt. Disse skipsoperatører er direkte konkurrenter til Holship. Kommisjonen er av den oppfatning at dette må tas i betraktning ved en vurdering av om det foreligger utilbørlig utnyttelse av en dominerende stilling.[118]

125 Kommisjonen gjør gjeldende at spørsmålet som bør stilles, er om Administrasjonskontorets atferd kan begrunnes objektivt.[119] Traktatens sosiale mål kan ikke påberopes som begrunnelse for regler som tar sikte på å forbedre arbeidsvilkårene for visse arbeidstakere på bekostning av andre. Selv om den nasjonale domstol skulle være av en annen oppfatning, anser Kommisjonen at boikotten iverksatt av Administrasjonskontoret og regelen om fortrinnsrett i Rammeavtalen som søkes håndhevet gjennom boikotten, går lenger enn det som er nødvendig for å beskytte arbeidstakernes rettigheter.

SPØRSMÅL B.1 – B.3

126 Kommisjonen viser til rettspraksis, særlig *Viking Line*,[120] og gjør gjeldende at boikotten, altså det kollektive tiltak saken gjelder, i prinsippet faller inn under virkeområdet til EØS-avtalen artikkel 31.

118 Det vises til *Silvano Raso*, som omtalt over (avsnitt 28), og sak C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE)* mot *Elliniko Dimosio*, Sml. 2008 s. I-4863 (avsnitt 51–52).

119 Det vises til sak C-209/10 *Post Danmark A/S* mot *Konkurrencerådet*, publisert elektronisk (avsnitt 40–41), og den rettspraksis som det vises til der.

120 Det vises til *Viking Line*, som omtalt over (avsnitt 33, 35, 60–62 og 65), *Laval*, som omtalt over, og sak 36/74 *B.N.O. Walrave og L.J.N. Koch* mot *Association Union Cycliste Internationale m.fl.*, Sml. 1974 s. 1405 (avsnitt 17); sak 13/76 *Gaetano Donà* mot *Mario Mantero*, Sml. 1976 s. 1333 (avsnitt 17); sak C-117/91 *Jean-Marc Bosman* mot *Kommisjonen*, Sml. 1991 s. I4837 (avsnitt 82); sak C265/95 *Kommisjonen* mot *Frankrike*, Sml. 1997 s. I-6959; forente saker C-51/96 og C-191/97 *Christelle Deliège* mot *Ligue francophone de judo et disciplines associées ASBL*, Sml. 2000 s. I2549 (avsnitt 47); sak C281/98 *Roman Angonese* mot *Cassa di Risparmio di Bolzano SpA*, Sml. 2000 s. I4139 (avsnitt 31); sak C309/99 *J. C. J. Wouters m.fl.* mot *Algemene Raad van de Nederlandse Orde van Advocaten*, Sml. 2002 s. I1577 (avsnitt 120); og *Schmidberger*, som omtalt over.

reasoning of the ECJ in *Viking Line* is considered not to apply in the present case on the grounds that the collective action is a purely private action, an alternative line of reasoning could still lead to the conclusion that the Framework Agreement restricts the fundamental freedoms. In this regard, the Commission observes that the NTF sought to obtain from the national court a declaration of the lawfulness of the notified boycott, in accordance with the Boycott Act. It contends that if a national court declares the boycott lawful, this *de facto* clears the way for enforcement of the Framework Agreement by boycotting companies such as Holship.[121] A declaration of that kind would go beyond the mere omission by the State to intervene against individuals who restrict fundamental freedoms. Accordingly, a decision by a national court authorising the enforcement of the Framework Agreement by boycott could be regarded as tantamount to a State measure falling within the scope of Article 31 EEA.

127 The Commission contends further that the boycott restricts the freedom of establishment.[122] The priority of engagement rule that the AO intends to enforce through a boycott generates substantial extra costs for companies from other EEA States,[123] all the more so given that they have no influence whatsoever over the wages to be paid to the dockworkers in question. The fact that the economic activity underlying establishment is made more difficult suffices to

121 Reference is made to Case C265/95 *Commission* v *France*, cited above, and *Schmidberger*, cited above.

122 Reference is made to Case C-442/02 *Caixa Bank France* v *Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I8961, paragraph 12; Case C89/09 *Commission* v *France* [2010] ECR I-12941, paragraph 44; *SOA Nazionale Costruttori*, cited above, paragraph 45; Case C518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraphs 63 and 64; Case C-577/11 *DKV Belgium* v *Association belge des consommateurs Test-Achats ASBL*, judgment of 7 March 2013, published electronically, paragraphs 31 to 33; and *Laval*, cited above.

123 Reference is made to *Commission* v *Spain*, cited above, paragraph 37.

Dersom EU-domstolens resonnement i *Viking Line* ikke anses å komme til anvendelse i den foreliggende sak, med henvisning til at det kollektive tiltak er et rent privat tiltak, vil et alternativt resonnement fortsatt kunne føre til den konklusjon at Rammeavtalen legger restriksjoner på de grunnleggende friheter. I denne sammenheng anfører Kommisjonen at NTF søkte å innhente en erklæring fra den nasjonale domstol om at den varslede boikott var lovlig, i samsvar med boikottloven. Kommisjonen anfører at dersom en nasjonal domstol erklærer boikotten for lovlig, vil dette i praksis berede veien for at Rammeavtalen kan håndheves ved å boikotte selskaper som Holship.[121] En erklæring av denne type ville være noe langt mer enn om en stat bare unnlot å gripe inn overfor enkeltpersoner som hindrer utøvelsen av grunnleggende friheter. Følgelig kan en avgjørelse av en nasjonal domstol som tillater at Rammeavtalen håndheves gjennom en boikott, betraktes som det samme som et statlig tiltak som faller inn under virkeområdet til EØS-avtalen artikkel 31.

127 Kommisjonen anfører videre at boikotten begrenser etableringsadgangen.[122] Fortrinnsrettsregelen som Administrasjonskontoret har til hensikt å håndheve gjennom en boikott, påfører selskaper fra andre EØS-stater betydelige merkostnader,[123] særlig siden de ikke har noen som helst innflytelse over lønningene som skal betales til de aktuelle havnearbeidere. Det faktum at den økonomiske virksomhet som etablering forutsetter

121 Det vises til sak C265/95 *Kommisjonen* mot *Frankrike*, som omtalt over, og *Schmidberger*, som omtalt over.

122 Det vises til sak C-442/02 *Caixa Bank France* mot *Ministère de l’Économie, des Finances et de l’Industrie*, Sml. 2004 s. I8961 (avsnitt 12); sak C89/09 *Kommisjonen* mot *Frankrike*, Sml. 2010 s. I-12941 (avsnitt 44); *SOA Nazionale Costruttori*, som omtalt over (avsnitt 45); sak C518/06 *Kommisjonen* mot *Italia*, Sml. 2009 s. I-3491 (avsnitt 63 og 64); sak C-577/11 *DKV Belgium* mot *Association belge des consommateurs Test-Achats ASBL*, dom 7. mars 2013, publisert elektronisk (avsnitt 31–33); og *Laval*, som omtalt over.

123 Det vises til *Kommisjonen* mot *Spania*, som omtalt over (avsnitt 37).

qualify the measure at issue as a restriction.[124] Moreover, companies that use Norwegian ports only occasionally are arguably more likely to have their own employees at their disposal to carry out loading and unloading work than companies that exclusively operate in Norwegian ports, which are likely to have adapted to the omnipresent priority of engagement rules. It appears that the double costs imposed on undertakings such as Holship (which are able to carry out the loading and unloading of goods using their own personnel) are significant.

128 In relation specifically to Question B2, the Commission notes that there is no *de minimis* rule under which minor restrictions on the fundamental freedoms can escape the prohibition. According to the ECJ, a national measure cannot evade the prohibition merely because the hindrance to the fundamental freedom is slight or because it is possible for the operators concerned to exercise these freedoms in other ways.[125]

129 The Commission submits that the need to ensure a public service, invoked in other cases,[126] cannot be invoked in the present case as an overriding reason in the public interest[127], as it can be inferred from the request that the stevedores of the Port of Drammen are not

124 Reference is made to *Caixa Bank France*, cited above, paragraphs 13 to 16, and *Viking Line*, cited above, paragraph 70 et seq.

125 Reference is made to Case C-49/89 *Corsica Ferries France* v *Direction générale des douanes françaises* [1989] ECR 4441, paragraph 8; Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov and ACO Industries Tábor* v *Odvolací finanční ředitelství*, judgment of 19 June 2014, published electronically, paragraph 42; Case 269/83 *Commission* v *France*, cited above, paragraph 10, and Joined Cases 177/82 and 178/82 *Jan van de Haar and Kaveka de Meern BV* [1984] ECR 1797. In addition, reference is made to Joined Cases C-49/98, C-50/98, C-52/98 to C54/98, and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Lda and Others* v *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I7831, paragraphs 36 and 37, and to Case C315/13 *Edgard Jan De Clercq and Others*, judgment of 3 December 2014, published electronically, paragraph 61.

126 Reference is made to *Commission* v *Spain*, cited above, paragraph 51.

127 Reference is made to *SOA Nazionale Costruttori*, cited above, paragraph 59, and *DKV Belgium*, cited above, paragraph 39.

vanskeliggjøres, er nok for å betegne det aktuelle tiltak som en restriksjon.[124] Videre vil det kunne hevdes at det er mer sannsynlig at selskaper som bruker norske havner bare sporadisk, vil ha egne ansatte til rådighet for å utføre losse- og lastearbeid, enn selskaper som utelukkende driver virksomhet i norske havner, som sannsynligvis har tilpasset seg de allmenne fortrinnsrettsregler. De doble kostnader som påføres foretak som Holship (som er i stand til å utføre lossing og lasting av gods ved bruk av eget personell), synes vesentlige.

128 Når det gjelder spørsmål B.2 spesielt, anfører Kommisjonen at det ikke finnes noen *de minimis*-regel som tilsier at mindre restriksjoner på de grunnleggende friheter ikke skal omfattes av forbudet. Ifølge EU-domstolen kan et nasjonalt tiltak ikke unntas fra forbudet bare fordi begrensningen på den grunnleggende rettighet er liten eller fordi det er mulig for de berørte operatører å utøve disse rettigheter på andre måter.[125]

129 Kommisjonen gjør gjeldende at behovet for å ivareta en offentlig tjeneste, som har vært påberopt i andre saker,[126] ikke kan påberopes i den foreliggende sak som et tvingende allment hensyn[127], da det fremgår av anmodningen at losse- og lastearbeiderne i Drammen

124 Det vises til *Caixa Bank France*, som omtalt over (avsnitt 13–16), og *Viking Line*, som omtalt over (avsnitt 70 flg.).

125 Det vises til sak C-49/89 *Corsica Ferries France* mot *Direction générale des douanes françaises*, Sml. 1989 s. 4441 (avsnitt 8); forente saker C-53/13 og C-80/13 *Strojírny Prostějov og ACO Industries Tábor* mot *Odvolací finanční ředitelství*, dom 19. juni 2014, publisert elektronisk (avsnitt 42); sak 269/83 *Kommisjonen* mot *Frankrike*, som omtalt over (avsnitt 10), og forente saker 177/82 og 178/82 *Jan van de Haar og Kaveka de Meern BV*, Sml. 1984 s. 1797. Det vises dessuten til forente saker C-49/98, C-50/98, C-52/98 til C54/98 og C-68/98 til C-71/98 *Finalarte Sociedade de Construção Civil Ld*[a] *m.fl.* mot *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft*, Sml. 2001 s. I7831 (avsnitt 36 og 37), og til sak C315/13 *Edgard Jan De Clercq m.fl.*, dom 3. desember 2014, publisert elektronisk (avsnitt 61).

126 Det vises til *Kommisjonen* mot *Spania*, som omtalt over (avsnitt 51).

127 Det vises til *SOA Nazionale Costruttori*, som omtalt over (avsnitt 59), og *DKV Belgium*, som omtalt over (avsnitt 39).

obliged to offer their services at all times when required. In fact, the AO can reject a request for stevedoring services and seemingly without further explanation.

130 The Commission submits further that the Convention cannot be invoked to justify the use of a priority of engagement rule.[128] Article 3(2) of the Convention, is not intended to establish or facilitate a monopoly arrangement for performing the loading and unloading work for one company alone.[129] The Convention leaves open the question of how Member States ensure that dockworkers benefit from regular employment and decent income. Nowhere does the Convention authorise boycotts to enforce priority of engagement rules or otherwise call upon signatory states to enact or authorise restrictions on the freedom of establishment. Local dockworkers can be guaranteed a stable income throughout the year, whilst still allowing companies to have recourse to their own employees for loading or unloading in ports. Furthermore, there are examples of other EEA States that have signed the Convention which show that the Convention can be implemented without a priority of engagement rule.[130] In any event, an EEA State cannot invoke an international agreement to justify a violation of a fundamental freedom.[131]

131 The Commission argues that whilst the protection of workers can generally be invoked as a legitimate interest in order to justify

128 Reference is made to *Commission* v *Spain*, cited above, paragraph 41.
129 Reference is made to the Direct Request adopted by the ILO Committee of Experts on the Application of Conventions and Recommendations in 1997, cited above, paragraph 2.
130 For a detailed description of the situation in different EEA Member States that have signed the Convention, reference is made to the study commissioned by the Commission and authored by Eric Van Hooydonk, *Port Labour in the EU* (Volume II).
131 Reference is made to Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, paragraphs 130 to 144.

havn ikke har plikt til å tilby sine tjenester når det måtte være behov for dem. Faktisk kan Administrasjonskontoret avslå en anmodning om losse- og lastetjenester, og dét tilsynelatende uten nærmere forklaring.

130 Kommisjonen gjør videre gjeldende at Konvensjonen ikke kan påberopes for å begrunne bruken av en regel om fortrinnsrett.[128] Konvensjonen artikkel 3 nr. 2 er ikke ment å opprette eller legge til rette for en monopolordning for at bare ett selskap skal kunne utføre losse- og lastetjenester.[129] Konvensjonen overlater til medlemsstatene hvordan de vil sikre at havnearbeidere har jevnlig arbeid og anstendig lønn. Ingen bestemmelser i Konvensjonen tillater boikott for å håndheve en regel om fortrinnsrett eller oppfordrer konvensjonsstatene på noen måte til å vedta eller tillate restriksjoner på etableringsadgangen. Lokale havnearbeidere kan sikres stabil inntekt gjennom året, samtidig som selskapene fortsatt tillates å ty til egne ansatte for lossing og lasting i havnene. Det finnes også eksempler på andre EØS-stater som har undertegnet Konvensjonen, som viser at Konvensjonen lar seg gjennomføre uten noen fortrinnsrettsregel.[130] Uansett kan ikke en EØS-stat påberope seg en internasjonal avtale som begrunnelse for en krenkelse av en grunnleggende rettighet.[131]

131 Kommisjonen gjør gjeldende at selv om man vanligvis kan påberope seg beskyttelse av arbeidstakere som et rettmessig hensyn for å

128 Det vises til *Kommisjonen* mot *Spania*, som omtalt over (avsnitt 41).

129 Det vises til den direkte anmodning vedtatt av ILOs ekspertkomité (CEACR) i 1997, som omtalt over (avsnitt 2).

130 For en nærmere beskrivelse av situasjonen i ulike EØS-stater som har undertegnet Konvensjonen, vises det til evalueringen utført av Eric Van Hooydonk på oppdrag fra Kommisjonen, *Port Labour in the EU* (Volume II).

131 Det vises til sak C-475/98 *Kommisjonen* mot *Østerrike*, Sml. 2002 s. I-9797 (avsnitt 130–144).

restrictions on the freedom of establishment,[132] this legitimate interest cannot be invoked in favour of the Framework Agreement in the present case. The protection of workers generally cannot be invoked where one group of workers is protected to the detriment of others. Exceptions to this rule may be acceptable where some workers merit special protection or some employees are granted a certain level of social protection by their employer and other employers should be incentivised to achieve upward convergence. Neither of these exceptions applies in the present case for two principal reasons.

132 First, the Commission argues that the request does not explain why the dockworkers registered with the AO merit special protection compared to other employees that might depend on the same jobs for their livelihoods. It questions whether precarious work conditions for dockworkers subsist under current Norwegian social security and social protection rules. It notes that the priority of engagement rule applies whether or not other employees whose working conditions might deteriorate because of the application of the Framework Agreement have social protection or employment conditions as good as that applying to the stevedores employed by the AO. Furthermore, in determining whether the dockworkers registered with the AO in Drammen merit special protection, account must be taken of the job opportunities that dockworkers can find in other ports of the EEA.

132 Reference is made to *Viking Line*, cited above, paragraph 77. In addition, reference is made to Joined Cases C-369/96 and C-376/96 *Jean Claude Arblade and Others* [1999] ECR I-8453, paragraph 36, Case C-165/98 André *Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189, paragraph 27, and *Finalarte and Others*, cited above, paragraph 33.

begrunne restriksjoner på etableringsadgangen,[132] kan dette hensyn i den foreliggende sak ikke påberopes som begrunnelse for Rammeavtalen. Beskyttelse av arbeidstakere kan normalt ikke påberopes når én gruppe arbeidstakere beskyttes på bekostning av en annen. Unntak fra denne regel kan godtas dersom enkelte arbeidstakere fortjener særlig beskyttelse eller enkelte ansatte er gitt et visst nivå av sosial trygghet av sin arbeidsgiver og andre arbeidsgivere bør motiveres til å tilstrebe de samme betingelser. Det er to hovedgrunner til at ingen av disse unntak kommer til anvendelse i den foreliggende sak.

132 For det første gjør Kommisjonen gjeldende at anmodningen ikke forklarer hvorfor havnearbeiderne som er registrert ved Administrasjonskontoret fortjener særlig beskyttelse sammenlignet med andre ansatte som kan være avhengige av de samme jobber for sitt levebrød. Kommisjonen stiller spørsmål ved om havnearbeidere har usikre arbeidsvilkår med dagens norske trygdeordning og regelverk for sosial trygghet. Kommisjonen anfører at fortrinnsrettsregelen kommer til anvendelse uavhengig av om andre arbeidstakere hvis arbeidsvilkår kan forverres som følge av anvendelsen av Rammeavtalen, har sosial trygghet eller ansettelsesvilkår som er like gode som dem som gjelder for losse- og lastearbeiderne ansatt ved Administrasjonskontoret. I en vurdering av om havnearbeiderne registrert ved Administrasjonskontoret i Drammen fortjener særlig beskyttelse, må det videre tas hensyn til de jobbmuligheter som havnearbeidere kan finne i andre havner i

132 Det vises til *Viking Line*, som omtalt over (avsnitt 77). Dessuten vises det til forente saker C-369/96 og C-376/96 *Jean Claude Arblade m.fl.*, Sml. 1999 s. I-8453 (avsnitt 36), sak C-165/98 *André Mazzoleni og Inter Surveillance Assistance SARL*, Sml. 2001 s. I-2189 (avsnitt 27), og *Finalarte m.fl.*, som omtalt over (avsnitt 33).

The Commission observes that it has successfully challenged comparable priority of engagement rules that foreclosed the labour market for dockworkers in certain Member States such as Spain.[133] Ensuring the mobility of dockworkers with the EEA could provide a better solution for the fluctuating demand for stevedoring in ports of EEA States than "recruit-local" requirements. This solution would also be in conformity with the policy objective pursued by the Commission in this area.[134]

133 Second, the Commission continues, it cannot be argued that the priority of engagement rule is intended to target employers that do not respect the social standards applicable to the dockworkers registered with the AO, thereby forcing these employers to abstain from social dumping or strive for upward coverage. This rule applies irrespective of the existence of a collective agreement providing equal or even higher social protection to stevedores not covered by the Framework Agreement. The reasoning of the ECJ in *Viking Line* can be applied, by analogy, in this respect.[135]

134 In relation to Question B3, the Commission suggests that it should be answered in the light of the *Viking Line* case law. The fact that the priority of engagement rule applies to the benefit of the dockworkers registered with the AO and irrespective of whether another collective agreement already ensures adequate social protection to the benefit of Holship's employees shows that the Framework Agreement does not serve the legitimate purpose of incentivising Holship to improve the working conditions of its employees. Instead, the Framework Agreement merely aims at improving the situation of one group of

133 Reference is made to *Commission* v *Spain*, cited above, paragraph 28.
134 Ibid.
135 Reference is made to *Viking Line*, cited above, paragraph 89.

EØS. Kommisjonen anfører at den tidligere med hell har reist innvendinger mot tilsvarende fortrinnsrettsregler som stengte havnearbeidere ute fra arbeidsmarkedet i visse medlemsstater som Spania.[133] Å sikre mobilitet for havnearbeidere i EØS kan være en bedre løsning på den varierende etterspørsel etter losse- og lastetjenester i havnene i EØS-statene, enn krav om lokal rekruttering. Denne løsning ville også være i samsvar med det samfunnsmål Kommisjonen tilstreber på dette område.[134]

133 For det andre, fortsetter Kommisjonen, kan det ikke hevdes at fortrinnsrettsregelen er ment å ramme arbeidsgivere som ikke overholder de sosiale standarder som gjelder for havnearbeidere registrert ved Administrasjonskontoret, og derved tvinge disse arbeidsgivere til å avstå fra sosial dumping eller til å tilby bedre vilkår. Regelen gjelder uansett om det foreligger en tariffavtale som gir lik eller til og med bedre sosial trygghet for losse- og lastearbeidere som ikke er omfattet av Rammeavtalen. EU-domstolens resonnement i *Viking Line* kan anvendes ved analogi hva dette angår.[135]

134 Når det gjelder spørsmål B.3, anmoder Kommisjonen om at det besvares i tråd med rettspraksis etter *Viking Line*. Det faktum at fortrinnsrettsregelen gjelder til fordel for havnearbeidere registrert ved Administrasjonskontoret, uten hensyn til at en annen tariffavtale allerede sikrer tilstrekkelig sosial trygghet for Holships ansatte, viser at Rammeavtalen ikke tjener det legitime mål å motivere Holship til å forbedre arbeidsvilkårene for sine ansatte. I stedet tar Rammeavtalen bare sikte på å forbedre situasjonen for én

133 Det vises til *Kommisjonen* mot *Spania*, som omtalt over (avsnitt 28).
134 Samme sted.
135 Det vises til *Viking Line*, som omtalt over (avsnitt 89).

workers to the detriment of other workers. Thus, the protection of workers cannot be invoked in favour of the Framework Agreement.

PROPOSED ANSWERS

135 The Commission proposes that the Court should provide the following answers to the questions referred:

(A1) The exemption from the competition rules of the EEA agreement that applies to collective agreements does not cover the use of a boycott against a port user in order to produce acceptance of a priority rule laid down in a collective agreement, when acceptance entails that the port user must give preference of buying unloading and loading services from a separate entity, rather than to use its own employees for the same work.

(A2) The system referred to under A1 should be assessed under Article 53 and Article 54 of the EEA Agreement.

(A3) The existence of an identical or corresponding system in other ports amongst other needs to be taken into account in the assessment of whether there is a noticeable effect on cross-border trade within the EEA.

(B1) It is a restriction on the freedom of establishment pursuant to Article 31 of the EEA Agreement for a trade union to use a boycott in order to produce acceptance of a priority rule laid down in a collective agreement by a company whose parent company is based in another EEA State, when the collective agreement entails that the company must give preference to buying unloading and loading services from a separate entity having the characteristics described in paragraphs 10 to 14 of the reference order rather than use its own employees for this work.

(B2) It is without significance for the assessment of whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/sporadic.

gruppe arbeidstakere på bekostning av andre arbeidstakere. Dermed kan beskyttelse av arbeidstakere ikke påberopes som begrunnelse for Rammeavtalen.

FORSLAG TIL SVAR

135 Kommisjonen anmoder EFTA-domstolen om å besvare de forelagte spørsmål på følgende måte:

A.1 Unntaket fra EØS-avtalens konkurranseregler som får anvendelse på tariffavtaler, omfatter ikke bruken av boikott mot en havnebruker for å oppnå tilslutning til en fortrinnsrettsregel fastsatt i en tariffavtale, dersom tilslutning innebærer at havnebrukeren fortrinnsvis må kjøpe losse- og lastetjenester fra et eget administrasjonskontor fremfor å benytte egne ansatte til det samme arbeid.

A.2 Systemet det vises til i A.1, bør bedømmes etter artikkel 53 og artikkel 54 i EØS-avtalen.

A.3 Det at samme eller tilsvarende system finnes i andre havner, er blant de forhold som må tas hensyn til ved vurderingen av om det foreligger en merkbar påvirkning på samhandelen innen EØS.

B.1 Det utgjør en restriksjon på etableringsretten etter EØS-avtalen artikkel 31 å benytte boikott fra en fagforenings side for å oppnå tilslutning til en fortrinnsrettsregel fastsatt i en tariffavtale fra en bedrift hvis morselskap er hjemmehørende i en annen EØS-stat, når tariffavtalen innebærer at bedriften fortrinnsvis må kjøpe losse- og lastetjenester fra et eget administrasjonskontor med de kjennetegn som fremgår av avsnittene 10 til 14 i anmodningen, fremfor å benytte sine egne ansatte til dette arbeid.

B.2 Det er uten betydning for vurderingen av om det foreligger en restriksjon at bedriftens behov for losse- og lastetjenester skulle vise seg å være svært begrenset og/eller sporadisk.

(B3) It is of importance for the assessment of whether the restriction described in question B1 is lawful or not that the priority rule applies irrespective of whether the company that is to be prevented from using its own employees applies a different collective agreement which provides for equal social protection as the Framework Agreement.

Carl Baudenbacher
Judge-Rapporteur

B.3 Det er av betydning for vurderingen av om restriksjonen beskrevet i spørsmål B.1 er lovlig eller ikke, at fortrinnsrettsregelen gjelder uansett om selskapet som skal forhindres fra å benytte sine egne ansatte, anvender en annen tariffavtale som gir like god sosial trygghet som Rammeavtalen.

Carl Baudenbacher
Saksforberedende dommer

Joined Cases

E-15/15 and E-16/15

Franz-Josef Hagedorn

v

Vienna-Life Lebensversicherung AG Vienna Life Insurance Group

and

Rainer Armbruster

v

Swiss Life (Liechtenstein) AG

(Directive 2002/83/EC – Article 36 – Transfer of life assurance contracts – Admissibility – The term "assurance contract" – Change in policy conditions)

Verbundene Rechtssachen

E-15/15 und E-16/15

Franz-Josef Hagedorn

und

Vienna-Life Lebensversicherung AG Vienna Life Insurance Group

sowie

Rainer Armbruster

und

Swiss Life (Liechtenstein) AG

(Richtline 2002/83/EG – Artikel 36 – Übernahme von Versicherungsverträgen – Zulässigkeit – Begriff des „Versicherungsvertrags“- Zusatzvertrag)

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Summary of the Judgment

1 Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance ("the Directive") was based on Article 47(2) EC and Article 55 EC, according to which directives were to be issued to facilitate the taking-up and pursuit of activities of self-employed persons with a view to the right of establishment and the freedom to provide services. Recital 7 in the preamble of the Directive shows that the approach adopted consists in bringing about only such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems. Recital 44 adds that the harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance.

2 Article 36(1) of Directive 2002/83/EC does not address legal transactions such as those in which an existing unit-linked life assurance policy is transferred via a purchase agreement from one person to another where the insured risk, namely the insured person, under the assurance policy remains the same. A transfer of a unit-linked life assurance policy by a legal transaction does not constitute a change in the policy conditions unless the terms of the assurance policy are also amended, thereby altering the balance of rights and obligations of the parties to the assurance contract. It falls to the referring court to assess the facts of the cases and to determine whether the relevant transfers led to a change in the policy conditions of the unit-linked life assurance policies acquired by the applicants.

3 If a "change in the policy conditions" within the meaning of the Directive has taken place, the referring court needs to consider

Zusammenfassung des Urteils

1 Die Rechtsgrundlage der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen („Richtlinie“) bilden Artikel 47 Abs. 2 und Artikel 55 EG-Vertrag, denen zufolge Richtlinien zur Erleichterung der Aufnahme und Ausübung selbständiger Tätigkeiten unter dem Gesichtspunkt der Niederlassungsfreiheit und des freien Dienstleitungsverkehrs erlassen werden sollten. Laut Erwägungsgrund 7 der Richtlinie besteht der gewählte Ansatz in einer wesentlichen, notwendigen und ausreichenden Harmonisierung, um zu einer gegenseitigen Anerkennung der Zulassungen und der Aufsichtssysteme zu gelangen. Erwägungsgrund 44 zufolge, ist die Harmonisierung des für den Versicherungsvertrag geltenden Rechts keine Vorbedingung für die Verwirklichung des Binnenmarkts im Versicherungssektor.

2 Artikel 36 Absatz 1 der Richtlinie 2002/83/EG ist nicht auf Rechtsgeschäfte wie die Übertragung einer bestehenden fondsgebundenen Lebensversicherung durch Kaufvertrag von einer Person auf eine andere, bei denen das versicherte Risiko – namentlich die im Rahmen der Versicherungspolice versicherte Person – das- bzw. dieselbe bleibt anwendbar. Die rechtsgeschäftliche Übernahme einer fondsgebundenen Lebensversicherung stellt keinen Zusatzvertrag dar, es sei denn, dass auch die Bedingungen der Versicherungspolice und damit die Gewichtung der Rechte und Pflichten der Parteien eines Versicherungsvertrags geändert werden. Es ist Aufgabe des vorlegenden Gerichts, den Sachverhalt zu prüfen und festzustellen, ob die massgeblichen Übernahmen zu einem Zusatzvertrag zu den von den Klägern erworbenen fondsgebundenen Lebensversicherungen führten.

3 Wenn es sich um einen „Zusatzvertrag“ im Sinne der Richtlinie handelt, muss das vorlegende Gericht beurteilen, ob die in

whether the information listed in Annex III(B)(b)(2) was provided to the second-hand policy holder in a clear, accurate and complete manner, in writing, and in an official language of the EEA State of commitment.

4 It is of no significance for the information obligation of the assurance undertaking whether the former policy holder was an undertaking and the new policy holder is a consumer, unless this difference has led to an amendment to the terms of the assurance contract.

5 The information listed in Annex III(A) of the Directive solely relates to "information about the assurance undertaking" and "information about the commitment". Consequently, whether or not the original policy holder disclosed information about himself so that his own risk or investor profile could be assessed is of no relevance for the information obligation of the assurance undertaking under the Directive.

6 Directives must be implemented into the national legal order of the EEA States with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. Furthermore, national courts are bound to interpret national law in conformity with EEA law. Under Article 34 SCA, the Court has jurisdiction to give advisory opinions on the interpretation of the EEA Agreement upon the request of national courts. After the Court has rendered its judgment, it falls to the referring court to interpret national law in light of the factors clarified by the Court. In cases where a conform interpretation of national law is not sufficient to achieve the result sought by the relevant EEA rule, that matter may be brought before the Court under the procedure prescribed by Article 31 SCA.

Anhang III Buchstabe B.b.2 aufgeführten Angaben dem Übernehmer der Secondhand-Police eindeutig, detailliert und vollständig schriftlich in einer Amtssprache des EWR-Staats der Verpflichtung mitgeteilt wurde.

4 Für die Informationspflichten des Versicherungsunternehmens ist es unerheblich, ob es sich beim vorherigen Versicherungsnehmer um ein Unternehmen und beim Übernehmer um einen Verbraucher gehandelt hat, es sei denn, dass dieser Wechsel zu einer Änderung der Bedingungen des Versicherungsvertrags geführt hat.

5 Die in Anhang III Buchstabe A der Richtlinie aufgeführten Angaben beziehen sich ausschliesslich auf „Informationen über das Versicherungsunternehmen" und „Informationen über die Versicherungspolicen". Somit ist es hinsichtlich der Informationspflichten des Versicherungsunternehmens im Rahmen der Richtlinie bedeutungslos, ob der ursprüngliche Versicherungsnehmer zur Beurteilung seines eigenen Risiko- oder Anlegerprofils notwendige Angaben offenlegte oder nicht.

6 Richtlinien sind mit unbestreitbarer Verbindlichkeit und mit der Konkretheit, Bestimmtheit und Klarheit, die erforderlich sind, um den Erfordernissen der Rechtssicherheit zu genügen, in die nationale Rechtsordnung eines EWR-Staats umzusetzen. Überdies sind die nationalen Gerichte verpflichtet, innerstaatliche Vorschriften im Einklang mit dem EWR-Recht auszulegen. Gemäss Artikel 34 ÜGA erstellt der Gerichtshof auf Antrag der nationalen Gerichte Gutachten über die Auslegung des EWR-Abkommens. Nachdem der Gerichtshof sein Gutachten erstellt hat, ist es Aufgabe des vorlegenden Gerichts, das nationale Recht vor dem Hintergrund der vom Gerichtshof erläuterten Faktoren auszulegen. In Fällen, in denen eine konforme Auslegung des nationalen Rechts nicht ausreicht, um das von der einschlägigen EWR-Norm angestrebte Ergebnis zu erreichen, kann im Rahmen des Verfahrens nach Artikel 31 ÜGA der Gerichtshof angerufen werden.

Judgment of the Court

10 May 2016[1]

(Directive 2002/83/EC – Article 36 – Transfer of life assurance contracts – Admissibility – The term 'assurance contract' – Change in policy conditions)

In Joined Cases E-15/15 and E-16/15,

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 Supreme Court of the Principality of Liechtenstein (Fürstlicher Oberster Gerichtshof), in the cases between

Franz-Josef Hagedorn

and

Vienna-Life Lebensversicherung AG Vienna Life Insurance Group

and

Rainer Armbruster

and

Swiss Life (Liechtenstein) AG

1 Language of the request: German.

Urteil des Gerichtshofs

10. Mai 2016[1]

(Richtlinie 2002/83/EG – Artikel 36 – Übernahme von Versicherungsverträgen – Zulässigkeit – Begriff des „Versicherungsvertrags“ – Zusatzvertrag)

In den verbundenen Rechtssachen E-15/15 und E-16/15,

ANTRÄGE des Fürstlichen Obersten Gerichtshofs an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs in den vor ihm anhängigen Rechtssachen

Franz-Josef Hagedorn

und

Vienna-Life Lebensversicherung AG Vienna Life Insurance Group

sowie

Rainer Armbruster

und

Swiss Life (Liechtenstein) AG

1 Sprache des Antrags: Deutsch.

concerning the interpretation of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance,

The Court

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

– Franz-Josef Hagedorn (“the applicant”), represented by Helmut Schwärzler and Matthias Niedermüller, advocates;

– Rainer Armbruster (“the applicant”), represented by Helmut Schwärzler and Matthias Niedermüller, advocates;

– Vienna-Life Lebensversicherung AG Vienna Life Insurance Group (“the defendant” or “Vienna Life”), represented by Moritz Blasy and Simon Ott, advocates;

– Swiss Life (Liechtenstein) AG (“the defendant” or “Swiss Life”), represented by Peter Nägele and Thomas Nägele, advocates;

– the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Monika Zelger-Jarnig, Senior Legal Officer, EEA Coordination Unit, acting as Agents;

betreffend die Auslegung der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen, erlässt

Der Gerichtshof

bestehend aus Carl Baudenbacher, Präsident, Per Christiansen und Páll Hreinsson (Berichterstatter), Richter,

Kanzler: Gunnar Selvik,

unter Berücksichtigung der schriftlichen Erklärungen

– von Franz-Josef Hagedorn (im Folgenden: Kläger), vertreten durch Helmut Schwärzler und Matthias Niedermüller, Rechtsanwälte;

– von Rainer Armbruster (im Folgenden: Kläger), vertreten durch Helmut Schwärzler und Matthias Niedermüller, Rechtsanwälte;

– der Vienna-Life Lebensversicherung AG Vienna Life Insurance Group (im Folgenden: Beklagte oder Vienna-Life), vertreten durch Moritz Blasy und Simon Ott, Rechtsanwälte;

– der Swiss Life (Liechtenstein) AG (im Folgenden: Beklagte oder Swiss Life), vertreten durch Peter Nägele und Thomas Nägele, Rechtsanwälte;

– der Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch, Direktorin, und Monika Zelger-Jarnig, leitende juristische Mitarbeiterin, von der Stabstelle EWR, als Bevollmächtigte;

– the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Director, Maria Moustakali and Clémence Perrin, Senior Officers, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission (“the Commission”), represented by Joan Rius Riu and Karl-Philipp Wojcik, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicants, represented by Alexander Amann, Rechtsanwalt; Vienna Life, represented by Moritz Blasy and Simon Ott, Swiss Life, represented by Peter Nägele; the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch and Monika Zelger-Jarnig; ESA, represented by Maria Moustakali, Clémence Perrin and Marlene Lie Hakkebo; and the Commission, represented by Karl-Philipp Wojcik, at the hearing on 14 January 2016,

gives the following

Judgment

I LEGAL BACKGROUND

EEA LAW

DIRECTIVE 2002/83/EC

1 Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (“the Directive”, “the

– der EFTA-Überwachungsbehörde, vertreten durch Carsten Zatschler, Direktor, Maria Moustakali und Clémence Perrin, leitende Beamtinnen, sowie Marlene Lie Hakkebo, Beamtin (befristet), Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

– der Europäischen Kommission (im Folgenden: Kommission), vertreten durch Joan Rius Riu und Karl-Philipp Wojcik, Mitarbeiter des Juristischen Diensts der Kommission, als Bevollmächtigte,

unter Berücksichtigung des Sitzungsberichts,

nach Anhörung der mündlichen Ausführungen der Kläger, vertreten durch Alexander Amann, Rechtsanwalt; von Vienna-Life, vertreten durch Moritz Blasy und Simon Ott, sowie Swiss Life, vertreten durch Peter Nägele; der Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch und Monika Zelger-Jarnig; der EFTA-Überwachungsbehörde, vertreten durch Maria Moustakali, Clémence Perrin und Marlene Lie Hakkebo, und der Kommission, vertreten durch Karl-Philipp Wojcik, in der Sitzung vom 14. Januar 2016,

folgendes

Urteil

I RECHTLICHER HINTERGRUND

EWR-RECHT

RICHTLINIE 2002/83/EG

1 Die Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen (im

Life Assurance Directive" or "the 2002 Directive") (OJ 2002 L 345, p. 1) was incorporated into the Agreement on the European Economic Area ("the EEA Agreement") at point 11 of Annex IX to the Agreement by EEA Joint Committee Decision No 60/2004 of 26 April 2004 (OJ 2004 L 277, p. 172, and EEA Supplement 2004 No 43, p. 156). The decision entered into force on 27 April 2004.

2 Recital 2 in the preamble to the Directive reads as follows:

In order to facilitate the taking-up and pursuit of the business of life assurance, it is essential to eliminate certain divergences which exist between national supervisory legislation. In order to achieve this objective and at the same time ensure adequate protection for policy holders and beneficiaries in all Member States, the provisions relating to the financial guarantees required of life assurance undertakings should be coordinated.

3 Recital 3 in the preamble to the Directive reads as follows:

It is necessary to complete the internal market in direct life assurance, from the point of view both of the right of establishment and of the freedom to provide services in the Member States, to make it easier for assurance undertakings with head offices in the Community to cover commitments situated within the Community and to make it possible for policy holders to have recourse not only to assurers established in their own country, but also to assurers which have their head office in the Community and are established in other Member States.

4 Recital 5 in the preamble to the Directive reads as follows:

This Directive therefore represents an important step in the merging of national markets into an integrated market and that stage must be supplemented by other Community instruments with a view to enabling

Folgenden: Richtlinie, Lebensversicherungsrichtlinie oder Richtlinie 2002) (ABl. 2002 L 345, S. 1) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 60/2004 vom 26. April 2004 (ABl. 2004 L 277, S. 172, und EWR-Beilage 2004, Nr. 43, S. 156) unter Nummer 11 des Anhangs IX in das Abkommen über den Europäischen Wirtschaftsraum (im Folgenden: EWR-Abkommen) aufgenommen. Der Beschluss trat am 27. April 2004 in Kraft.

2 Erwägungsgrund 2 der Richtlinie lautet:

Zur Erleichterung der Aufnahme und der Ausübung der Tätigkeiten der Lebensversicherung sind gewisse Unterschiede zwischen dem Aufsichtsrecht der verschiedenen Mitgliedstaaten zu beseitigen, wobei ein angemessener Schutz der Versicherten und der Begünstigten in allen Mitgliedstaaten gewahrt bleiben muss. Zu diesem Zweck sind insbesondere die Vorschriften über die an Lebensversicherungsunternehmen gestellten finanziellen Anforderungen zu koordinieren.

3 Erwägungsgrund 3 der Richtlinie lautet:

Der Binnenmarkt im Bereich der Direktversicherung (Lebensversicherung) muss unter dem doppelten Gesichtspunkt der Niederlassungsfreiheit und des freien Dienstleistungsverkehrs in den Mitgliedstaaten vollendet werden, um es den Versicherungsunternehmen mit Sitz in der Gemeinschaft zu erleichtern, innerhalb der Gemeinschaft Verpflichtungen einzugehen und es den Versicherungsnehmern zu ermöglichen, sich nicht nur bei in ihrem Land niedergelassenen Versicherungsunternehmen, sondern auch bei solchen zu versichern, die ihren Geschäftssitz in der Gemeinschaft haben und in anderen Mitgliedstaaten niedergelassen sind.

4 Erwägungsgrund 5 der Richtlinie lautet:

Die vorliegende Richtlinie stellt folglich einen bedeutenden Abschnitt bei der Verschmelzung der einzelstaatlichen Märkte zu einem einheitlichen Binnenmarkt dar; dieser Abschnitt muss durch weitere

all policy holders to have recourse to any assurer with a head office in the Community who carries on business there, under the right of establishment or the freedom to provide services, while guaranteeing them adequate protection.

5 Recital 7 in the preamble to the Directive reads as follows:

The approach adopted consists in bringing about such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State.

6 Recital 44 in the preamble to the Directive reads as follows:

The provisions in force in the Member States regarding contract law applicable to the activities referred to in this Directive differ. The harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance. Therefore, the opportunity afforded to the Member States of imposing the application of their law to assurance contracts covering commitments within their territories is likely to provide adequate safeguards for policy holders. The freedom to choose, as the law applicable to the contract, a law other than that of the State of the commitment may be granted in certain cases, in accordance with rules which take into account specific circumstances.

7 Recital 52 in the preamble to the Directive reads as follows:

In an internal market for assurance the consumer will have a wider and more varied choice of contracts. If he/she is to profit fully from this diversity and from increased competition, he/she must be provided with whatever information is necessary to enable him/her to choose the

Gemeinschaftsabschnitte ergänzt werden und soll es allen Versicherungsnehmern ermöglichen, jeden Versicherer mit Sitz in der Gemeinschaft zu wählen, der in ihr seine Geschäftstätigkeit im Rahmen der Niederlassungsfreiheit oder der Dienstleistungsfreiheit ausübt, wobei ihnen gleichzeitig ein angemessener Schutz zu gewährleisten ist.

5 Erwägungsgrund 7 der Richtlinie lautet:

Der gewählte Ansatz besteht in einer wesentlichen, notwendigen und ausreichenden Harmonisierung, um zu einer gegenseitigen Anerkennung der Zulassungen und der Aufsichtssysteme zu gelangen, die die Erteilung einer einheitlichen, innerhalb der ganzen Gemeinschaft gültigen Zulassung sowie die Anwendung des Grundsatzes der Aufsicht durch den Herkunftsmitgliedstaat erlaubt.

6 Erwägungsgrund 44 der Richtlinie lautet:

Die in den Mitgliedstaaten geltenden Vorschriften des Vertragsrechts für die in dieser Richtlinie genannten Tätigkeiten sind unterschiedlich. Die Harmonisierung des für den Versicherungsvertrag geltenden Rechts ist keine Vorbedingung für die Verwirklichung des Binnenmarkts im Versicherungssektor. Die den Mitgliedstaaten belassene Möglichkeit, die Anwendung ihres eigenen Rechts für Versicherungsverträge vorzuschreiben, bei denen die Versicherungsunternehmen Verpflichtungen in ihrem Hoheitsgebiet eingehen, stellt deshalb eine hinreichende Sicherung für die Versicherungsnehmer dar. Die Freiheit der Wahl eines anderen Vertragsrechts als das des Staates der Verpflichtung kann in bestimmten Fällen nach Regeln gewährt werden, in denen die spezifischen Umstände berücksichtigt werden.

7 Erwägungsgrund 52 der Richtlinie lautet:

Im Rahmen eines Versicherungsbinnenmarkts wird dem Verbraucher eine größere und weiter gefächerte Auswahl von Verträgen zur Verfügung stehen. Um diese Vielfalt und den verstärkten Wettbewerb voll zu nutzen, muss er im Besitz der notwendigen Informationen sein,

contract best suited to his/her needs. This information requirement is all the more important as the duration of commitments can be very long. The minimum provisions must therefore be coordinated in order for the consumer to receive clear and accurate information on the essential characteristics of the products proposed to him/her as well as the particulars of the bodies to which any complaints of policy holders, assured persons or beneficiaries of contracts may be addressed.

8 Article 36 of the Directive, which is headed Information for policy holders, reads as follows:

1. Before the assurance contract is concluded, at least the information listed in Annex III(A) shall be communicated to the policy holder.

2. The policy-holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).

3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex III only if it is necessary for a proper understanding by the policy holder of the essential elements of the commitment.

4. The detailed rules for implementing this Article and Annex III shall be laid down by the Member State of the commitment.

9 Annex III to the Directive, which is headed Information for policy holders, reads as follows:

um den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen. Da die Dauer der Verpflichtungen sehr lang sein kann, ist diese Information für den Verbraucher noch wichtiger. Folglich sind die Mindestvorschriften zu koordinieren, damit er klare und genaue Angaben über die wesentlichen Merkmale der ihm angebotenen Produkte und über die Stellen erhält, an die etwaige Beschwerden der Versicherungsnehmer, Versicherten oder Begünstigten des Vertrages zu richten sind.

8 Artikel 36 der Richtlinie, der die Überschrift „Angaben für den Versicherungsnehmer“ trägt, lautet:

(1) Vor Abschluss des Versicherungsvertrags sind dem Versicherungsnehmer mindestens die in Anhang III Buchstabe A aufgeführten Angaben mitzuteilen.

(2) Der Versicherungsnehmer muss während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B aufgeführten Angaben auf dem Laufenden gehalten werden.

(3) Der Mitgliedstaat der Verpflichtung kann von den Versicherungsunternehmen nur dann die Vorlage von Angaben zusätzlich zu den in Anhang III genannten Auskünften verlangen, wenn diese für das tatsächliche Verständnis der wesentlichen Bestandteile der Versicherungspolice durch den Versicherungsnehmer notwendig sind.

(4) Die Durchführungsvorschriften zu diesem Artikel und zu Anhang III werden von dem Mitgliedstaat der Verpflichtung erlassen.

9 Anhang III der Richtlinie, der die Überschrift „Informationen für den Versicherungsnehmer“ trägt, lautet:

The following information, which is to be communicated to the policy holder before the contract is concluded (A) or during the term of the contract (B), must be provided in a clear and accurate manner, in writing, in an official language of the Member State of the commitment.

However, such information may be in another language if the policy holder so requests and the law of the Member State so permits or the policy holder is free to choose the law applicable.

A. Before concluding the contract

Information about the assurance undertaking

(a)1 The name of the undertaking and its legal form

(a)2 The name of the Member State in which the head office and, where appropriate, the agency or branch concluding the contract is situated

(a)3 The address of the head office and, where appropriate, of the agency or branch concluding the contract

Information about the commitment

(a)4 Definition of each benefit and each option

(a)5 Term of the contract

(a)6 Means of terminating the contract

(a)7 Means of payment of premiums and duration of payments

(a)8 Means of calculation and distribution of bonuses

(a)9 Indication of surrender and paid-up values and the extent to which they are guaranteed

Dem Versicherungsnehmer sind die nachfolgenden Informationen entweder (A) vor Abschluss des Vertrages oder (B) während der Laufzeit des Vertrages mitzuteilen. Die Informationen sind eindeutig und detailliert schriftlich in einer Amtssprache des Mitgliedstaats der Verpflichtung abzufassen.

Diese Informationen können jedoch in einer anderen Sprache abgefasst werden, sofern der Versicherungsnehmer dies wünscht und es nach dem Recht des Mitgliedstaats zulässig ist oder sofern der Versicherungsnehmer das maßgebende Recht frei wählen kann.

A. Vor Abschluss des Vertrages mitzuteilende Informationen

Informationen über das Versicherungsunternehmen

a.1 Firma und Rechtsform der Gesellschaft

a.2 Name des Mitgliedstaats, in dem sich der Sitz und gegebenenfalls die Agentur oder Zweigniederlassung befindet, die die Police ausstellt

a.3 Anschrift des Sitzes und gegebenenfalls der Agentur oder der Zweigniederlassung, die die Police ausstellt

Informationen über die Versicherungspolicen

a.4 Beschreibung jeder Garantie und jeder Option

a.5 Laufzeit der Police

a.6 Einzelheiten der Vertragsbeendigung

a.7 Prämienzahlungsweise und Prämienzahlungsdauer

a.8 Methoden der Gewinnberechnung und Gewinnbeteiligung

a.9 Angabe der Rückkaufwerte und beitragsfreien Leistungen und das Ausmaß, in dem diese Leistungen garantiert sind

(a)10 Information on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate

(a)11 For unit-linked policies, definition of the units to which the benefits are linked

(a)12 Indication of the nature of the underlying assets for unit-linked policies

(a)13 Arrangements for application of the cooling-off period

(a)14 General information on the tax arrangements applicable to the type of policy

(a)15 The arrangements for handling complaints concerning contracts by policy holders, lives assured or beneficiaries under contracts including, where appropriate, the existence of a complaints body, without prejudice to the right to take legal proceedings

(a)16 Law applicable to the contract where the parties do not have a free choice or, where the parties are free to choose the law applicable, the law the assurer proposes to choose

B. During the term of the contract

In addition to the policy conditions, both general and special, the policy-holder must receive the following information throughout the term of the contract.

Information about the assurance undertaking

(b)1 Any change in the name of the undertaking, its legal form or the address of its head office and, where appropriate, of the agency or branch which concluded the contract

a.10 Informationen über die Prämien für jede Leistung, und zwar sowohl Haupt- als auch Nebenleistungen, wenn sich derartige Informationen als sinnvoll erweisen

a.11 für fondsgebundene Policen: Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind

a.12 Angabe der Art der den fondsgebundenen Policen zugrunde liegenden Vermögenswerte

a.13 Modalitäten der Ausübung des Widerrufs und Rücktrittsrechts

a.14 allgemeine Angaben zu der auf die Policenart anwendbaren Steuerregelung

a.15 Bestimmungen zur Bearbeitung von den Vertrag betreffenden Beschwerden der Versicherungsnehmer, der Versicherten oder der Begünstigten des Vertrags, gegebenenfalls einschließlich des Hinweises auf eine Beschwerdestelle; dies gilt unbeschadet der Möglichkeit, den Rechtsweg zu beschreiten

a.16 das für den Vertrag maßgebende Recht für den Fall, dass die Parteien keine Wahlfreiheit haben oder, wenn die Parteien das maßgebende Recht frei wählen können, das von dem Versicherungsunternehmen vorgeschlagene Recht

B. Während der Laufzeit des Vertrages mitzuteilende Informationen

Zusätzlich zu den allgemeinen und besonderen Versicherungsbedingungen muss der Versicherungsnehmer die folgenden Informationen während der Laufzeit des Vertrages erhalten:

Informationen über das Versicherungsunternehmen

b.1 Jede Änderung des Firmennamens der Gesellschaft, ihrer Rechtsform und der Anschrift ihres Sitzes oder gegebenenfalls der Agentur oder Zweigniederlassung, die die Police ausgestellt hat

Information about the commitment

(b)2 All the information listed in points (a)(4) to (a)(12) of A in the event of a change in the policy conditions or amendment of the law applicable to the contract

(b)3 Every year, information on the state of bonuses

NATIONAL LAW

10 Liechtenstein has implemented the Life Assurance Directive by way of the Insurance Supervision Act ("VersAG"), LR 961.01, the Insurance Supervision Regulation ("VersAV"), LR 961.011, the Insurance Contracts Act ("VersVG"), LR 215.229.1, the International Private Law Act ("IPRG"), LR 290, and the International Insurance Contracts Act ("IVersVG"), LR 291.

11 Article 45 of the VersAG reads as follows:

Duties to inform policy holders

Prior to conclusion and during the term of insurance contracts, specific information shall be provided to policy holders for purposes of their information and protection. The content and scope of these duties to provide information are regulated in Annex 4.

12 Annex 4 to the VersAG reads as follows:

Duties to inform policy holders under Articles 45 and 49

Where the policy holder is a natural person, insurance undertakings shall inform him of the essential facts and rights pertaining to the insurance relationship prior to conclusion and during the term of a contract in accordance with the following provisions. In the case of insurance of large risks, it shall be sufficient to indicate the applicable

Informationen über die Versicherungspolicen

b.2 Alle Angaben gemäß a.4 bis a.12 des Teils A im Fall eines Zusatzvertrages oder einer Änderung der für den Vertrag geltenden Rechtsvorschriften

b.3 Alljährlich Informationen über den Stand der Gewinnbeteiligung

NATIONALES RECHT

10 Liechtenstein hat die Lebensversicherungsrichtlinie im Wege des Versicherungsaufsichtsgesetzes (VersAG), LR 961.01, der Versicherungsaufsichtsverordnung (VersAV), LR 961.011, des Versicherungsvertragsgesetzes (VersVG), LR 215.229.1, des Gesetzes über das internationale Privatrecht (IPRG), LR 290, und des Gesetzes über das internationale Versicherungsvertragsrecht (IVersVG), LR 291, in nationales Recht umgesetzt.

11 Artikel 45 VersAG lautet:

Mitteilungspflichten gegenüber Versicherungsnehmern

Vor Abschluss und während der Laufzeit von Versicherungsverträgen sind zur Information und zum Schutz von Versicherungsnehmern diesen gegenüber spezielle Informationen abzugeben. Inhalt und Umfang dieser Mitteilungspflichten sind in Anhang 4 geregelt.

12 Anhang 4 VersAG lautet:

Mitteilungspflichten gegenüber Versicherungsnehmern gemäss Art. 45 und 49

Die Versicherungsunternehmen haben den Versicherungsnehmer, wenn es sich um eine natürliche Person handelt, über die für das Versicherungsverhältnis massgeblichen Tatsachen und Rechte vor Abschluss und während der Laufzeit eines Vertrages gemäss den nachfolgenden Bestimmungen zu unterrichten. Bei der Versicherung von

law and the competent supervisory authority. Information shall be provided in writing.

Section I

1. *Information required for all classes of insurance:*

   (a) *name, address, legal form and registered office of the insurance undertaking and, where appropriate, any branch through which the contract is to be concluded;*

   (b) *the general insurance conditions applicable to the insurance relationship, including the terms concerning scales of premiums, and indication of the law applicable to the contract;*

   (c) *information on the nature, scope and maturity of the insurance undertaking benefits, where no general insurance conditions or where no terms concerning scales of premiums are applied;*

   (d) *information on the term of the insurance relationship;*

   (e) *information on the amount of the premiums, which should be identified individually if the insurance relationship is to include several autonomous insurance contracts, and on the method of payment of premiums, as well as information on any additional fees or costs, with an indication of the total amount to be paid;*

   (f) *information on the period for which the applicant is to be bound by the application;*

   (g) *instructions concerning the right of cancellation or withdrawal;*

Grossrisiken genügt die Angabe des anwendbaren Rechts und der zuständigen Aufsichtsbehörde. Die Informationen haben schriftlich zu erfolgen.

Abschnitt I

1. *Für alle Versicherungssparten notwendige Informationen:*

   a) *Name, Anschrift, Rechtsform und Sitz des Versicherungsunternehmens und der etwaigen Niederlassung, über die der Vertrag abgeschlossen werden soll;*

   b) *die für das Versicherungsverhältnis geltenden allgemeinen Versicherungsbedingungen einschliesslich der Tarifbestimmungen sowie die Angabe des auf den Vertrag anwendbaren Rechts;*

   c) *Angaben über Art, Umfang und Fälligkeit der Leistung des Versicherungsunternehmens, sofern keine allgemeinen Versicherungsbedingungen oder Tarifbestimmungen verwendet werden;*

   d) *Angaben zur Laufzeit des Versicherungsverhältnisses;*

   e) *Angaben über die Prämienhöhe, wobei die Prämien einzeln auszuweisen sind, wenn das Versicherungsverhältnis mehrere selbständige Versicherungsverträge umfassen soll, und über die Prämienzahlungsweise sowie Angaben über etwaige Nebengebühren und Nebenkosten und Angabe des insgesamt zu zahlenden Betrages;*

   f) *Angaben über die Frist, während der der Antragsteller an den Antrag gebunden sein soll;*

   g) *Belehrung über das Recht zum Widerruf oder zum Rücktritt;*

(h) address of the competent supervisory authority which the policy holder may contact in the event of complaints about the insurance undertaking.

2. Additional information required for life assurance or accident insurance with premium refund:

(a) information on the calculation principles and criteria used for profit determination and profit participation;

(b) indication of surrender values;

(c) information on the minimum sum insured for conversion into a fully paid-up insurance policy and on the benefits from a fully paid-up insurance policy;

(d) information on the extent to which the benefits under (b) and (c) are guaranteed;

(e) for unit-linked insurance policies, information on the unit underlying the insurance policy and the nature of the assets contained therein;

(f) general information on the tax rules applicable to this type of insurance policy.

Section II

Information to be provided by the insurance undertaking during the term of an insurance contract

1. changes of name, address, legal form and registered office of the insurance undertaking and any branch through which the contract has been concluded;

2. changes to the information provided in accordance with Section I(1)(c) to (e) and (2)(a) to (e), where such changes stem from amendments of the law;

h) die Anschrift der zuständigen Aufsichtsbehörde, an die sich der Versicherungsnehmer bei Beschwerden über das Versicherungsunternehmen wenden kann.

2. Bei Lebensversicherungen und Unfallversicherungen mit Prämienrückgewähr zusätzlich notwendige Informationen:

a) Angaben über die für die Überschussermittlung und Überschussbeteiligung geltenden Berechnungsgrundsätze und Massstäbe;

b) Angabe der Rückkaufswerte;

c) Angaben über den Mindestversicherungsbetrag für eine Umwandlung in eine prämienfreie Versicherung und über die Leistungen aus prämienfreier Versicherung;

d) Angaben über das Ausmass, in dem die Leistungen nach den Bst. b und c garantiert sind;

e) bei fondsgebundenen Versicherungen Angaben über den der Versicherung zugrunde liegenden Fonds und die Art der darin enthaltenen Vermögenswerte;

f) allgemeine Angaben über die für diese Versicherungsart geltende Steuerregelung.

Abschnitt II

Während der Laufzeit eines Versicherungsvertrages vom Versicherungsunternehmen zu erteilende Informationen:

1. Änderungen von Namen, Anschrift, Rechtsform und Sitz des Versicherungsunternehmens und der etwaigen Niederlassung, über die der Vertrag geschlossen worden ist;

2. Änderungen bei den nach Abschnitt I Nr. 1 Bst. c bis e und Nr. 2 Bst. a bis e erteilten Informationen, sofern sie sich aus Änderungen von Rechtsvorschriften ergeben;

3. *annual notification of the status of profit participation in life assurance and accident insurance policies with premium refund.*

II FACTS AND PROCEDURE

13 The cases before the national court concern the question whether, and, if so, to what extent, a life assurance undertaking has an obligation to provide information to a person that acquires a life assurance policy from an existing policy holder ("second-hand life assurance policy").

14 The defendants, Swiss Life and Vienna Life, are registered in Liechtenstein and have a licence to provide life assurance. In Case E-15/15, a unit-linked life assurance policy was concluded on 30 December 2004 between Vienna Life, as the assurer, and Gold Bank Finance Ltd, as the policy holder. On 28 November 2006, the applicant, Mr Hagedorn, acquired this unit-linked life assurance policy. The policy transfer took place on 19 December 2006. An intermediary, Mass & Partner Kapitalmanagement GmbH, working on behalf of Swiss Select Asset Management AG (SSAM), a Liechtenstein-based asset management firm, brokered the sale of the life assurance policy from the original policy holder to Mr Hagedorn.

15 The purchase price and the total investment of Mr Hagedorn was EUR 500 000, an amount calculated by SSAM. It became due upon the transfer of the original policy.

16 In Case E-16/15, a unit-linked life assurance policy was concluded in 2003 between the defendant Swiss Life, as the assurer, and Werner

3. *jährliche Mitteilung über den Stand der Überschussbeteiligung in der Lebensversicherung und Unfallversicherung mit Prämienrückgewähr.*

II SACHVERHALT UND VERFAHREN

13 Die Rechtssachen vor dem nationalen Gericht beschäftigen sich mit der Frage, ob – und wenn ja, in welchem Ausmass – ein Lebensversicherungsunternehmen verpflichtet ist, einer Person, die eine Lebensversicherungspolice von einem bisherigen Versicherungsnehmer übernimmt („Secondhand-Lebensversicherungspolice"), Informationen zu geben.

14 Die Beklagten, Swiss Life und Vienna-Life, haben ihren Sitz in Liechtenstein und besitzen eine Bewilligung zum Betrieb einer Lebensversicherung. In der Rechtssache E-15/15 schloss die Gold Bank Finance Ltd als Versicherungsnehmerin am 30. Dezember 2004 bei Vienna-Life als Versicherungsunternehmen eine fondsgebundene Lebensversicherung ab. Am 28. November 2006 übernahm der Kläger, Franz-Josef Hagedorn, diese fondsgebundene Lebensversicherung. Die Übernahme der Police erfolgte am 19. Dezember 2006. Die Mass & Partner Kapitalmanagement GmbH, bei der es sich um eine Vermögensverwaltungsgesellschaft mit Sitz in Liechtenstein handelt, die im Auftrag der Swiss Select Asset Management AG (im Folgenden: SSAM) tätig war, vermittelte den Verkauf der Lebensversicherung von der ursprünglichen Versicherungsnehmerin an Herrn Hagedorn.

15 Der Kaufpreis dieser einzigen Investition von Herrn Hagedorn betrug 500 000 EUR, wobei dieser Betrag von der SSAM errechnet wurde. Er war zum Zeitpunkt der Übernahme der Originalpolice fällig.

16 In der Rechtssache E-16/15 schlossen Werner Finzel und Ute Finzel-Heidinger als Versicherungsnehmer 2003 bei Swiss Life als

Finzel and Ute Finzel-Heidinger, as the policy holders. The applicant, Mr Armbruster, acquired this unit-linked life insurance policy from the original policy holders through a purchase agreement dated 17 and 21 May 2007. The policy transfer took place on 9 July 2007. SSAM brokered the sale of the life assurance policy from the original policy holders to Mr Armbruster.

17 The purchase price was EUR 243 000, an amount calculated by SSAM. It became due upon the transfer of the original policy. The purchase price was paid to "the community of heirs of Werner Lorenz Finzel" on 4 June 2007. The total investment of Mr Armbruster amounted to EUR 750 000, of which EUR 250 000 was obtained by credit financing arranged through SSAM, with the Liechtensteinische Landesbank as the lender.

18 A document permitting a change of policy holder was signed by Ute Finzel-Heidinger, Mr Armbruster, a representative of SSAM and an authorised representative of Swiss Life. The document inter alia includes the following passage:

The new policy holder was informed and expressly agreed that by entering into the assurance contract he acquires the same rights and the duties which applied to the existing policy holders at the time he entered into the contract. This also holds for all agreements made with the existing policy holders (e.g. investment strategy, risk disclosure, any ancillary arrangements, supplementary arrangements etc.).

19 Both applicants suffered substantial losses on their investments. The cases before the national court concern the defendants' liability for damages on the basis that they failed to fulfil their obligations to provide sufficient information, as provided for in Article 36 of the

Versicherungsunternehmen eine fondsgebundene Lebensversicherung ab. Der Kläger, Rainer Armbruster, übernahm diese fondsgebundene Lebensversicherung von den ursprünglichen Versicherungsnehmern mittels Kaufvertrag vom 17. bzw. 21. Mai 2007. Die Übernahme der Police erfolgte am 9. Juli 2007. Die SSAM vermittelte den Verkauf der Lebensversicherung von den ursprünglichen Versicherungsnehmern an Herrn Armbruster.

17 Der Kaufpreis, der von SSAM errechnet wurde, betrug 243 000 EUR. Er war zum Zeitpunkt der Übernahme der Originalpolice fällig. Der Kaufpreis wurde am 4. Juni 2007 an die „Erbengemeinschaft Werner Lorenz Finzel“ entrichtet. Die Gesamtanlage von Herrn Armbruster betrug 750 000 EUR. Auf Vermittlung der SSAM wurden 250 000 EUR von dieser Summe über einen Kredit bei der Liechtensteinischen Landesbank finanziert.

18 Eine Urkunde mit dem Titel „Änderung des Versicherungsnehmers“ wurde von Ute Finzel-Heidinger, Rainer Armbruster, einem Vertreter der SSAM und einem vertretungsbefugten Organ von Swiss Life unterzeichnet. Darin findet sich u. a. der folgende Passus:

Der/die neuen Versicherungsnehmer wurden darauf hingewiesen und erklären sich damit ausdrücklich einverstanden, dass sie aufgrund ihres Eintritts in den Versicherungsvertrag die gleichen Rechte und Pflichten übernehmen, welche zum Zeitpunkt des Eintritts den bisherigen Versicherungsnehmern anhafteten. Dies gilt auch für alle mit den bisherigen Versicherungsnehmern getroffenen Vereinbarungen (z. B. Anlagestrategie, Risikoaufklärung, eventuelle Nebenabreden, Zusatzvereinbarungen, etc.).

19 Beide Kläger erlitten im Zusammenhang mit ihren Anlagen erhebliche Verluste. Die vor dem nationalen Gericht anhängigen Rechtssachen betreffen die Haftung der Beklagten für Schadenersatz, da sie ihrer Verpflichtung zur Mitteilung ausreichender Informationen, wie in Artikel 36 der Richtlinie vorgesehen und in

Directive and detailed in Annex III thereto. By an order of 3 July 2015, the national court sought two advisory opinions: first, in the proceedings between Franz-Josef Hagedorn and Vienna Life, and, second, in the proceedings between Rainer Armbruster and Swiss Life. Both requests were received at the Court Registry on 9 July 2015.

20 By a decision of 5 November 2015, the Court, pursuant to Article 39 of the Rules of Procedure ("RoP") and after having received observations from the parties, joined the two cases for the purposes of the oral procedure and final judgment.

21 The following questions were submitted to the Court in Case E-15/15:

1. *Is Article 36(2) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance to be interpreted as meaning that the duties to provide information referred to therein and in Annex III(A)(a)(11) and (a)(12) and (B)(b)(2) for unit-linked life assurance policies must also be fulfilled in relation to a person who, by a legal transaction, acquires a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract ('second-hand policies')?*

   In the event that the Court answers the first question in the affirmative, the following additional questions are asked:

2(a) *Is Article 36(2) of Directive 2002/83/EC concerning life assurance to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, only general information must be provided to the new policy holder or is the assurance company also required to provide the new policy holder with information specifically regarding the assurance product to be acquired by him, in particular regarding any differences between the*

deren Anhang III ausgeführt, nicht nachgekommen sind. Mit seinen Beschlüssen vom 3. Juli 2015 stellte das nationale Gericht Anträge auf Vorabentscheidung im Verfahren zwischen Franz-Josef Hagedorn und Vienna-Life sowie im Verfahren zwischen Rainer Armbruster und Swiss Life. Beide Anträge gingen beim Gerichtshof am 9. Juli 2015 ein.

20 Mittels Beschluss vom 5. November 2015 hat der Gerichtshof die beiden Rechtssachen gemäss Artikel 39 der Verfahrensordnung nach Eingang der schriftlichen Erklärungen der Parteien zur Durchführung des mündlichen Verfahrens und zur Entscheidung verbunden.

21 In der Rechtssache E-15/15 wurden dem Gerichtshof die folgenden Fragen vorgelegt:

1. Ist Art. 36 Abs. 2 der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 05.11.2002 über Lebensversicherungen dahingehend auszulegen, dass die dort und in Anhang III Bst. A.a.11 und a.12 bzw. B.b.2 für fondsgebundene Lebensversicherungen genannten Informationspflichten auch zu Gunsten einer Person bestehen, die eine fondsgebundene Lebensversicherung von einer anderen Person mit Zustimmung des Versicherers rechtsgeschäftlich im Wege der Vertragsübernahme übernimmt („Secondhand-Policen“)?

Für den Fall, dass der Gerichtshof die erste Frage bejaht, werden folgende weitere Fragen gestellt:

2.a) Ist Art. 36 Abs. 2 der Richtlinie 2002/83/EG über Lebensversicherungen dahin auszulegen, dass es sich im Fall der rechtsgeschäftlichen Übernahme einer fondsgebundenen Lebensversicherung bloss um allgemeine Informationen dem neuen Versicherungsnehmer gegenüber handeln muss oder ist die Versicherung diesem gegenüber auch zu Informationen konkret zu dem von ihm zu übernehmenden Versicherungsprodukt,

investor or risk profiles of the existing policy holder and of the transferee?

In the event that Question 2(a) is answered in the negative, the following question is asked:

2(b) *Is specific information to be given to the transferee of the contract regarding the assurance product to be acquired by him where the existing policy holder is an undertaking, while the transferee of the contract is a natural person or a consumer?*

In the event that Question 2(b) is answered in the negative, the following question is asked:

2(c) *Is specific information to be given to the transferee of the contract regarding the assurance product to be acquired by him where the transferor of the policy dispensed with information regarding the assurance product in question, for example because he did not disclose to the assurance company the information necessary in order to assess his own risk or investor profile?*

Furthermore, the following additional question is asked:

3. *Are the provisions concerning the assurer's obligations under Annex III(B)(b)(2) of Directive 2002/83/EC concerning life assurance effectively transposed into national law even if national law provides, in Annex 4(II)(2) of the Versicherungsaufsichtsgesetz (Law on insurance supervision), in the case of unit-linked assurance policies, that during the term of an assurance contract information must be provided on the units underlying the assurance policy and the nature of the assets contained therein only where the changes in the information provided stem from 'amendments of the law' but*

insbesondere zu einem allenfalls abweichenden Anleger- bzw. Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers, verpflichtet?

Für den Fall der Verneinung der Frage 2.a) wird die folgende Frage gestellt:

2.b) *Sind dem Vertragsübernehmer dann konkrete Informationen zu dem von ihm zu übernehmenden Versicherungsprodukt zu geben, wenn der bisherige Versicherungsnehmer ein Unternehmen, der Vertragsübernehmer jedoch eine natürliche Person oder ein Verbraucher ist?*

Für den Fall der Verneinung der Frage 2.b) wird folgende Frage gestellt:

2.c) *Sind dem Vertragsübernehmer dann konkrete Informationen zu dem von ihm zu übernehmenden Versicherungsprodukt zu geben, wenn der Veräusserer der Police auf Informationen zu dem gegenständlichen Versicherungsprodukt seinerseits verzichtete, so z. B. dadurch, dass er die zur Beurteilung seines eigenen Risiko- bzw. Anlegerprofils notwendigen Angaben der Versicherung gegenüber nicht offenlegte?*

Darüber hinaus wird die folgende weitere Frage gestellt:

3. *Sind die Bestimmungen über die Verpflichtungen des Versicherers gem. Anhang III B.b.2 der Richtlinie 2002/83/EG über Lebensversicherungen auch dann wirksam in das innerstaatliche Recht umgesetzt, wenn dieses in Anhang 4 Abschnitt II Z 2. VersAG eine Verpflichtung zur Erteilung von Informationen bei fondsgebundenen Versicherungen während der Laufzeit eines Versicherungsvertrags über den der Versicherung zugrundeliegenden Fonds und die Art der darin enthaltenen Vermögenswerte bloss dann vorsieht, wenn sich die Änderungen bei*

not also 'in the event of a change in the policy conditions' (Annex III(B)(b)(2) to Directive 2002/83/EC)?

22 In Case E-16/15, the first question referred is essentially identical in substance to the first question in Case E-15/15, the only difference being that the referring court writes "has acquired" instead of "acquires". The third question in Case E16/15 is identical to the third question in Case E-15/15. Finally, the second question in Case E-16/15, which is asked in the event that the Court answers the first question in the affirmative, is substantively similar to Question 2(a) in Case E-15/15 and is worded as follows:

2. Is Article 36(2) of Directive 2002/83/EC concerning life assurance to be interpreted as meaning that, in the case of the legal transfer of the contract for a unit-linked life assurance policy, only general information must be provided to the new policy holder or is the assurance company also required to provide the new policy holder with information specifically regarding the assurance product to be acquired by him, in particular regarding any differences between the risk profiles of the existing policy holder and of the transferee?

23 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.

den erteilten Informationen aus „Änderungen von Rechtsvorschriften ergeben“, nicht aber auch „im Fall eines Zusatzvertrages“ (Anhang III B.b.2 der Richtlinie 2002/83/EG)?

22 Die erste vorgelegte Frage in der Rechtssache E-16/15 ist im Wesentlichen mit der ersten Frage in der Rechtssache E-15/15 inhaltsgleich, wobei der einzige Unterschied darin besteht, dass das vorlegende Gericht anstelle der Formulierung „übernimmt“ die Formulierung „übernommen hat“ gewählt hat. Die dritte Frage in der Rechtssache E-16/15 ist identisch mit der dritten Frage in der Rechtssache E-15/15. Die zweite Frage in der Rechtssache E-16/15, die für den Fall gestellt wird, dass der Gerichtshof die erste Frage bejaht, stimmt im Wesentlichen mit Frage 2.a) in der Rechtssache E-15/15 überein und lautet folgendermassen:

2. Ist Art. 36 Abs. 2 der Richtlinie 2002/83/EG über Lebensversicherungen dahin auszulegen, dass es sich bei rechtsgeschäftlicher Vertragsübernahme der fondsgebundenen Lebensversicherung bloss um allgemeine Informationen dem neuen Versicherungsnehmer gegenüber handeln muss oder ist die Versicherung diesem gegenüber auch zu Informationen konkret zu dem von ihm zu übernehmenden Versicherungsprodukt, insbesondere zu einem allenfalls abweichenden Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers, verpflichtet?

23 Für eine ausführliche Darstellung des rechtlichen Hintergrunds, des Sachverhalts, des Verfahrens und der beim Gerichtshof eingereichten schriftlichen Erklärungen wird auf den Sitzungsbericht verwiesen. Auf den Sitzungsbericht wird im Folgenden nur insoweit eingegangen, wie es für die Begründung des Gerichtshofs erforderlich ist.

III ADMISSIBILITY

ARGUMENTS SUBMITTED TO THE COURT

24 Vienna Life argues that the request in Case E15/15 is inadmissible. It submits that even if an assurance undertaking has a duty to provide information to the purchaser of a second-hand policy, which Vienna Life denies, a violation of such duty could never be regarded as causal for damage resulting from the acquisition of the assurance policy. Therefore, Question 1 is purely hypothetical. According to Vienna Life, the same applies to Question 2(c) since no waiver by a primary policy holder of the right to be provided with the information specified in Annex III to the Directive was granted in the case. Finally, Vienna Life argues that Question 3 is also purely hypothetical since the transfer of the beneficial rights arising under a life assurance policy cannot be regarded as a change in the conditions of the life assurance policy at issue.

FINDINGS OF THE COURT

25 At the outset, the Court recalls that, under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("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 an advisory opinion necessary to enable it to give judgment. Indeed, the purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. It is intended to be 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-23/13

III ZULÄSSIGKEIT

DEM GERICHTSHOF VORGELEGTE AUSFÜHRUNGEN

24 Vienna-Life bringt vor, der Antrag in der Rechtssache E-15/15 sei unzulässig. Selbst wenn ein Versicherungsunternehmen verpflichtet ist, dem Käufer einer gebrauchten Police Informationen mitzuteilen, was Vienna-Life bestreitet, könnte die Verletzung dieser Verpflichtung niemals als ursächlich für Schäden betrachtet werden, die aus der Übernahme der Versicherungspolice entstanden sind. Dementsprechend ist Frage 1 rein hypothetischer Natur. Vienna-Life zufolge gilt dies auch für Frage 2.c), da seitens des ursprünglichen Versicherungsnehmers kein Verzicht auf die Informationspflicht nach Anhang III der Richtlinie erklärt wurde. Abschliessend macht Vienna-Life geltend, dass Frage 3 ebenfalls rein hypothetischer Natur ist, da die Übernahme der Ansprüche aus einer Lebensversicherungspolice nicht als Zusatzvertrag der gegenständlichen Lebensversicherungspolice gewertet werden kann.

ENTSCHEIDUNG DES GERICHTSHOFS

25 Einleitend erinnert der Gerichtshof daran, dass nach Artikel 34 des Abkommens zwischen den EFTA-Staaten zur Errichtung einer Überwachungsbehörde und eines Gerichtshofs (im Folgenden: ÜGA) jedes Gericht eines EFTA-Staats Fragen hinsichtlich der Auslegung des EWR-Abkommens an den Gerichtshof richten kann, sofern es eine Vorabentscheidung zum Erlass eines Urteils für erforderlich hält. Tatsächlich besteht der Zweck von Artikel 34 ÜGA in der Schaffung einer Grundlage für die Zusammenarbeit zwischen dem Gerichtshof und den nationalen Gerichten. Er stellt ein Instrument zur Gewährleistung einer einheitlichen Auslegung des EWR-Rechts und zur Unterstützung der Gerichte der EFTA-Staaten in

Hellenic Capital Market Commission [2014] EFTA Ct. Rep. 88, paragraphs 30 to 33).

26 Furthermore, it is settled case law that questions on the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Joined Cases E-3/13 and E-20/13 *Fred. Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraphs 75 and 76 and case law cited). Contrary to Vienna Life's submissions, no such exceptional circumstances are applicable to the questions in the case at hand.

27 It follows that the questions referred by the Supreme Court of the Principality of Liechtenstein are admissible.

IV ANSWERS OF THE COURT

THE FIRST SET OF QUESTIONS

28 By its first question in each of the two cases, the national court seeks in essence to establish whether Article 36 of the Directive entails an

Rechtssachen, in denen die Anwendung von Bestimmungen des EWR-Rechts erforderlich ist, dar (vgl. Rechtssache E-23/13 *Hellenic Capital Market Commission*, EFTA Court Report 2014, S. 88, Randnrn. 30 bis 33).

26 Aus der ständigen Rechtsprechung geht zudem hervor, dass für von einem nationalen Gericht vorgelegte Fragen betreffend die Auslegung des EWR-Rechts im Kontext des Sachverhalts und des rechtlichen Rahmens, welche von diesem Gericht zu definieren sind und deren Genauigkeit nicht vom Gerichtshof zu bestimmen ist, eine Vermutung der Entscheidungserheblichkeit besteht. Die Zurückweisung des Ersuchens eines nationalen Gerichts ist dem Gerichtshof mithin nur möglich, wenn die erbetene Auslegung des EWR-Rechts ganz offensichtlich in keiner Beziehung zum Sachverhalt oder dem Gegenstand des Ausgangsrechtsstreits steht, wenn das Problem hypothetischer Natur ist oder wenn der Gerichtshof nicht über die tatsächlichen und rechtlichen Angaben verfügt, die für eine zweckdienliche Beantwortung der ihm vorgelegten Fragen erforderlich sind (vgl. verbundene Rechtssachen E-3/13 und E-20/13 *Fred. Olsen and Others*, EFTA Court Report 2014, S. 400, Randnrn. 75 und 76, und die zitierte Rechtsprechung). Anders als von Vienna-Life vorgebracht, liegen in der gegenständlichen Rechtssache keine derartigen ausserordentlichen Umstände vor.

27 Folglich sind die vom Fürstlichen Obersten Gerichtshof vorgelegten Fragen zulässig.

IV ANTWORTEN DES GERICHTSHOFS

ZUR JEWEILS ERSTEN FRAGE

28 Mit seiner jeweils ersten Frage in den beiden Rechtssachen ersucht das nationale Gericht im Wesentlichen um Klärung, ob Artikel 36 der

obligation for life assurance undertakings to provide certain information to a person that acquires a unit-linked life assurance policy from an existing policy holder.

OBSERVATIONS SUBMITTED TO THE COURT

29 The applicants submit, with regard to the scope of Article 36 of the Directive, that paragraphs 1 and 2 of that provision refer simply to a "policy holder" without distinguishing between the original policy holder and its legal successor. Accordingly, the term "policy holder" used in Article 36(1) and (2) must also include any natural or legal person who by virtue of a legal transaction acquires an existing policy.

30 Furthermore, it is only reasonable that the assurer provide its prospective contractual partner with the information referred to in Article 36(1), which is listed in Annex III(A) to the Directive. The reason is that Article 36(1) imposes certain obligations on the assurer before the assurance contract is concluded. Since the new policy holder could also be said to conclude an assurance contract, the wording of Article 36(1) applies to the new policy holder as well. The applicants maintain that the spirit and purpose of the Directive, in particular as evidenced in recital 52 in the preamble to the Directive, also support the interpretation advanced here.

31 With regard to the application of Article 36(1) of the Directive to the present case, the applicants observe that the case law of the Court confirms that life assurance contracts are generally of a complex nature, the details of which may be difficult to understand for the average consumer (reference is made to Case E11/12 *Koch and Others*

Richtlinie Lebensversicherungsunternehmen verpflichtet, einer Person, die einen fondsgebundenen Lebensversicherungsvertrag vom bisherigen Versicherungsnehmer übernimmt, bestimmte Informationen zu geben.

DEM GERICHTSHOF VORGELEGTE STELLUNGNAHMEN

29 Die Kläger halten mit Blick auf den Geltungsbereich des Artikels 36 der Richtlinie fest, dass sich die Absätze 1 und 2 dieser Bestimmung nur auf einen „Versicherungsnehmer" beziehen, ohne dabei zwischen dem ursprünglichen Versicherungsnehmer und dessen Rechtsnachfolger zu unterscheiden. Dementsprechend müsse der Begriff „Versicherungsnehmer", wie in Artikel 36 Absatz 1 und 2 verwendet, auch natürliche oder juristische Personen umfassen, die eine vorhandene Police rechtsgeschäftlich erwerben.

30 Zudem sei es nur vernünftig, dass das Versicherungsunternehmen seinem künftigen Vertragspartner die in Artikel 36 Absatz 1 genannten Angaben macht, die in Anhang III Buchstabe A der Richtlinie aufgeführt sind. Der Grund hierfür ist, dass Artikel 36 Absatz 1 dem Versicherungsunternehmen vor Abschluss des Versicherungsvertrags bestimmte Verpflichtungen auferlegt. Da der neue Versicherungsnehmer sozusagen einen Versicherungsvertrag abschliesst, ist der Wortlaut von Artikel 36 Absatz 1 auch auf den neuen Versicherungsnehmer anwendbar. Die Kläger heben hervor, dass der Sinn und Zweck der Richtlinie, wie er insbesondere aus Erwägungsgrund 52 der Richtlinie hervorgeht, diese Auslegung ebenfalls stützt.

31 Im Hinblick auf die Anwendung von Artikel 36 Absatz 1 der Richtlinie auf die gegenständliche Rechtssache führen die Kläger aus, dass die Rechtsprechung des Gerichtshofs bestätigt, dass Lebensversicherungsverträge in der Regel komplex sind und deren Einzelheiten für den Durchschnittsverbraucher schwierig zu

[2013] EFTA Ct. Rep. 272, paragraph 63). In addition, the applicants allege that the legal transfer of the assurance contract requires the approval of the assurer. Thus, another contractual partner cannot be imposed on the assurer contrary to its will.

32 In the event that the Court does not share the applicants' views concerning the application of Article 36(1) of the Directive, they submit that Article 36(2) applies in any case. According to that provision, a policy holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B) to the Directive. That annex provides that if a change in the policy conditions or an amendment of the applicable law takes place, all the information listed in points a(4) to a(12) in Annex III(A) must be provided to the policy holder. The applicants argue that both of these conditions cover the acquisition of an existing assurance policy by a new policy holder through the legal transfer of an assurance contract. In any case, they maintain that there are cases – such as the change of policy holder – where the assurer must realise that its new contractual partner is in need of comprehensive information.

33 Vienna Life argues that it would hamper the secondary market for life assurance policies if assurance undertakings were obliged to provide the purchasers with the information specified in Annex III to the Directive. In addition, such an obligation would necessarily require contact between the assurance undertaking and the future purchaser prior to the acquisition of the policy. In contrast, Vienna Life submits that there can be no duty on an assurance undertaking to provide the purchaser of a second-hand life assurance policy with

verstehen sein können (es wird auf die Rechtssache E11/12 *Koch u. a.*, EFTA Court Report 2013, S. 272, Randnr. 63, verwiesen). Darüber hinaus führen die Kläger an, dass die rechtsgeschäftliche Übernahme der Versicherungspolice die Zustimmung des Versicherungsunternehmens erfordert. Folglich kann dem Versicherungsunternehmen nicht gegen seinen Willen ein anderer Vertragspartner aufgezwungen werden.

32 Sollte der Gerichtshof die Ansicht der Kläger hinsichtlich der Anwendung von Artikel 36 Absatz 1 der Richtlinie nicht teilen, gilt Artikel 36 Absatz 2 nach Meinung der Kläger gleichwohl. Gemäss dieser Bestimmung muss der Versicherungsnehmer während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B der Richtlinie aufgeführten Angaben auf dem Laufenden gehalten werden. Dieser Anhang sieht vor, dass dem Versicherungsnehmer im Fall eines Zusatzvertrages oder einer Änderung der für den Vertrag geltenden Rechtsvorschriften alle Angaben gemäss Anhang III Buchstaben A.a.4 bis a.12 mitzuteilen sind. Die Kläger machen geltend, dass diese beiden Voraussetzungen die rechtsgeschäftliche Übernahme einer bestehenden Versicherungspolice durch einen neuen Versicherungsnehmer abdecken. Jedenfalls gibt es Situationen – wie die der Änderung des Versicherungsnehmers – in denen dem Versicherungsunternehmen klar sein muss, dass sein neuer Vertragspartner umfassende Informationen benötigt.

33 Vienna-Life bemerkt, es würde den Sekundärmarkt für Lebensversicherungen behindern, wenn Versicherungsunternehmen verpflichtet wären, Käufern die Informationen gemäss Anhang III der Richtlinie mitzuteilen. Zudem würde eine solche Verpflichtung zwingend den Kontakt zwischen dem Versicherungsunternehmen und dem künftigen Käufer im Vorfeld der Übernahme der Police voraussetzen. Laut Vienna-Life kann jedoch keine Verpflichtung eines Versicherungsunternehmens bestehen, dem Käufer einer

information on the policy in advance of the purchase since this is a mere two-party transaction to which the assurance undertaking is not a party.

34 Vienna Life submits further that the brokerage of second-hand life assurance policies only results in the transfer of existing rights and does not create a new assurance relationship. In fact, such brokerage should be regarded as an investment advisory service, which means that it falls to the brokers on the secondary market to inform and advise the purchaser in accordance with Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

35 Swiss Life's arguments with regard to the first question in Case E-16/15 are essentially the same as those of Vienna Life. In addition, Swiss Life contends that, having regard to Liechtenstein law in general, a transfer of a contract entails that one party to the contract is replaced by a third party. The new party fully replaces the previous one, such that the latter completely withdraws from the contractual relationship. This means that the complete contractual legal status is transferred to an unrelated third party, the transferee of the contract, without any change of content or legal identity of the present contract. This entails that no new assurance relationship is established. Rather, the claims from an existing unchanged contract are transferred against payment.

36 The Liechtenstein Government submits that the Directive does not address legal transactions such as those in which a unit-linked life assurance policy is transferred via a purchase agreement from one

Secondhand-Lebensversicherungspolice vor der Übernahme Informationen über die Police mitzuteilen, da es sich um eine Transaktion zwischen zwei Parteien handelt und der Versicherer hieran nicht beteiligt ist.

34 Die Vermittlung von Secondhand-Lebensversicherungspolicen, so führt Vienna-Life weiter aus, führt nur zu einer Übernahme der bestehenden Rechte, begründet aber kein neues Versicherungsverhältnis. Tatsächlich sollte eine derartige Vermittlung als Anlageberatung gelten, sodass es Aufgabe der Vermittler am Sekundärmarkt ist, den Käufer gemäss Richtlinie 2004/39/EG des Europäischen Parlaments und des Rates vom 21. April 2004 über Märkte für Finanzinstrumente, zur Änderung der Richtlinien 85/611/EWG und 93/6/EWG des Rates und der Richtlinie 2000/12/EG des Europäischen Parlaments und des Rates und zur Aufhebung der Richtlinie 93/22/EWG des Rates (ABl. 2004 L 145, S. 1) zu informieren und zu beraten.

35 Die Argumente von Swiss Life hinsichtlich der ersten Frage in der Rechtssache E-16/15 sind im Wesentlichen mit jenen von Vienna-Life identisch. Swiss Life trägt jedoch mit Blick auf das liechtensteinische Recht im Allgemeinen zusätzlich vor, dass im Zuge der Übernahme eines Vertrags eine Vertragspartei durch eine dritte Partei ersetzt wird. Die neue Partei tritt uneingeschränkt an die Stelle der früheren Partei, sodass sich diese vollkommen aus dem Vertragsverhältnis zurückzieht. Das bedeutet, der gesamte vertragliche Rechtsstatus geht ohne Änderung des Inhalts oder der Rechtspersönlichkeit des gegenständlichen Vertrags auf eine unbeteiligte dritte Partei – den Vertragsübernehmer – über. Dementsprechend entsteht kein neues Versicherungsverhältnis. Vielmehr werden Ansprüche aus einem bestehenden, unveränderten Vertrag gegen Entgelt übernommen.

36 Der Regierung des Fürstentums Liechtenstein zufolge findet die Richtlinie auf Rechtsgeschäfte wie die Übertragung einer fondsgebundenen Lebensversicherung durch Kaufvertrag von einer

person to another. Moreover, it follows from Article 36(4) of the Directive that it is for the EEA State of commitment to lay down the detailed rules for implementing Article 36 and Annex III.

37 According to the Liechtenstein Government, it follows from Article 32 of the Directive that legal transactions concerning contracts falling within the Directive's scope are subject to the law of the respective EEA State. This view is further supported by recital 44 in the preamble to the Directive and case law of the Court (reference is made to *Koch and Others*, cited above, paragraphs 113 and 114).

38 In the event that the Court adopts a different interpretation, the Liechtenstein Government submits that the transfer of a unit-linked life assurance policy by a legal transaction does not constitute a change in the policy conditions. A change in the policy conditions means an additional or altered contract, in other words a "new" contract, as is the case, for example, where an additional risk is covered. This interpretation of the phrase "policy conditions", as used in Annex III(B)(b)(2), is strengthened by the German-language version of the Annex, which refers to a "Zusatzvertrag", which literally means "accessory contract". In any event, the transfer of a unit-linked assurance policy cannot be interpreted as constituting a "change of policy conditions" since the existing policy is not being changed or supplemented.

Person auf eine andere keine Anwendung. Überdies ist Artikel 36 Absatz 4 der Richtlinie zu entnehmen, dass die Durchführungsvorschriften zur Umsetzung von Artikel 36 und Anhang III vom EWR-Staat der Verpflichtung erlassen werden.

37 Laut der Regierung des Fürstentums Liechtenstein geht aus Artikel 32 der Richtlinie hervor, dass auf Rechtsgeschäfte über Verträge, die vom Geltungsbereich der Richtlinie umfasst sind, das Recht des jeweiligen EWR-Staats anwendbar ist. Diese Ansicht wird durch Erwägungsgrund 44 der Richtlinie und die Rechtsprechung des Gerichtshofs weiter gestützt (es wird auf *Koch u. a.*, oben erwähnt, Randnrn. 113 und 114, verwiesen).

38 Für den Fall, dass der Gerichtshof dies anders beurteilen sollte, merkt die Regierung des Fürstentums Liechtenstein an, dass die rechtsgeschäftliche Übernahme einer fondsgebundenen Lebensversicherung keinen Zusatzvertrag darstellt. Bei einem Zusatzvertrag handelt es sich um einen zusätzlichen oder abgeänderten Vertrag, in anderen Worten um einen „neuen“ Vertrag, wie es beispielsweise der Fall ist, wenn ein zusätzliches Risiko abgedeckt wird. Diese Auslegung des englischen Wortlauts „policy conditions“ laut Anhang III Buchstabe B.b.2 wird durch die deutsche Sprachfassung dieses Anhangs untermauert, in der wörtlich von einem „Zusatzvertrag“ die Rede ist. Die Übernahme einer fondsgebundenen Lebensversicherung kann keinesfalls als „Zusatzvertrag“ gewertet werden, da die bestehende Police nicht geändert oder ergänzt wird.

39 ESA argues that the referring court is mistaken in focusing its first question in each case on Article 36(2) of the Directive, concerning information to be provided "throughout the term of the contract". Rather, ESA contends, the referring court should have focused on Article 36(1) of the Directive, concerning information to be provided "[b]efore the assurance contract is concluded".

40 In order to answer the referring court's first question, ESA submits that the starting point should be the rationale underlying Article 36 of the Directive, which is the protection of policy holders. That entails that Article 36(1) must be examined from the point of view of policy holders (reference is made to recital 52 in the preamble to the Directive, *Koch and Others*, cited above, paragraph 62, and Case E1/05 *ESA* v *Norway* [2005] EFTA Ct. Rep. 234, paragraph 42). In this regard, ESA adds that there is no difference from the point of view of the policy holder between the conclusion of a new contract and the acquisition of an existing one. Thus, the person acquiring the second-hand life assurance policy should be considered a new policy holder for the purposes of the obligation to provide information under the Directive and be entitled to the same information as any other new policy holder. With that in mind, ESA suggests that the Court should answer the questions referred on the basis of Article 36 as a whole and not simply on the basis of Article 36(2).

41 Furthermore, ESA argues that the information to be provided during the term of the contract is only effective and relevant if the policy holder has received the information pursuant to Annex III(A) before

39 Die EFTA-Überwachungsbehörde meint, dass das vorlegende Gericht irrt, wenn es seine erste Frage in den beiden Rechtssachen auf Artikel 36 Absatz 2 der Richtlinie stützt, der Angaben betrifft, über die der Versicherungsnehmer „während der gesamten Vertragsdauer“ auf dem Laufenden gehalten werden muss. Das vorlegende Gericht hätte sich, so die EFTA-Überwachungsbehörde, vielmehr auf Artikel 36 Absatz 1 der Richtlinie beziehen sollen, der sich mit Angaben beschäftigt, die „[v]or Abschluss des Versicherungsvertrags“ mitzuteilen sind.

40 Nach Ansicht der EFTA-Überwachungsbehörde sollte das Artikel 36 der Richtlinie zugrundeliegende Anliegen – der Schutz der Versicherungsnehmer – den Ausgangspunkt für die Beantwortung der ersten Frage des vorlegenden Gerichts bilden. Dementsprechend muss Artikel 36 Absatz 1 aus der Sicht des Versicherungsnehmers betrachtet werden (es wird auf Erwägungsgrund 52 der Richtlinie, *Koch u. a.*, oben erwähnt, Randnr. 62, und die Rechtssache E1/05 *Efta*-Überwachungsbehörde *./. Norwegen*, EFTA Court Report 2005, S. 234, Randnr. 42, verwiesen). Die EFTA-Überwachungsbehörde fügt hinzu, dass aus der Sicht des Versicherungsnehmers kein Unterschied zwischen dem Abschluss eines neuen Vertrags und der Übernahme eines vorhandenen besteht. Die Person, die die Secondhand-Lebensversicherungspolice übernimmt, sollte daher für die Zwecke der Informationspflichten im Sinne der Richtlinie als neuer Versicherungsnehmer gelten und Anspruch auf dieselben Informationen haben wie jeder andere neue Versicherungsnehmer. In Anbetracht dessen schlägt die EFTA-Überwachungsbehörde vor, dass der Gerichtshof die auf der Grundlage von Artikel 36 vorgelegten Fragen gesamtheitlich und nicht nur mit Blick auf Artikel 36 Absatz 2 beantwortet.

41 Darüber hinaus argumentiert die EFTA-Überwachungsbehörde, die während der Laufzeit des Vertrages mitzuteilenden Informationen seien nur sinnvoll und relevant, wenn der Versicherungsnehmer die

the conclusion of the contract. If the policy holder has not first been provided with the information required under Article 36(1) of the Directive, he will not be in a position to fully understand the changes occurring to the life assurance product throughout its term. ESA further argues that the interpretation of the principles of national contract law, in particular those applying to the legal transaction that took place between the original and the second-hand policy holder, must be interpreted in a way which does not affect the effectiveness of the Directive.

42 ESA maintains that the transfer of the life assurance policy is undertaken with the consent of the assurer and that the assurance undertaking is thus made aware of the identity of the new potential policy holder before the transfer of the assurance policy takes place. The assurance undertaking is therefore in a position to communicate the information listed in Annex III(A) before the contract is transferred. In addition, in order to be effective, such information should be updated and reflect the situation as it stands at the time of the actual transfer. To take a different approach would run counter to the rationale and effectiveness of the Directive (reference is made to *ESA* v *Norway*, cited above, paragraph 43).

43 The Commission's arguments, with regard to the first question in each case, are substantively the same as those submitted by ESA. In addition, the Commission argues that, although neither Article 36(1) and (2) of the Directive nor Annex III to the Directive deals expressly with the situation of a transfer of a unit-linked life assurance policy from one person to another with the consent of the assurer, the objective of the Directive should nevertheless lead to an

einschlägigen Informationen gemäss Anhang III Buchstabe A vor Vertragsabschluss erhalten hat. Wurden dem Versicherungsnehmer nicht zuerst die Angaben laut Artikel 36 Absatz 1 der Richtlinie mitgeteilt, wird er nicht in der Lage sein, die Veränderungen am Versicherungsprodukt während dessen Laufzeit vollkommen zu verstehen. Die EFTA-Überwachungsbehörde argumentiert weiter, dass die Auslegung allgemeiner Grundsätze des nationalen Vertragsrechts und insbesondere derjenigen Grundsätze, die auf das Rechtsgeschäft zwischen dem ursprünglichen Versicherungsnehmer und dem Übernehmer der gebrauchten Police Anwendung finden, in einer Weise stattfinden muss, welche die Wirksamkeit der Richtlinie nicht beeinträchtigt.

42 Die EFTA-Überwachungsbehörde führt aus, dass die Übertragung der Lebensversicherungspolice mit Zustimmung des Versicherers erfolgt und das Versicherungsunternehmen deshalb vor der Übernahme der Versicherungspolice über die Identität des neuen potenziellen Versicherungsnehmers in Kenntnis gesetzt wird. Das Versicherungsunternehmen ist daher durchaus in der Lage, die in Anhang III Buchstabe A aufgeführten Angaben vor der Vertragsübernahme mitzuteilen. Damit sie Gültigkeit erhalten, sollten solche Informationen zudem aktualisiert werden und die Lage zum Zeitpunkt der tatsächlichen Übernahme widerspiegeln. Jeder andere Ansatz würde dem Anliegen und der Wirksamkeit der Richtlinie entgegenstehen (es wird auf *Efta*-Überwachungsbehörde ./. *Norwegen*, oben erwähnt, Randnr. 43, verwiesen).

43 Die Argumente der Kommission hinsichtlich der ersten Frage sind in beiden Rechtssachen im Wesentlichen mit jenen der EFTA-Überwachungsbehörde identisch. Zusätzlich bringt die Kommission vor, dass die Zielsetzung der Richtlinie – obwohl weder in Artikel 36 Absatz 1 und 2 noch im Anhang III der Richtlinie ausdrücklich auf die Möglichkeit der Übertragung einer fondsgebundenen Lebensversicherung mit Zustimmung des

interpretation whereby the pre-contractual information requirements and the information requirements during the duration of the contract also apply to such situations.

44 The Commission concedes that, when the second-hand buyer acquires the assurance policy from the original purchaser, an assurance contract already exists. However, this does not preclude the possibility that the acquisition of the insurance policy can be regarded as the conclusion of another assurance contract distinct from the initial one. Moreover, this interpretation is supported by recital 5 in the preamble to the Directive. Furthermore, in the Commission's view, the transfer of an assurance contract requires the consent of the assurance undertaking as this is a contract of mutual obligations.

FINDINGS OF THE COURT

Article 36(1) of the Directive

45 At the outset, the Court notes that the term "unit-linked life assurance policy" refers to an assurance contract where the original policy holder may not necessarily be the person whose life is insured.

46 Indeed, in Case E-15/15, the original holder of the assurance policy was Goldbank Finance Limited. However, the insured person was Corina Weber. On the transfer of the policy from Goldbank Finance Limited to Mr Hagedorn, no changes were made with respect to the insured person under the contract. In Case E-16/15, the original policy holders, Werner Finzel and Ute Finzel-Heidinger, were also the insured persons. By the time Mr Armbruster acquired the assurance

Versicherungsunternehmens von einer Person auf eine andere eingegangen wird – trotzdem zu einer Auslegung führen sollte, in der die vorvertraglichen Informationspflichten sowie die Informationspflichten, die während der Laufzeit des Vertrags bestehen, auch auf solche Umstände anwendbar sind.

44 Die Kommission räumt ein, dass der Versicherungsvertrag zum Zeitpunkt der Übernahme der gebrauchten Versicherungspolice durch den Käufer bereits existiert. Dies schliesst jedoch die Möglichkeit nicht aus, die Übernahme der Versicherungspolice als Abschluss eines weiteren, vom ursprünglichen Vertrag getrennten Versicherungsvertrags zu betrachten. Diese Auslegung wird zudem durch Erwägungsgrund 5 der Richtlinie untermauert. Nach Ansicht der Kommission erfordert die Übernahme des Versicherungsvertrags zudem die Zustimmung des Versicherungsunternehmens, da der Vertrag Verpflichtungen für beide Seiten vorsieht.

ENTSCHEIDUNG DES GERICHTSHOFS

Artikel 36 Absatz 1 der Richtlinie

45 Einleitend hält der Gerichtshof fest, dass sich der Begriff „fondsgebundene Lebensversicherung“ auf einen Versicherungsvertrag bezieht, der nicht zwangsläufig erfordert, dass es sich beim ursprünglichen Versicherungsnehmer um die Person handelt, deren Leben versichert ist.

46 Tatsächlich war der ursprüngliche Versicherungsnehmer in der Rechtssache E15/15 Goldbank Finance Limited, während Corina Weber die versicherte Person war. Im Zuge der Übertragung der Police von Goldbank Finance Limited an Herrn Hagedorn wurde keine Änderung der im Rahmen des Vertrags versicherten Person vorgenommen. In der Rechtssache E-16/15 handelte es sich bei den ursprünglichen Versicherungsnehmern, Werner Finzel und Ute

policy from Mrs Finzel-Heidinger, Mr Finzel had passed away. However, no change in the insured person took place on the transfer of the assurance policy to Mr Armbruster.

47 As regards the question why the applicants decided to purchase second-hand life assurance policies despite having no apparent relation to the insured persons, instead of taking out new assurance policies for themselves, the advocate for the applicants stated at the hearing that the interest of the applicants had been to make an investment. More precisely, the applicants were not seeking the insurance aspect of the contracts but a tax advantage. Furthermore, the advocate indicated that unit-linked life assurance policies should mainly be regarded as financial investments.

48 Upon a question from the bench, the advocate for Vienna Life stated that the reason why the applicants did not take out new assurance policies themselves was that, due to tax reasons, it was more beneficial for them to acquire existing assurance contracts. This submission was not disputed by the other parties at the hearing.

49 The Court notes that the Directive was repealed with effect from 1 November 2012 by Directive 2009/138/EC of the European Parliament and the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (OJ 2009 L 335, p. 1). Directive 2009/138/EC was incorporated into the EEA Agreement at point 1 of Annex IX to the Agreement by EEA Joint Committee Decision No 78/2011 of 1 July 2011. The dispute in the main proceedings, however, is governed by the 2002 Directive.

Finzel-Heidinger, auch um die versicherten Personen. Zu dem Zeitpunkt, zu dem Herr Armbruster die Versicherungspolice von Frau Finzel-Heidinger übernahm, war Herr Finzel verstorben. Trotzdem wurde im Zuge der Übernahme der Versicherungspolice durch Herrn Armbruster die versicherte Person nicht geändert.

47 In Beantwortung der Frage, warum sich die Kläger zum Erwerb von Secondhand-Lebensversicherungspolicen entschlossen, obwohl sie in keiner erkennbaren Beziehung zu den versicherten Personen stehen, anstatt neue Versicherungspolicen in ihrem eigenen Namen abzuschliessen, brachte der Rechtsanwalt der Kläger in der mündlichen Verhandlung vor, die Kläger hätten eine Investition tätigen wollen. Genauer gesagt wären die Kläger nicht am Versicherungsaspekt der Police, sondern an einem Steuervorteil interessiert gewesen. Der Rechtsanwalt wies ferner darauf hin, dass fondsgebundene Lebensversicherungen vorwiegend als Investitionen verstanden werden sollten.

48 In Beantwortung einer Frage des Gerichtshofs erklärte der Rechtsanwalt von Vienna-Life, dass die Kläger keine neuen Versicherungspolicen in ihrem eigenen Namen abschlossen, weil es aus steuerlichen Gründen für sie günstiger war, bestehende Versicherungsverträge zu erwerben. Die anderen bei der Sitzung anwesenden Parteien widersprachen dieser Äusserung nicht.

49 Der Gerichtshof hält fest, dass die Richtlinie mit Wirkung vom 1. November 2012 aufgehoben und durch die Richtlinie 2009/138/EG des Europäischen Parlaments und des Rates vom 25. November 2009 betreffend die Aufnahme und Ausübung der Versicherungs- und der Rückversicherungstätigkeit (ABl. 2009 L 335, S. 1) ersetzt wurde. Die Richtlinie 2009/138/EG wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 78/2011 vom 1. Juli 2011 unter Nummer 1 des Anhangs IX in das EWR-Abkommen aufgenommen. Der Rechtsstreit im Ausgangsverfahren unterliegt jedoch der Richtlinie aus dem Jahr 2002.

50 The Directive was based on Article 47(2) EC and Article 55 EC, according to which directives were to be issued to facilitate the taking-up and pursuit of activities of self-employed persons with a view to the right of establishment and the freedom to provide services. Recital 7 in the preamble to the Directive shows that the approach adopted consists in bringing about only such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems. As further explained below, recital 44 adds that the harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance.

51 According to recitals 3 and 5 in the preamble, the Directive aims at promoting an internal market in life assurance (see, for comparison, the Opinion of Advocate General Kokott in *RVS Levensverzekeringen NV*, C243/11, EU:C:2012:546, point 4). Although this represents the main objective of the Directive, recitals 2 and 5 in its preamble demonstrate that it was also meant to ensure adequate protection for policy holders and beneficiaries in EEA States.

52 As regard the latter goal, it is established case law that the Directive aims at protecting consumers through choice based on information. This approach is reflected in recital 52 in the preamble to the Directive, which states that if consumers are to profit fully from wider and more varied choice of contracts, they must be provided with whatever information is necessary to enable them to choose the contract best suited to their needs (see *Koch and Others*, cited above, paragraph 62 and case law cited).

50 Die Rechtsgrundlage der Richtlinie bilden Artikel 47 Absatz 2 und Artikel 55 EG-Vertrag, denen zufolge Richtlinien zur Erleichterung der Aufnahme und Ausübung selbstständiger Tätigkeiten unter dem Gesichtspunkt der Niederlassungsfreiheit und des freien Dienstleistungsverkehrs erlassen werden sollten. Laut Erwägungsgrund 7 der Richtlinie besteht der gewählte Ansatz in einer wesentlichen, notwendigen und ausreichenden Harmonisierung, um zu einer gegenseitigen Anerkennung der Zulassungen und der Aufsichtssysteme zu gelangen. Wie unten weiter ausgeführt wird, ist Erwägungsgrund 44 zufolge die Harmonisierung des für den Versicherungsvertrag geltenden Rechts keine Vorbedingung für die Verwirklichung des Binnenmarkts im Versicherungssektor.

51 Gemäss den Erwägungsgründen 3 und 5 der Präambel dient die Richtlinie der Förderung eines Binnenmarkts im Lebensversicherungssektor (vgl. entsprechend die Schlussanträge der Generalanwältin Kokott in der Rechtssache *RVS Levensverzekeringen NV*, C243/11, EU:C:2012:546, Nr. 4). Obschon es sich dabei um das Hauptziel der Richtlinie handelt, zeigen die Erwägungsgründe 2 und 5 in der Präambel, dass ausserdem ein angemessener Schutz der Versicherten und der Begünstigten in allen EWR-Staaten gewahrt werden sollte.

52 In Bezug auf das letztgenannte Ziel entspricht es ständiger Rechtsprechung, dass die Richtlinie darauf ausgerichtet ist, den Verbraucher dadurch zu schützen, dass dieser im Besitz der notwendigen Informationen ist, wenn er seine Wahl trifft. Dieser Ansatz spiegelt sich auch in Erwägungsgrund 52 der Richtlinie wider, wo es heisst, dass der Verbraucher, um die grössere und weiter gefächerte Auswahl von Verträgen voll zu nutzen, im Besitz der notwendigen Informationen sein muss, um den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen (vgl. *Koch u. a.*, oben erwähnt, Randnr. 62, und die zitierte Rechtsprechung).

53 However, these considerations are only relevant as far as consumers are in need of protection. As the Court has held in *Koch and Others*, even though life assurance contracts are in general of a complex nature the details of which may be difficult to understand for the average consumer, the Directive does not impose any obligation on the assurance undertaking to provide advice (see *Koch and Others*, cited above, paragraphs 69 and 71).

54 Moreover, the facts of *Koch and Others* must be distinguished from those of the cases at hand, which concern the situation where a policy holder has already concluded an assurance contract and then proceeds to transfer his policy to a new policy holder without any change in the insured risk under the policy. In other words, the insured persons remain the same after the transfer. It is undisputed that assurance undertakings are obliged to provide original policy holders with the information under Article 36(1) in the Directive before the conclusion of unit-linked life assurance contracts. The Court also notes that according to Article 36(2), original policy holders, and those that subsequently purchase such policies, must be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).

55 Therefore, the main issue before the Court is whether Article 36 of the Directive places a duty to inform on assurance undertakings with regard to persons that acquire unit-linked life assurance policies from existing policy holders without any change in the insured risk under the policy.

56 In this regard, the Court recalls that, according to Article 2 thereof, the Directive covers the taking-up and pursuit of activities related to

53 Diese Erwägungen sind jedoch nur insofern relevant, als der Verbraucher schutzbedürftig ist. Der Gerichtshof hat in *Koch u. a.* festgestellt, dass die Richtlinie dem Versicherungsunternehmen keinerlei Verpflichtung zur Beratung auferlegt, obwohl Lebensversicherungsverträge in der Regel komplex sind und deren Einzelheiten für den Durchschnittsverbraucher schwierig zu verstehen sein können (vgl. *Koch u. a.*, oben erwähnt, Randnrn. 69 und 71).

54 Des Weiteren unterscheidet sich der Sachverhalt in Koch u. a. von jenem in den gegenständlichen Rechtssachen, in welchen ein Versicherungsnehmer bereits einen Versicherungsvertrag abgeschlossen hat und in der Folge seine Police ohne Änderung des laut Police versicherten Risikos an einen neuen Versicherungsnehmer überträgt. Die versicherte Person bleibt also nach der Übertragung dieselbe. Es ist unstreitig, dass Versicherungsunternehmen verpflichtet sind, den ursprünglichen Versicherungsnehmern die Informationen gemäss Artikel 36 Absatz 1 der Richtlinie vor dem Abschluss von fondsgebundenen Lebensversicherungsverträgen mitzuteilen. Der Gerichtshof hält darüber hinaus fest, dass nach Artikel 36 Absatz 2 ursprüngliche Versicherungsnehmer und Käufer, die solche Policen zu einem späteren Zeitpunkt erwerben, während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B aufgeführten Angaben auf dem Laufenden gehalten werden müssen.

55 Die dem Gerichtshof vorgelegte zentrale Frage ist daher, ob Artikel 36 der Richtlinie Informationspflichten für Versicherungsunternehmen gegenüber Personen vorsieht, die fondsgebundene Lebensversicherungspolicen von bisherigen Versicherungsnehmern ohne Änderung des laut Police versicherten Risikos übernehmen.

56 In diesem Zusammenhang erinnert der Gerichtshof daran, dass die Richtlinie gemäss Artikel 2 die Aufnahme und Ausübung von

certain kinds of assurance, such as life assurance, where they are on a contractual basis. Thus, the duty to inform stemming from Article 36(1) of the Directive is conditional upon the conclusion of an "assurance contract" within the meaning of the Directive.

57 Although the term "assurance contract" appears on several instances in the Directive, it is not expressly defined therein. Nonetheless, this term requires an autonomous and uniform interpretation throughout the EEA.

58 The applicants, ESA and the Commission maintain that the transfer of a life assurance policy from an original policy holder to another person must be seen as a new assurance contract. In this regard, the Court notes that, despite its regulation of issues concerning the transfer of portfolios of contracts, specified in particular in Articles 14 and 53, the Directive does not mention the transfer of life assurance policies from an original policy holder to another person.

59 Furthermore, recital 44 in the preamble to the Directive expressly recognises that the provisions in force in the EEA States differ with regard to the contract law applicable to the activities referred to in the Directive. The recital adds that the harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance. The recital goes on to conclude that, therefore, the opportunity afforded to the EEA States of imposing the application of their law to assurance contracts covering commitments within their territories is likely to provide adequate safeguards for policy holders.

Tätigkeiten in Bezug auf bestimmte Versicherungen, darunter Lebensversicherungen betrifft, falls sie sich aus einem Vertrag ergeben. Die Informationspflichten nach Artikel 36 Absatz 1 der Richtlinie gelten daher abhängig vom Abschluss eines „Versicherungsvertrags“ im Sinne der Richtlinie.

57 Obwohl der Begriff „Versicherungsvertrag“ in der Richtlinie mehrfach verwendet wird, ist er darin nicht ausdrücklich definiert. Gleichwohl erfordert dieser Begriff eine autonome und einheitliche Auslegung innerhalb des EWR.

58 Die Kläger, die EFTA-Überwachungsbehörde und die Kommission argumentieren, dass die Übertragung einer Lebensversicherungspolice von einem ursprünglichen Versicherungsnehmer an eine andere Person als neuer Versicherungsvertrag zu werten ist. Der Gerichtshof hält diesbezüglich fest, dass die Richtlinie, obgleich sie – insbesondere in den Artikeln 14 und 53 – Aspekte im Zusammenhang mit der Übertragung von Vertragsbestand regelt, die Übertragung von Lebensversicherungspolicen von einem ursprünglichen Versicherungsnehmer an eine andere Person unerwähnt lässt.

59 Ausserdem wird in Erwägungsgrund 44 der Richtlinie ausdrücklich darauf Bezug genommen, dass die in den EWR-Staaten geltenden Vorschriften des Vertragsrechts für die in der Richtlinie genannten Tätigkeiten unterschiedlich sind. Dort heisst es weiter, dass die Harmonisierung des für den Versicherungsvertrag geltenden Rechts keine Vorbedingung für die Verwirklichung des Binnenmarkts im Versicherungssektor darstellt. Die den EWR-Staaten belassene Möglichkeit, die Anwendung ihres eigenen Rechts für Versicherungsverträge vorzuschreiben, bei denen die Versicherungsunternehmen Verpflichtungen in ihrem Hoheitsgebiet eingehen, stellt deshalb eine hinreichende Sicherung für die Versicherungsnehmer dar, so der weitere Wortlaut des Erwägungsgrunds.

60 Thus, the recital demonstrates that the Directive was not intended to harmonise contract laws among the EEA States in this field, but instead left decisions on the content of contract laws up to the States themselves where the Directive does not expressly provide otherwise. This reading finds further support in recital 7 in the preamble to the Directive. In addition, Article 36(4) of the Directive provides that the detailed rules for implementing Article 36 and Annex III shall be laid down by the EEA State of the commitment.

61 Moreover, it is a prerequisite for a legal transaction to be considered an "assurance contract" within the meaning of the Directive that it entails a new and independent assumption of risk in return for payment. In the present case, it appears that the legal transactions at issue have transferred the underlying assurance contracts from one party to another without there being a change of the pre-existing risk assumption. Notably, the insured person, agreed on by the original parties to the contract, remains the same after the transfer. Accordingly, the Court finds that such a legal transaction does not involve any new and independent assumption of risk.

62 Any assessment of the obligation that Article 36(1) of the Directive places on assurance undertakings must be viewed in light of these factors.

63 Bearing all of this in mind, it is clear from the wording of Article 36(1) of the Directive that an assurance undertaking is obliged to provide its customer with the information referred to in that provision before the conclusion of the assurance contract. After the conclusion of that contract, and with the assurance undertaking having already honoured its obligation, Article 36(1) places no further obligation on that undertaking to communicate information. The only remaining duty to inform then resting on an assurance

60 Dieser Erwägungsgrund zeigt also, dass die Richtlinie keine Harmonisierung des Vertragsrechts der EWR-Staaten in diesem Bereich beabsichtigte, sondern Entscheidungen über den Inhalt des Vertragsrechts den Staaten selbst überlassen wollte, soweit die Richtlinie keine ausdrücklichen Bestimmungen enthält. Diese Auslegung wird durch Erwägungsgrund 7 der Richtlinie weiter gestützt. Überdies sieht Artikel 36 Absatz 4 der Richtlinie vor, dass die Durchführungsvorschriften zu Artikel 36 und zu Anhang III von dem EWR-Staat der Verpflichtung erlassen werden.

61 Zudem muss ein Rechtsgeschäft, um als „Versicherungsvertrag" im Sinne der Richtlinie zu gelten, eine neue und unabhängige, entgeltliche Risikoübernahme bedingen. Im vorliegenden Fall scheint durch die gegenständlichen Rechtsgeschäfte eine Übertragung der zugrundeliegenden Versicherungsverträge von einer Partei an eine andere ohne Änderung der bereits bestehenden Risikoübernahme erfolgt zu sein. So blieb die von den ursprünglichen Vertragsparteien vereinbarte versicherte Person bei der Übertragung dieselbe. Der Gerichtshof stellt daher fest, dass ein solches Rechtsgeschäft keine neue und unabhängige Risikoübernahme beinhaltet.

62 Jede Beurteilung der Verpflichtung von Versicherungsunternehmen nach Artikel 36 Absatz 1 der Richtlinie hat vor diesem Hintergrund zu erfolgen.

63 Unter Berücksichtigung all dieser Faktoren geht aus dem Wortlaut von Artikel 36 Absatz 1 der Richtlinie klar hervor, dass ein Versicherungsunternehmen verpflichtet ist, seinem Kunden vor Abschluss des Versicherungsvertrags die in dieser Bestimmung aufgeführten Angaben mitzuteilen. Nach Abschluss dieses Vertrags, und wenn das Versicherungsunternehmen seiner Verpflichtung bereits nachgekommen ist, unterliegt dieses Unternehmen keinen weiteren Informationspflichten nach Artikel 36 Absatz 1. Die

undertaking under the Directive follows from Article 36(2), dealt with below.

64 The Court thus concludes that Article 36(1) of the Directive does not address legal transactions such as those in which an existing unit-linked life assurance policy is transferred via a purchase agreement from one person to another where the insured risk, namely the insured person, under the assurance policy remains the same. Neither such purchase agreements nor the acknowledgement of such agreements by assurance undertakings constitute "assurance contracts" within the meaning of Article 36(1). The transfer of unit-linked life assurance policies is, as a general rule, governed by national law. This result entails that it is a matter for national law to determine whether, and, if so, to what extent, a transfer of an existing assurance policy should trigger an additional obligation on assurance undertakings to provide second-hand policy holders with information such as that referred to in Article 36(1) of the Directive.

65 For the sake of completeness, the Court adds that the regulatory framework at issue has been subject to revision and amendment. It cannot be ruled out that those changes may place certain obligations of information on assurance undertakings with respect to second-hand policy holders. However, the assessment in the present case must be based on the Directive as it stood at the relevant time.

Article 36(2) of the Directive

66 At the outset, the Court notes that Article 36 of the Directive refers to "policy holders" in general and consequently covers original and

einzigen verbleibenden Informationspflichten eines Versicherungsunternehmens gemäss der Richtlinie folgen dann aus Artikel 36 Absatz 2. Diese werden nachstehend erläutert.

64 Der Gerichtshof gelangt somit zu dem Schluss, dass Artikel 36 Absatz 1 der Richtlinie nicht auf Rechtsgeschäfte wie die Übertragung einer bestehenden fondsgebundenen Lebensversicherung durch Kaufvertrag von einer Person auf eine andere, bei denen das versicherte Risiko – namentlich die im Rahmen der Versicherungspolice versicherte Person – das- bzw. dieselbe bleibt, anwendbar ist. Weder solche Kaufverträge noch die Kenntnisnahme von solchen Kaufverträgen durch Versicherungsunternehmen stellen „Versicherungsverträge" im Sinne von Artikel 36 Absatz 1 dar. Die Übertragung fondsgebundener Lebensversicherungspolicen wird generell im nationalen Recht geregelt. Es ist daher Aufgabe des nationalen Rechts festzulegen, ob – und wenn ja, in welchem Ausmass – durch eine Übertragung einer bestehenden Versicherungspolice eine zusätzliche Verpflichtung von Versicherungsunternehmen entsteht, Übernehmer von Secondhand-Policen Angaben wie die in Artikel 36 Absatz 1 der Richtlinie aufgeführten mitzuteilen.

65 Der Vollständigkeit halber ergänzt der Gerichtshof, dass der gegenständliche Regulierungsrahmen überarbeitet und ergänzt wurde. Es kann nicht ausgeschlossen werden, dass im Zuge dessen bestimmte Informationspflichten für Versicherungsunternehmen betreffend Übernehmer von Secondhand-Policen eingeführt wurden. Die Beurteilung im vorliegenden Fall muss jedoch auf der Grundlage des Inhalts der Richtlinie zum massgeblichen Zeitpunkt erfolgen.

Artikel 36 Absatz 2 der Richtlinie

66 Einleitend hält der Gerichtshof fest, dass sich Artikel 36 der Richtlinie allgemein auf „Versicherungsnehmer" bezieht, womit

second-hand policy holders alike. Thus, Article 36(2) of the Directive may apply in the case at hand if the requirements stipulated therein are fulfilled.

67 According to Article 36(2) of the Directive, a policy holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B) to the Directive. Annex III(B) provides that if a change in the policy conditions takes place, all the information listed in points a(4) to a(12) in Annex III(A) must be provided to the policy holder.

68 The applicants argue that the acquisition of an existing assurance policy by a new policy holder through the legal transfer of an assurance contract constitutes a change in the policy conditions that should trigger the application of Article 36(2).

69 These contentions do not find support in the Directive. A "change in the policy conditions" implies that the terms of an assurance policy are being amended, thereby altering the balance of rights and obligations of the parties to an assurance contract. An example of such a change would be if the conditions governing the obligation of payment were amended by making the conditions for paying out the insurance either more or less likely to be triggered. However, a change in the person of the policy holder, taken on its own, while upholding the remainder of the contractual rights and obligations, does not amount to "a change in the policy conditions".

70 The Court therefore holds that the transfer of a unit-linked life assurance policy by a legal transaction does not constitute a change in the policy conditions unless the terms of an assurance policy are also amended, thereby altering the balance of rights and obligations of the parties. It falls to the referring court to assess the facts of the

ursprüngliche Versicherungsnehmer und Übernehmer von Secondhand-Policen gleichermassen gemeint sind. Folglich ist Artikel 36 Absatz 2 der Richtlinie in den vorliegenden Rechtssachen anwendbar, wenn die darin festgelegten Anforderungen erfüllt sind.

67 Gemäss Artikel 36 Absatz 2 der Richtlinie muss der Versicherungsnehmer während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B der Richtlinie aufgeführten Angaben auf dem Laufenden gehalten werden. Anhang III Buchstabe B sieht vor, dass dem Versicherungsnehmer im Fall eines Zusatzvertrages alle Angaben gemäss Anhang III Buchstaben A.a.4 bis a.12 mitzuteilen sind.

68 Die Kläger machen geltend, dass die rechtsgeschäftliche Übernahme einer bestehenden Versicherungspolice durch einen neuen Versicherungsnehmer einen Zusatzvertrag darstellt, der zur Anwendung von Artikel 36 Absatz 2 führen sollte.

69 Diese Vorbringen werden von der Richtlinie nicht gestützt. Ein „Zusatzvertrag" legt nahe, dass eine Änderung der Bedingungen der Versicherungspolice erfolgt, wodurch sich die Gewichtung der Rechte und Pflichten der Parteien verschiebt. Ein Beispiel für eine solche Änderung könnte die Abänderung der Zahlungsverpflichtung sein, sodass die Wahrscheinlichkeit für das Eintreten der Bedingungen für die Auszahlung der Versicherungssumme zu- oder abnimmt. Bei einer Änderung der Person des Versicherungsnehmers für sich allein genommen handelt es sich jedoch nicht um einen „Zusatzvertrag", wenn die sonstigen vertraglich vorgesehenen Rechte und Pflichten unverändert bleiben.

70 Der Gerichtshof hält daher fest, dass die rechtsgeschäftliche Übernahme einer fondsgebundenen Lebensversicherung keinen Zusatzvertrag darstellt, es sei denn, dass auch die Bedingungen der Versicherungspolice und damit die Gewichtung der Rechte und Pflichten der Parteien eines Versicherungsvertrags geändert werden.

cases at hand and to determine whether the relevant transfers led to a change in the policy conditions of the unit-linked life assurance policies acquired by the applicants.

71 For the sake of completeness, the Court notes that Annex III(B) to the Directive applies not only to cases where there is a change in the policy conditions but also where an amendment of the law applicable to the contract takes place. The applicants have argued that this condition covers the acquisition of an existing assurance policy by a new policy holder through the legal transfer of an assurance contract. However, they have not furnished any reasoning as to how such circumstances could, even remotely, be seen to apply to the cases at hand. Furthermore, no indication of any relevant amendment of law can be found in the case file. Consequently, this argument merits no further discussion.

72 In light of the above, the answer to the first question in each of the two cases must be that Article 36(1) of the Directive does not address legal transactions such as those in which an existing unit-linked life assurance policy is transferred via a purchase agreement from one person to another where the insured risk, namely the insured person, under the assurance policy remains the same. Furthermore, a transfer of a unit-linked life assurance policy by a legal transaction does not constitute a change in the policy conditions unless the terms of an assurance policy are also amended, thereby altering the balance of rights and obligations of the parties to an assurance contract. It falls to the referring court to assess the facts and to determine whether the relevant transfers led to a change in the policy conditions of the unit-linked life assurance policies acquired by the applicants.

Es ist Aufgabe des vorlegenden Gerichts, den genauen Sachverhalt in den gegenständlichen Rechtssachen zu prüfen und festzustellen, ob die massgeblichen Übernahmen zu einem Zusatzvertrag zu den von den Klägern erworbenen fondsgebundenen Lebensversicherungen führten.

71 Der Vollständigkeit halber führt der Gerichtshof aus, dass Anhang III Buchstabe B der Richtlinie nicht nur für Zusatzverträge, sondern auch im Fall einer Änderung der für den Vertrag geltenden Rechtsvorschriften anwendbar ist. Die Kläger haben geltend gemacht, dass diese Voraussetzung die rechtsgeschäftliche Übernahme einer bestehenden Versicherungspolice durch einen neuen Versicherungsnehmer abdeckt. Sie haben jedoch nicht erläutert, inwiefern solche Umstände auch nur im Entferntesten auf die gegenständlichen Rechtssachen zutreffen könnten. Überdies finden sich im Akt auch keinerlei Hinweise auf eine relevante Änderung der Rechtsvorschriften. Entsprechend bedarf dieses Vorbringen keiner weiteren Erörterung.

72 Angesichts der vorstehenden Feststellungen muss die Antwort auf die jeweils ersten Fragen lauten, dass Artikel 36 Absatz 1 der Richtlinie nicht auf Rechtsgeschäfte wie die Übertragung einer bestehenden fondsgebundenen Lebensversicherung durch Kaufvertrag von einer Person auf eine andere anwendbar ist, bei denen das versicherte Risiko, namentlich die im Rahmen der Versicherungspolice versicherte Person, das bzw. dieselbe bleibt. Ferner stellt die rechtsgeschäftliche Übernahme einer fondsgebundenen Lebensversicherung keinen Zusatzvertrag dar, es sei denn, dass auch die Bedingungen der Versicherungspolice und damit die Gewichtung der Rechte und Pflichten der Parteien eines Versicherungsvertrags geändert werden. Es ist Aufgabe des vorlegenden Gerichts, den Sachverhalt zu prüfen und festzustellen, ob die massgeblichen Übernahmen zu einem Zusatzvertrag zu den von den Klägern erworbenen fondsgebundenen Lebensversicherungen führten.

THE SECOND SET OF QUESTIONS

73 The second set of questions relates in essence to the content and extent of the information which needs to be provided by the assurance undertaking. In light of the answer given to the first question in each of the two cases, the Court finds it appropriate to address these questions, in case the referring court concludes that the transfer of the assurance contract at issue in the main proceedings led to a "change in the policy conditions" as set out above.

OBSERVATIONS SUBMITTED TO THE COURT

74 The applicants argue that according to Article 36(2) of the Directive a new policy holder needs to be provided with all the information listed in points (a)(4) to (a)(12) in Annex (B)(b)(2) of the Directive. This includes information specifically relating to the assurance product to be acquired and in particular with regard to any differences between the investor or risk profiles of the existing policy holder and of the transferee. The applicant in Case E-15/15 maintains, in relation to Question 2(b), that in the event a unit-linked life assurance policy is acquired by a natural person or a consumer from an undertaking, the assurer has to provide all the information listed in points (a)(4) to (a)(12) in Annex (B)(b)(2) of the Directive to the new policy holder, since an undertaking and a consumer are in significantly different positions as regards their need for protection. With regard to Question 2(c), the same applicant submits that the Directive does not provide for the possibility to dispense with information regarding the insurance product. Hence,

ZUR JEWEILS ZWEITEN FRAGE

73 Die jeweils zweite Frage dreht sich im Wesentlichen um Inhalt und Umfang der Informationen, die vom Versicherungsunternehmen gegeben werden müssen. Mit Blick auf die Antwort auf die jeweils erste Frage in den beiden Rechtssachen hält es der Gerichtshof für erforderlich, diese Fragen zu beantworten, sollte das vorlegende Gericht zu dem Schluss gelangen, dass es sich bei der Übernahme des Versicherungsvertrags, die Gegenstand des Ausgangsverfahrens ist, um einen den vorstehenden Ausführungen entsprechenden „Zusatzvertrag“ handelt.

DEM GERICHTSHOF VORGELEGTE STELLUNGNAHMEN

74 Den Klägern zufolge sind einem neuen Versicherungsnehmer nach Artikel 36 Absatz 2 der Richtlinie mindestens alle Angaben gemäss Buchstaben a.4 bis a.12 laut Anhang III Buchstabe B.b.2 der Richtlinie mitzuteilen. Dies beinhaltet speziell Informationen zu dem von ihm zu übernehmenden Versicherungsprodukt und insbesondere zu einem allenfalls abweichenden Anleger- bzw. Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers. Zur Frage 2.b) bringt der Kläger in der Rechtssache E-15/15 vor, dass im Fall der Übernahme einer fondsgebundenen Lebensversicherung durch eine natürliche Person oder einen Verbraucher von einem Unternehmen das Versicherungsunternehmen dem neuen Versicherungsnehmer alle in Buchstaben a.4 bis a.12 laut Anhang III Buchstabe B.b.2 der Richtlinie aufgeführten Angaben mitteilen muss, da sich ein Unternehmen und ein Verbraucher hinsichtlich ihrer Schutzbedürftigkeit in sehr unterschiedlichen Positionen befinden. Betreffend Frage 2.c geht derselbe Kläger davon aus, dass die Richtlinie keine Möglichkeit vorsieht, auf Informationen zum Versicherungsprodukt zu verzichten. Das

the assurer is not able to rely on a decision by the original policy holder to dispense with information. *In eventu*, the applicant maintains that the transferee's right to be informed about the insurance product shall not be affected by any undertaking given to the assurer by the transferor to dispense with information.

75 Both defendants submit that, according to the Directive, the assurer must provide information and not advice. Vienna Life adds that the information to be provided under the Directive is purely factual information and thus not affected by the risk and/or investor profile of the individual policy holder. With regard to Question 2(b), Vienna Life submits that according to the Directive it is irrelevant for the information obligation of the assurer whether the policy holder is a legal entity or a natural person. The information specified in Annex III of the Directive has been regarded as sufficient by the European legislative bodies to protect consumers. As regards Question 2(c), Vienna Life contends that any consequences for the purchase of the second-hand policy resulting from a waiver of advice by the original policy holder must be determined not by reference to the Directive but in accordance with national law.

76 With regard to Questions 2(a), 2(b) and 2(c) the Liechtenstein Government refers to its proposed answer to the first question, where it contends that the first question should not be answered in the affirmative. *In eventu*, the Government submits that, according to the Directive, an assurance undertaking has to communicate the information listed in Annex III(A) when a contract is concluded or the information listed in Annex III(B) during the term of the contract. The Directive does not stipulate any further information

Versicherungsunternehmen kann sich somit nicht auf eine Entscheidung des ursprünglichen Versicherungsnehmers berufen, auf Informationen zu verzichten. Hilfsweise hält der Kläger fest, dass das Recht des Vertragsübernehmers auf Informationen über das Versicherungsprodukt durch einen etwaigen Informationsverzicht des Veräusserers gegenüber dem Versicherungsunternehmen keinesfalls eingeschränkt werden kann.

75 Die beiden Beklagten argumentieren, dass die Richtlinie für das Versicherungsunternehmen eine Informations-, jedoch keine Beratungspflicht vorsieht. Vienna-Life fügt hinzu, dass es sich bei den gemäss der Richtlinie mitzuteilenden Angaben um rein sachliche Informationen handelt, auf die das Risiko- bzw. Anlegerprofil des einzelnen Versicherungsnehmers keinerlei Einfluss hat. Im Hinblick auf Frage 2.b) betont Vienna-Life, laut Richtlinie sei es für die Informationspflichten des Versicherungsunternehmens nicht relevant, ob es sich beim Versicherungsnehmer um eine juristische oder eine natürliche Person handelt. Die in Anhang III der Richtlinie genannten Informationen werden von den europäischen Rechtsetzungsorganen als für den Verbraucherschutz ausreichend angesehen. Betreffend Frage 2.c) steht Vienna-Life auf dem Standpunkt, dass etwaige Folgen des Erwerbs einer Secondhand-Police infolge eines Beratungsverzichts des ursprünglichen Versicherungsnehmers nicht anhand der Richtlinie, sondern nach nationalem Recht zu ermitteln sind.

76 Zu den Fragen 2.a), 2.b) und 2.c) verweist die Regierung des Fürstentums Liechtenstein auf ihre vorgeschlagene Antwort auf die erste Frage, in der sie zu dem Schluss gelangt, dass die erste Frage nicht bejaht werden sollte. Hilfsweise äussert die Regierung, dass ein Versicherungsunternehmen der Richtlinie zufolge bei Abschluss eines Vertrages die in Anhang III Buchstabe A aufgeführten Angaben bzw. während der Laufzeit des Vertrages die in Anhang III Buchstabe B aufgeführten Angaben mitzuteilen hat. Die Richtlinie

duties. Nor are assurance undertakings obliged to provide advice. With regard to Question 2(b), the Government of Liechtenstein argues that the term "consumer" is not used in the Directive. Thus, the Directive does not impose an obligation to provide specific information to the transferee of the contract when the original policy holder was an undertaking while the transferee is a natural person or a consumer. On Question 2(c), the Government submits that the Directive does not require specific information to be given to the transferee where the transferor dispensed with information regarding the insurance product.

77 ESA argues that the referring court distinguishes between "general information", which it understands as information listed under Annex III(A) of the Directive, and "specific information regarding the insurance product", which is based on the investment and risk profile of the second-hand policy buyer. However, as regards "general information", ESA maintains that the obligation imposed on the assurance undertaking under the Directive should be limited to the provision of the information listed in Annex III(A) of the Directive. It adds, however, that the Directive does not preclude national legislation establishing an obligation to provide specific information concerning the unit-linked life assurance to the second-hand buyer, provided that this does not affect the effectiveness of the Directive and as long as the additional information is necessary, clear and accurate.

78 With regard to the second question in each case, the Commission submits that it follows from its proposed reply to the first question,

sieht keine weiteren Informationspflichten vor, und Versicherungsunternehmen sind auch nicht zur Erbringung von Beratungsleistungen verpflichtet. Betreffend Frage 2.b) macht die Regierung darauf aufmerksam, dass der Begriff „Verbraucher“ in der Richtlinie keine Verwendung findet. Die Richtlinie sieht daher keine Verpflichtung vor, dem Vertragsübernehmer dann konkrete Informationen zu geben, wenn der ursprüngliche Versicherungsnehmer ein Unternehmen, der Vertragsübernehmer jedoch eine natürliche Person oder ein Verbraucher ist. Zur Frage 2.c) trägt die Regierung des Fürstentums Liechtenstein vor, dass die Richtlinie nicht verlangt, dass dem Vertragsübernehmer dann konkrete Informationen zu geben sind, wenn der Veräusserer auf Informationen zu dem Versicherungsprodukt verzichtete.

77 Die EFTA-Überwachungsbehörde führt aus, dass das vorlegende Gericht zwischen „allgemeinen Informationen“, unter denen die Behörde die Angaben in Anhang III Buchstabe A der Richtlinie versteht, und „konkreten Informationen zu dem […] Versicherungsprodukt“, die auf dem Anleger- bzw. Risikoprofil des Käufers der Secondhand-Police basieren, unterscheidet. Im Hinblick auf „allgemeine Informationen“ hält die EFTA-Überwachungsbehörde jedoch fest, dass die dem Versicherungsunternehmen im Rahmen der Richtlinie auferlegte Verpflichtung auf die Mitteilung der in Anhang III Buchstabe A der Richtlinie aufgeführten Angaben beschränkt sein sollte. Sie fügt jedoch hinzu, dass die Richtlinie der Schaffung einer Verpflichtung zur Mitteilung konkreter Informationen über die fondsgebundene Lebensversicherung an den Käufer der gebrauchten Police im nationalen Recht nicht entgegensteht, solange die Wirksamkeit der Richtlinie dadurch nicht berührt wird und die zusätzlichen Informationen notwendig, klar und genau sind.

78 Zur zweiten Frage in den beiden Rechtssachen stellt die Kommission fest, dass aus ihrer vorgeschlagenen Antwort auf die erste Frage –

namely that Article 36 and Annex III of the Directive apply regardless of the issue whether technically there is a new policy or the transfer of an existing policy with the consent of the assurance undertaking, that the prospective policy holder will need to receive all the relevant information set out in Annex III pre-contractually and during the term of the contract. For this reason, the Commission does not consider it warranted to distinguish between general information and product-specific information.

FINDINGS OF THE COURT

79 By Question 2(a) in Case E-15/15 and the second question in Case E-16/15, the referring court seeks, in essence, guidance on the content of information to be given to the second-hand policy holder.

80 The Court recalls that Article 36 of the Directive and Annex III thereto show that the legislature considered the information required pursuant to these provisions sufficient to protect the average consumer (compare *Koch and Others*, cited above, paragraph 70).

81 The information listed in Annex III to the Directive must be provided in writing in a clear and accurate manner and in an official language of the EEA State of commitment (compare *Koch and Others*, cited above, paragraph 85).

82 Further, the information communicated to the policy holder pursuant to Annex III of the Directive must be complete (compare *Koch and Others*, cited above, paragraph 88).

83 Thus, in answer to Question 2(a) in Case E-15/15 and the second question in Case E-16/15, the Court finds that, if a “change in the policy conditions” within the meaning of the Directive has taken

nämlich dass Artikel 36 und Anhang III der Richtlinie unabhängig davon anwendbar sind, ob es sich tatsächlich um eine neue Police oder die Übernahme einer bestehenden Police mit Zustimmung des Versicherungsunternehmens handelt – folgt, dass der künftige Versicherungsnehmer alle relevanten Informationen gemäss Anhang III vor Abschluss und während der Laufzeit des Vertrags erhalten muss. Aus diesem Grund hält es die Kommission für nicht gerechtfertigt, zwischen allgemeinen und konkreten Informationen zum Produkt zu unterscheiden.

ENTSCHEIDUNG DES GERICHTSHOFS

79 Mit Frage 2.a) in der Rechtssache E-15/15 und der zweiten Frage in der Rechtssache E-16/15 ersucht das vorlegende Gericht im Wesentlichen um Klärung des Inhalts der Informationen, die dem Übernehmer der Secondhand-Police mitzuteilen sind.

80 Der Gerichtshof erinnert daran, dass sich aus Artikel 36 der Richtlinie und deren Anhang III ergibt, dass der Gesetzgeber die gemäss diesen Bestimmungen verlangten Informationen zum Schutz des Durchschnittsverbrauchers als ausreichend erachtet (vgl. *Koch u.* a., oben erwähnt, Randnr. 70).

81 Die in Anhang III der Richtlinie angeführten Informationen müssen schriftlich, eindeutig und detailliert und in einer Amtssprache des EWR-Staats der Verpflichtung übermittelt werden (vgl. *Koch u. a.*, oben erwähnt, Randnr. 85).

82 Zudem müssen die dem Versicherungsnehmer gemäss Anhang III der Richtlinie mitgeteilten Informationen vollständig sein (vgl. *Koch u. a.*, oben erwähnt, Randnr. 88).

83 In Beantwortung der Frage 2.a) in der Rechtssache E-15/15 und der zweiten Frage in der Rechtssache E-16/15 stellt der Gerichtshof daher fest, dass das vorlegende Gericht, wenn es sich um einen

place, the referring court needs to consider whether the information listed in Annex III(B)(b)(2) was provided to the second-hand policy holder in a clear, accurate and complete manner, in writing, and in an official language of the EEA State of commitment.

84 This finding is not altered by the fact that the former policy holder may have been an undertaking and the new policy holder a consumer, unless this difference in the person of the policy holder has also led to an amendment of the terms of the assurance contract. In this regard, the fact that an insurance undertaking has consented to a change in policy holder does not in itself amount to an amendment of the terms when this consent does not affect the balance of rights and obligations of the parties to an assurance contract.

85 In answer to Question 2(b) it is thus of no significance for the information obligation of the assurance undertaking whether the former policy holder was an undertaking and the new policy holder is a consumer, unless this difference has led to an amendment to the terms of the assurance contract.

86 By Question 2(c), the referring court asks whether specific information is to be given to the second-hand policy holder if the original policy holder dispensed with information regarding the assurance product in question, for example because he/she did not disclose to the assurance undertaking the information necessary in order to assess his/her own risk or investor profile.

„Zusatzvertrag" im Sinne der Richtlinie handelt, beurteilen muss, ob die in Anhang III Buchstabe B.b.2 aufgeführten Angaben dem Übernehmer der Secondhand-Police eindeutig, detailliert und vollständig schriftlich in einer Amtssprache des EWR-Staats der Verpflichtung mitgeteilt wurden.

84 Der Umstand, dass es sich beim vorherigen Versicherungsnehmer um ein Unternehmen und beim Übernehmer um einen Verbraucher gehandelt haben könnte, ändert nichts an dieser Feststellung, es sei denn, dass dieser Wechsel des Versicherungsnehmers auch zu einer Änderung der Bedingungen des Versicherungsvertrags geführt hat. Allein die Tatsache, dass ein Versicherungsunternehmen einer Änderung des Versicherungsnehmers zugestimmt hat, bedingt an sich noch keine Änderung der Bedingungen, sofern diese Zustimmung sich nicht auf die Gewichtung der Rechte und Pflichten der Parteien eines Versicherungsvertrags auswirkt.

85 Zur Beantwortung der Frage 2.b) ist es für die Informationspflichten des Versicherungsunternehmens daher unerheblich, ob es sich beim vorherigen Versicherungsnehmer um ein Unternehmen und beim Übernehmer um einen Verbraucher gehandelt hat, es sei denn, dass dieser Wechsel zu einer Änderung der Bedingungen des Versicherungsvertrags geführt hat.

86 Mit Frage 2.c) ersucht das vorlegende Gericht um Klärung, ob dem Übernehmer der Secondhand-Police konkrete Informationen zu geben sind, wenn der ursprüngliche Versicherungsnehmer auf Informationen zu dem gegenständlichen Versicherungsprodukt seinerseits verzichtete, so z. B. dadurch, dass er die zur Beurteilung seines eigenen Risiko- bzw. Anlegerprofils notwendigen Angaben der Versicherung gegenüber nicht offenlegte.

87 First, the Court recalls that the Directive does not require the assurance undertaking to provide advice to the policy holder (Koch and Others, cited above, paragraph 78).

88 Second, as outlined above, Article 36 of the Directive and Annex III thereto show that the legislature considered the information required pursuant to these provisions sufficient to protect the average consumer before the contract is concluded. In this regard, it should be added that the Court has also ruled that where any part of the information listed in Annex III(A) has not been provided to the policy holder before the contract is concluded, such a contract is not concluded in accordance with the requirements of the Directive (Koch and Others, cited above, paragraph 89).

89 In answer to Question 2(c), the Court thus finds that the information listed in Annex III(A) of the Directive solely relates to “information about the assurance undertaking” and “information about the commitment”. Consequently, whether or not the original policy holder disclosed information about himself so that his own risk or investor profile could be assessed is of no relevance for the information obligation of the assurance undertaking under the Directive.

THE THIRD SET OF QUESTIONS

90 By its third question in each of the two cases the national court asks, in essence, whether the provisions concerning the assurer’s obligations under Annex III(B)(b)(2) of the Directive are effectively transposed into national law even if national law provides, in the case of unit-linked assurance policies, that during the term of an

87 Zum einen erinnert der Gerichtshof daran, dass die Richtlinie das Versicherungsunternehmen nicht zur Beratung des Versicherungsnehmers verpflichtet (vgl. *Koch u. a.*, oben erwähnt, Randnr. 78).

88 Zum anderen ergibt sich, wie oben ausgeführt, aus Artikel 36 der Richtlinie und deren Anhang III, dass der Gesetzgeber die gemäss diesen Bestimmungen verlangten Informationen zum Schutz des Durchschnittsverbrauchers vor Abschluss des Vertrages als ausreichend erachtet. Ferner hat der Gerichtshof in diesem Zusammenhang auch befunden, dass, wenn ein Teil der in Anhang III Buchstabe A angeführten Informationen dem Versicherungsnehmer nicht vor Abschluss des Vertrags mitgeteilt wurde, dieser Vertrag nicht entsprechend den Anforderungen der Richtlinie abgeschlossen ist (vgl. *Koch u. a.* oben erwähnt, Randnr. 89).

89 In Beantwortung der Frage 2.c) stellt der Gerichtshof daher fest, dass die in Anhang III Buchstabe A der Richtlinie aufgeführten Angaben sich ausschliesslich auf „Informationen über das Versicherungsunternehmen“ und „Informationen über die Versicherungspolicen“ beziehen. Somit ist es hinsichtlich der Informationspflichten des Versicherungsunternehmens im Rahmen der Richtlinie bedeutungslos, ob der ursprüngliche Versicherungsnehmer zur Beurteilung seines eigenen Risiko- oder Anlegerprofils notwendige Angaben offenlegte oder nicht.

ZUR JEWEILS DRITTEN FRAGE

90 Mit seiner jeweils dritten Frage in den beiden Rechtssachen ersucht das nationale Gericht im Grunde um Klärung, ob die Bestimmungen über die Verpflichtungen des Versicherers gemäss Anhang III Buchstabe B.b.2 der Richtlinie wirksam in das innerstaatliche Recht umgesetzt sind, selbst wenn das nationale Recht eine Verpflichtung

assurance contract information must be provided on the units underlying the assurance policy and the nature of the assets contained therein only where the changes in the information provided stem from "amendments of the law" but not also "in the event of a change in the policy conditions".

OBSERVATIONS SUBMITTED TO THE COURT

91 Both applicants argue that Liechtenstein has implemented the Directive too narrowly into national law.

92 Swiss Life argues that the question lacks relevance and should not be answered. Vienna Life concurs with Swiss Life and adds that the question is purely hypothetical.

93 The Liechtenstein Government submits that it is not for the Court to assess under the Article 34 SCA procedure whether national law is compatible with EEA law. Therefore, the third question is for the referring court to decide.

94 ESA argues that it is for the national court to assess whether it is possible in the present case to interpret the national provisions transposing Article 36(2) of the Directive into the Liechtenstein legal order in a manner harmonious with the actual meaning of the Directive, i.e. that the policy holders shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).

95 The Commission submits that any transposition of Annex III(B)(b)(2) of the Directive needs to ensure the necessary information

zur Erteilung von Informationen bei fondsgebundenen Versicherungen während der Laufzeit eines Versicherungsvertrags über den der Versicherung zugrundeliegenden Fonds und die Art der darin enthaltenen Vermögenswerte bloss dann vorsieht, wenn sich die Änderungen bei den erteilten Informationen aus „Änderungen von Rechtsvorschriften ergeben“, nicht aber auch „im Fall eines Zusatzvertrages“.

DEM GERICHTSHOF VORGELEGTE STELLUNGNAHMEN

91 Beide Kläger stehen auf dem Standpunkt, dass Liechtenstein die Richtlinie bei der Umsetzung in innerstaatliches Recht zu eng ausgelegt hat.

92 Swiss Life argumentiert, dass die Frage nicht relevant ist und daher nicht beantwortet werden sollte. Vienna-Life stimmt Swiss Life zu und ergänzt, dass es sich um eine rein hypothetische Frage handelt.

93 Die Regierung des Fürstentums Liechtenstein führt aus, dass es nicht Aufgabe des Gerichtshofs ist, im Rahmen des Verfahrens nach Artikel 34 ÜGA zu beurteilen, ob das nationale Recht mit dem EWR-Recht vereinbar ist. Über die dritte Frage hat daher das vorlegende Gericht zu entscheiden.

94 Der EFTA-Überwachungsbehörde zufolge obliegt es dem nationalen Gericht zu prüfen, ob es im vorliegenden Fall möglich ist, die nationalen Bestimmungen zur Umsetzung von Artikel 36 Absatz 2 der Richtlinie in die liechtensteinische Rechtsordnung im Einklang mit der tatsächlichen Bedeutung der Richtlinie – d. h. dass die Versicherungsnehmer während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B aufgeführten Angaben auf dem Laufenden gehalten werden – auszulegen.

95 Der Kommission zufolge muss jede Umsetzung von Anhang III Buchstabe B.b.2 der Richtlinie die Mitteilung von Informationen in

requirements in two distinct cases, i.e. when there is, first, a change in the policy conditions, and, second, an amendment of the law applicable to the contract. Whether Liechtenstein legislation can be interpreted in a way that reflects the requirements of the Directive is a matter for the national court to establish.

FINDINGS OF THE COURT

96 It is settled case law that directives must be implemented into the national legal order of the EEA States with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. EEA States must ensure full application of directives not only in fact but also in law. It is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts. Moreover, EEA States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see Case E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz*, judgment of 2 October 2015, not yet reported, paragraph 33 and case law cited).

97 Furthermore, it is inherent in the objectives of the EEA Agreement that national courts are obliged to interpret national law in conformity with EEA law. They are bound by EEA law to apply, as far as possible, the methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law,

zwei verschiedenen Fällen gewährleisten, d. h. erstens bei einem Zusatzvertrag und zweitens bei einer Änderung der für den Vertrag geltenden Rechtsvorschriften. Ob das liechtensteinische Recht so ausgelegt werden kann, dass es den Anforderungen der Richtlinie entspricht, ist durch das nationale Gericht festzustellen.

ENTSCHEIDUNG DES GERICHTSHOFS

96 Der ständigen Rechtsprechung zufolge sind Richtlinien mit unbestreitbarer Verbindlichkeit und mit der Konkretheit, Bestimmtheit und Klarheit, die erforderlich sind, um den Erfordernissen der Rechtssicherheit zu genügen, in die nationale Rechtsordnung eines EWR-Staats umzusetzen. Die EWR-Staaten haben die volle Anwendung von Richtlinien nicht nur in tatsächlicher, sondern auch in rechtlicher Hinsicht zu gewährleisten. Es ist daher wesentlich, dass die sich aus den nationalen Umsetzungsmassnahmen ergebende Rechtslage hinreichend bestimmt und klar ist und dass Einzelpersonen in die Lage versetzt werden, von allen ihren Rechten Kenntnis zu erlangen und diese gegebenenfalls vor den nationalen Gerichten geltend zu machen. Zudem dürfen die EWR-Staaten keine Regelungen anwenden, die die Verwirklichung der mit einer Richtlinie verfolgten Ziele gefährden und dieser damit ihre praktische Wirksamkeit nehmen könnten (vgl. Rechtssache E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz*, Urteil vom 2. Oktober 2015, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 33, und die zitierte Rechtsprechung).

97 Ferner ist es integraler Bestandteil der Ziele des EWR-Abkommens, dass die nationalen Gerichte verpflichtet sind, innerstaatliche Vorschriften im Einklang mit dem EWR-Recht auszulegen. Sie sind auf der Grundlage des EWR-Rechts verpflichtet, die im nationalen Recht anerkannten Auslegungsmethoden soweit wie möglich anzuwenden, um das von der einschlägigen EWR-Norm angestrebte Ergebnis zu erreichen und in der Folge den aus Artikel 3 und 7 des

and consequently comply with Articles 3 and 7 EEA and Protocol 35 EEA. When interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not. These obligations arise on the day the respective legal act is made part of the EEA Agreement. The national rules in the present case must be interpreted with those obligations in mind (see *Liechtensteinische Gesellschaft für Umweltschutz*, cited above, paragraph 74 and case law cited).

98 Under Article 34 SCA, the Court has jurisdiction to give advisory opinions on the interpretation of the EEA Agreement upon the request of national courts. After the Court has rendered its judgment, it falls to the referring court to interpret national law in light of the factors clarified above. In cases where a conform interpretation of national law is not sufficient to achieve the result sought by the relevant EEA rule, that matter may be brought before the Court under the procedure prescribed by Article 31 SCA.

99 The answer to the third question in each of the two cases must therefore be that directives must be implemented into the national legal order of the EEA States with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. Furthermore, national courts are bound to interpret national law in conformity with EEA law. Under Article 34 SCA, the Court has jurisdiction to give advisory opinions on the interpretation of the EEA Agreement upon the request of national courts. After the Court has rendered its judgment, it falls to the referring court to interpret national law in light of the factors clarified above. In cases where a conform interpretation of national law is not sufficient to achieve the result sought by the relevant EEA

EWR-Abkommens sowie Protokoll 35 zum EWR-Abkommen resultierenden Verpflichtungen nachzukommen. Bei der Auslegung innerstaatlicher Vorschriften berücksichtigen die nationalen Gerichte jedes massgebliche Element des EWR-Rechts, unabhängig davon, ob es umgesetzt wurde oder nicht. Diese Verpflichtungen gelten ab dem Tag, an dem der entsprechende Rechtsakt in das EWR-Abkommen aufgenommen wird. Die innerstaatlichen Vorschriften im gegenständlichen Fall sind vor dem Hintergrund dieser Verpflichtungen auszulegen (vgl. *Liechtensteinische Gesellschaft für Umweltschutz*, oben erwähnt, Randnr. 74, und die zitierte Rechtsprechung).

98 Gemäss Artikel 34 ÜGA erstellt der Gerichtshof auf Antrag der nationalen Gerichte Gutachten über die Auslegung des EWR-Abkommens. Nachdem der Gerichtshof sein Gutachten erstellt hat, ist es Aufgabe des vorlegenden Gerichts, das nationale Recht vor dem Hintergrund der oben erläuterten Faktoren auszulegen. In Fällen, in denen eine konforme Auslegung des nationalen Rechts nicht ausreicht, um das von der einschlägigen EWR-Norm angestrebte Ergebnis zu erreichen, kann im Rahmen des Verfahrens nach Artikel 31 ÜGA der Gerichtshof angerufen werden.

99 Die Antwort auf die dritte Frage in den beiden Rechtssachen muss daher lauten, dass Richtlinien mit unbestreitbarer Verbindlichkeit und mit der Konkretheit, Bestimmtheit und Klarheit, die erforderlich sind, um den Erfordernissen der Rechtssicherheit zu genügen, in die nationale Rechtsordnung eines EWR-Staats umzusetzen sind. Überdies sind die nationalen Gerichte verpflichtet, innerstaatliche Vorschriften im Einklang mit dem EWR-Recht auszulegen. Gemäss Artikel 34 ÜGA erstellt der Gerichtshof auf Antrag der nationalen Gerichte Gutachten über die Auslegung des EWR-Abkommens. Nachdem der Gerichtshof sein Gutachten erstellt hat, ist es Aufgabe des vorlegenden Gerichts, das nationale Recht vor dem Hintergrund der oben erläuterten Faktoren auszulegen. In Fällen, in denen eine

rule, that matter can be brought before the Court under the procedure prescribed by Article 31 SCA.

V COSTS

100 The costs incurred by the Liechtenstein Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, 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 questions referred to it by *the Supreme Court of the Principality of Liechtenstein* hereby gives the following Advisory Opinion:

1. **Article 36(1) of Directive 2002/83/EC does not address legal transactions such as those in which an existing unit-linked life assurance policy is transferred via a purchase agreement from one person to another where the insured risk, namely the insured person, under the assurance policy remains the same. A transfer of a unit-linked life assurance policy by a legal transaction does not constitute a change in the policy conditions unless the terms of the assurance policy are also amended, thereby altering the balance of rights and obligations**

konforme Auslegung des nationalen Rechts nicht ausreicht, um das von der einschlägigen EWR-Norm angestrebte Ergebnis zu erreichen, kann im Rahmen des Verfahrens nach Artikel 31 ÜGA der Gerichtshof angerufen werden.

V KOSTEN

100 Die Auslagen der Regierung des Fürstentums Liechtenstein, der EFTA-Überwachungsbehörde und der Kommission, die vor dem Gerichtshof Erklärungen abgegeben haben, sind nicht erstattungsfähig. Da es sich bei diesem Verfahren um einen Zwischenstreit in einem beim nationalen Gericht anhängigen Rechtsstreit handelt, ist die Kostenentscheidung betreffend die Parteien dieses Verfahrens Sache dieses Gerichts.

Aus diesen Gründen erstellt

Der Gerichtshof

In Beantwortung der ihm vom Fürstlichen Obersten Gerichtshof vorgelegten Fragen folgendes Gutachten:

1. **Artikel 36 Absatz 1 der Richtlinie 2002/83/EG ist nicht auf Rechtsgeschäfte wie die Übertragung einer bestehenden fondsgebundenen Lebensversicherung durch Kaufvertrag von einer Person auf eine andere anwendbar, bei denen das versicherte Risiko, namentlich die im Rahmen der Versicherungspolice versicherte Person, das- bzw. dieselbe bleibt. Die rechtsgeschäftliche Übernahme einer fondsgebundenen Lebensversicherung stellt keinen Zusatzvertrag dar, es sei denn, dass auch die Bedingungen der Versicherungspolice und damit die Gewichtung der Rechte und Pflichten der Parteien des Versicherungsvertrags geändert**

of the parties to the assurance contract. It falls to the referring court to assess the facts of the cases and to determine whether the relevant transfers led to a change in the policy conditions of the unit-linked life assurance policies acquired by the applicants.

2. **If a "change in the policy conditions" within the meaning of the Directive has taken place, the referring court needs to consider whether the information listed in Annex III(B)(b)(2) was provided to the second-hand policy holder in a clear, accurate and complete manner, in writing, and in an official language of the EEA State of commitment.**

3. **It is of no significance for the information obligation of the assurance undertaking whether the former policy holder was an undertaking and the new policy holder is a consumer, unless this difference has led to an amendment to the terms of the assurance contract.**

4. **The information listed in Annex III(A) of the Directive solely relates to "information about the assurance undertaking" and "information about the commitment". Consequently, whether or not the original policy holder disclosed information about himself so that his own risk or investor profile could be assessed is of no relevance for the information obligation of the assurance undertaking under the Directive.**

5. **Directives must be implemented into the national legal order of the EEA States with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. Furthermore, national courts are bound to interpret national law in conformity with EEA law.**

werden. Es ist Aufgabe des vorlegenden Gerichts, den Sachverhalt in den Rechtssachen zu prüfen und festzustellen, ob die massgeblichen Übernahmen zu einem Zusatzvertrag zu den von den Klägern erworbenen fondsgebundenen Lebensversicherungen führten.

2. **Wenn es sich um einen „Zusatzvertrag" im Sinne der Richtlinie handelt, muss das vorlegende Gericht beurteilen, ob die in Anhang III Buchstabe B.b.2 aufgeführten Angaben dem Übernehmer der Secondhand-Police eindeutig, detailliert und vollständig schriftlich in einer Amtssprache des EWR-Staats der Verpflichtung mitgeteilt wurden.**

3. **Für die Informationspflichten des Versicherungsunternehmens ist es unerheblich, ob es sich beim vorherigen Versicherungsnehmer um ein Unternehmen und beim Übernehmer um einen Verbraucher gehandelt hat, es sei denn, dass dieser Wechsel zu einer Änderung der Bedingungen des Versicherungsvertrags geführt hat.**

4. **Die in Anhang III Buchstabe A der Richtlinie aufgeführten Angaben beziehen sich ausschliesslich auf „Informationen über das Versicherungsunternehmen" und „Informationen über die Versicherungspolicen". Somit ist es hinsichtlich der Informationspflichten des Versicherungsunternehmens im Rahmen der Richtlinie bedeutungslos, ob der ursprüngliche Versicherungsnehmer zur Beurteilung seines eigenen Risiko- oder Anlegerprofils notwendige Angaben offenlegte oder nicht.**

5. **Richtlinien sind mit unbestreitbarer Verbindlichkeit und mit der Konkretheit, Bestimmtheit und Klarheit, die erforderlich sind, um den Erfordernissen der Rechtssicherheit zu genügen, in die nationale Rechtsordnung eines EWR-Staats umzusetzen. Überdies sind die nationalen Gerichte verpflichtet, innerstaatliche Vorschriften im Einklang mit dem EWR-Recht**

Under Article 34 SCA, the Court has jurisdiction to give advisory opinions on the interpretation of the EEA Agreement upon the request of national courts. After the Court has rendered its judgment, it falls to the referring court to interpret national law in light of the factors clarified by the Court. In cases where a conform interpretation of national law is not sufficient to achieve the result sought by the relevant EEA rule, that matter may be brought before the Court under the procedure prescribed by Article 31 SCA.

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Delivered in open court in Luxembourg on
***10 May 2016*.**

Gunnar Selvik
Registrar

Carl Baudenbacher
President

auszulegen. Gemäss Artikel 34 ÜGA erstellt der Gerichtshof auf Antrag der nationalen Gerichte Gutachten über die Auslegung des EWR-Abkommens. Nachdem der Gerichtshof sein Gutachten erstellt hat, ist es Aufgabe des vorlegenden Gerichts, das nationale Recht vor dem Hintergrund der vom Gerichtshof erläuterten Faktoren auszulegen. In Fällen, in denen eine konforme Auslegung des nationalen Rechts nicht ausreicht, um das von der einschlägigen EWR-Norm angestrebte Ergebnis zu erreichen, kann im Rahmen des Verfahrens nach Artikel 31 ÜGA der Gerichtshof angerufen werden.

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Verkündet in öffentlicher Sitzung in Luxemburg am ***10. Mai 2016****.*

Gunnar Selvik
Kanzler

Carl Baudenbacher
Präsident

Report for the Hearing

in Joined Cases E-15/15 and E-16/15

REQUESTS to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of the Principality of Liechtenstein (Fürstlicher Oberster Gerichtshof), in cases pending before it between

Franz-Josef Hagedorn

and

Vienna-Life Lebensversicherung AG Vienna Life Insurance Group

and

Rainer Armbruster

and

Swiss Life (Liechtenstein) AG

concerning the interpretation of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

I INTRODUCTION

1 By a letter of 6 July 2015, registered at the Court as Case E-15/15 on 9 July 2015, the Supreme Court of the Principality of Liechtenstein ("the national court") made a request for an Advisory Opinion in a

Sitzungsbericht

in den verbundenen Rechtssachen E-15/15 und E-16/15

ANTRÄGE des Fürstlichen Obersten Gerichtshofs an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs in den vor ihm anhängigen Rechtssachen

Franz-Josef Hagedorn

und

Vienna-Life Lebensversicherung AG Vienna Life Insurance Group

sowie

Rainer Armbruster

und

Swiss Life (Liechtenstein) AG

betreffend die Auslegung der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002
über Lebensversicherungen.

I EINLEITUNG

1 Mit Schreiben vom 6. Juli 2015, beim Gerichtshof am 9. Juli 2015 eingegangen und als Rechtssache E-15/15 registriert, stellte der Fürstliche Oberste Gerichtshof des Fürstentums Liechtenstein (im

case pending before it between Franz-Josef Hagedorn ("the applicant") and Vienna-Life Lebensversicherung AG Vienna Life Insurance Group ("the defendant" or "Vienna Life"). By a separate letter of 6 July 2015, registered at the Court as Case E-16/15 on 9 July 2015, the Supreme Court of the Principality of Liechtenstein made a request for an Advisory Opinion in a case pending before it between Rainer Armbruster ("the applicant") and Swiss Life (Liechtenstein) AG ("the defendant" or "Swiss Life").

2 In each of its two requests, the national court refers three main questions, essentially similar in both cases, although in Case E-15/15 the second question is subdivided into three sub-questions.

3 The cases before the national court concern disputes between the applicants, as life assurance policy holders, and the defendants, as assurance undertakings, concerning each applicant's life assurance contract. The applicants assert that the defendants failed to discharge the obligation to provide them with certain information included in Annex III to Directive 2002/83/EC ("the Directive" or "the Life Assurance Directive")[1] and that this failure caused them financial loss. In contrast, the defendants maintain that, since these were second-hand life assurance contracts acquired by the applicants from previous policy holders on a secondary market, the acquisition of the policies did not trigger the obligation under the Directive to provide the information specified in Annex III.

1 OJ 2002 L 345, p. 1.

Folgenden: nationales Gericht) einen Antrag auf Vorabentscheidung in einer bei ihm anhängigen Rechtssache zwischen Franz-Josef Hagedorn (im Folgenden: Kläger) und der Vienna-Life Lebensversicherung AG Vienna Life Insurance Group (im Folgenden: Beklagte oder Vienna-Life). Mit getrenntem Schreiben vom 6. Juli 2015, beim Gerichtshof am 9. Juli 2015 eingegangen und als Rechtssache E-16/15 registriert, stellte der Fürstliche Oberste Gerichtshof des Fürstentums Liechtenstein einen Antrag auf Vorabentscheidung in einer bei ihm anhängigen Rechtssache zwischen Rainer Armbruster (im Folgenden: Kläger) und der Swiss Life (Liechtenstein) AG (im Folgenden: Beklagte oder Swiss Life).

2 Beide Anträge des nationalen Gerichts enthalten drei im Grunde ähnliche Fragen, wenngleich die zweite Frage in der Rechtssache E-15/15 in drei Teilfragen untergliedert ist.

3 Die vor dem nationalen Gericht anhängigen Rechtssachen betreffen Auseinandersetzungen zwischen den Klägern, in ihrer Eigenschaft als Inhaber von Lebensversicherungspolicen, und den Beklagten, in ihrer Eigenschaft als Versicherungsunternehmen, über die Lebensversicherungsverträge der beiden Kläger. Den Klägern zufolge sind die Beklagten ihrer Verpflichtung zur Mitteilung bestimmter Informationen gemäss Anhang III der Richtlinie 2002/83/EG (im Folgenden: Richtlinie oder Lebensversicherungsrichtlinie)[1] nicht nachgekommen, wodurch den Klägern ein finanzieller Verlust entstanden sei. Im Gegensatz dazu bringen die Beklagten vor, dass durch die Übernahme der Policen keine Verpflichtung zur Mitteilung der in Anhang III der Richtlinie genannten Informationen eintrat, da die Kläger am Zweitmarkt gebrauchte Lebensversicherungsverträge von früheren Versicherungsnehmern übernommen hatten.

1 ABl. 2002 L 345, S. 1.

4 The national court seeks in essence to establish whether Article 36(2) of the Directive entails an obligation on assurance undertakings to provide information in cases where a person acquires a unit-linked life assurance contract from an existing policy holder with the consent of the assurer through the transfer of the contract ("second-hand policies"), and, if that is not the case, whether certain information must nevertheless be given to the transferee. Finally, the national court asks whether certain provisions of the Directive have been transposed effectively into national law in Liechtenstein.

II LEGAL BACKGROUND

DIRECTIVE 2002/83/EC

5 The Life Assurance Directive was incorporated into the Agreement on the European Economic Area ("the EEA Agreement") at point 11 of Annex IX to the Agreement by EEA Joint Committee Decision No 60/2004 of 26 April 2004.[2] The decision entered into force on 27 April 2004.

6 Recital 5 in the preamble to the Directive reads as follows:

This Directive therefore represents an important step in the merging of national markets into an integrated market and that stage must be supplemented by other Community instruments with a view to enabling all policy holders to have recourse to any assurer with a head office in the Community who carries on business there, under the right of establishment or the freedom to provide services, while guaranteeing them adequate protection.

2 EEA Supplement 2004 No 43, p. 156.

4 Das nationale Gericht ersucht im Wesentlichen um Klärung, ob Artikel 36 Absatz 2 der Richtlinie Versicherungsunternehmen verpflichtet, in Fällen, in denen eine Person einen fondsgebundenen Lebensversicherungsvertrag vom bisherigen Versicherungsnehmer mit Zustimmung des Versicherers rechtsgeschäftlich im Wege der Vertragsübernahme übernimmt („Secondhand-Policen"), Informationen mitzuteilen bzw. ob dem Vertragsübernehmer, wenn dies nicht der Fall ist, trotzdem bestimmte Informationen mitgeteilt werden müssen. Darüber hinaus stellt das nationale Gericht die Frage, ob gewisse Bestimmungen der Richtlinie wirksam in das innerstaatliche Recht Liechtensteins umgesetzt wurden.

II RECHTLICHER HINTERGRUND

RICHTLINIE 2002/83/EG

5 Die Lebensversicherungsrichtlinie wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 60/2004 vom 26. April 2004 unter Nummer 11 des Anhangs IX in das EWR-Abkommen aufgenommen.[2] Der Beschluss trat am 27. April 2004 in Kraft.

6 Erwägungsgrund 5 der Präambel der Richtlinie lautet:

Die vorliegende Richtlinie stellt folglich einen bedeutenden Abschnitt bei der Verschmelzung der einzelstaatlichen Märkte zu einem einheitlichen Binnenmarkt dar; dieser Abschnitt muss durch weitere Gemeinschaftsabschnitte ergänzt werden und soll es allen Versicherungsnehmern ermöglichen, jeden Versicherer mit Sitz in der Gemeinschaft zu wählen, der in ihr seine Geschäftstätigkeit im Rahmen der Niederlassungsfreiheit oder der Dienstleistungsfreiheit ausübt, wobei ihnen gleichzeitig ein angemessener Schutz zu gewährleisten ist.

2 EWR-Beilage 2004, Nr. 43, S. 156.

7 Recital 44 in the preamble to the Directive reads as follows:

The provisions in force in the Member States regarding contract law applicable to the activities referred to in this Directive differ. The harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance. Therefore, the opportunity afforded to the Member States of imposing the application of their law to assurance contracts covering commitments within their territories is likely to provide adequate safeguards for policy holders. The freedom to choose, as the law applicable to the contract, a law other than that of the State of the commitment may be granted in certain cases, in accordance with rules which take into account specific circumstances.

8 Recital 52 in the preamble to the Directive reads as follows:

In an internal market for assurance the consumer will have a wider and more varied choice of contracts. If he/she is to profit fully from this diversity and from increased competition, he/she must be provided with whatever information is necessary to enable him/her to choose the contract best suited to his/her needs. This information requirement is all the more important as the duration of commitments can be very long. The minimum provisions must therefore be coordinated in order for the consumer to receive clear and accurate information on the essential characteristics of the products proposed to him/her as well as the particulars of the bodies to which any complaints of policy holders, assured persons or beneficiaries of contracts may be addressed.

9 Article 32(1) of the Directive, which is headed "Law applicable", reads as follows:

1. *The law applicable to contracts relating to the activities referred to in this Directive shall be the law of the Member State of the*

7 Erwägungsgrund 44 der Präambel der Richtlinie lautet:

Die in den Mitgliedstaaten geltenden Vorschriften des Vertragsrechts für die in dieser Richtlinie genannten Tätigkeiten sind unterschiedlich. Die Harmonisierung des für den Versicherungsvertrag geltenden Rechts ist keine Vorbedingung für die Verwirklichung des Binnenmarkts im Versicherungssektor. Die den Mitgliedstaaten belassene Möglichkeit, die Anwendung ihres eigenen Rechts für Versicherungsverträge vorzuschreiben, bei denen die Versicherungsunternehmen Verpflichtungen in ihrem Hoheitsgebiet eingehen, stellt deshalb eine hinreichende Sicherung für die Versicherungsnehmer dar. Die Freiheit der Wahl eines anderen Vertragsrechts als das des Staates der Verpflichtung kann in bestimmten Fällen nach Regeln gewährt werden, in denen die spezifischen Umstände berücksichtigt werden.

8 Erwägungsgrund 52 der Präambel der Richtlinie lautet:

Im Rahmen eines Versicherungsbinnenmarkts wird dem Verbraucher eine größere und weiter gefächerte Auswahl von Verträgen zur Verfügung stehen. Um diese Vielfalt und den verstärkten Wettbewerb voll zu nutzen, muss er im Besitz der notwendigen Informationen sein, um den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen. Da die Dauer der Verpflichtungen sehr lang sein kann, ist diese Information für den Verbraucher noch wichtiger. Folglich sind die Mindestvorschriften zu koordinieren, damit er klare und genaue Angaben über die wesentlichen Merkmale der ihm angebotenen Produkte und über die Stellen erhält, an die etwaige Beschwerden der Versicherungsnehmer, Versicherten oder Begünstigten des Vertrages zu richten sind.

9 Artikel 32 Absatz 1 der Richtlinie, der die Überschrift „Anwendbares Recht“ trägt, lautet:

1. Das Recht, das auf die Verträge über die in der vorliegenden Richtlinie genannten Tätigkeiten anwendbar ist, ist das Recht des

commitment. However, where the law of that State so allows, the parties may choose the law of another country.

10 Article 35(1) of the Directive, which is headed "Cancellation period", reads as follows:

1. *Each Member State shall prescribe that a policy holder who concludes an individual life-assurance contract shall have a period of between 14 and 30 days from the time when he/she was informed that the contract had been concluded within which to cancel the contract.*

   The giving of notice of cancellation by the policy holder shall have the effect of releasing him/her from any future obligation arising from the contract.

   The other legal effects and the conditions of cancellation shall be determined by the law applicable to the contract as defined in Article 32, notably as regards the arrangements for informing the policy holder that the contract has been concluded.

11 Article 36 of the Directive, which is headed "Information for policy holders", reads as follows:

1. *Before the assurance contract is concluded, at least the information listed in Annex III(A) shall be communicated to the policy holder.*

2. *The policy-holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).*

3. *The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in*

Mitgliedstaats der Verpflichtung. Jedoch können die Parteien, sofern dies nach dem Recht dieses Mitgliedstaats zulässig ist, das Recht eines anderen Staates wählen.

10 Artikel 35 Absatz 1 der Richtlinie, der die Überschrift „Rücktrittszeitraum“ trägt, lautet:

1. Jeder Mitgliedstaat schreibt vor, dass der Versicherungsnehmer eines individuellen Lebensversicherungsvertrags von dem Zeitpunkt an, zu dem er davon in Kenntnis gesetzt wird, dass der Vertrag geschlossen ist, über eine Frist verfügt, die zwischen 14 und 30 Tagen betragen kann, um von dem Vertrag zurückzutreten.

Die Mitteilung des Versicherungsnehmers, dass er vom Vertrag zurücktritt, befreit ihn für die Zukunft von allen aus diesem Vertrag resultierenden Verpflichtungen.

Die übrigen rechtlichen Wirkungen des Rücktritts und die dafür erforderlichen Voraussetzungen werden gemäß dem auf den Versicherungsvertrag nach Artikel 32 anwendbaren Recht geregelt, insbesondere was die Modalitäten betrifft, nach denen der Versicherungsnehmer davon in Kenntnis gesetzt wird, dass der Vertrag geschlossen ist.

11 Artikel 36 der Richtlinie, der die Überschrift „Angaben für den Versicherungsnehmer“ trägt, lautet:

1. Vor Abschluss des Versicherungsvertrags sind dem Versicherungsnehmer mindestens die in Anhang III Buchstabe A aufgeführten Angaben mitzuteilen.

2. Der Versicherungsnehmer muss während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B aufgeführten Angaben auf dem Laufenden gehalten werden.

3. Der Mitgliedstaat der Verpflichtung kann von den Versicherungsunternehmen nur dann die Vorlage von Angaben

Annex III only if it is necessary for a proper understanding by the policy holder of the essential elements of the commitment.

4. *The detailed rules for implementing this Article and Annex III shall be laid down by the Member State of the commitment.*

12 Annex III to the Directive, which is headed "Information for policy holders", reads as follows:

The following information, which is to be communicated to the policy holder before the contract is concluded (A) or during the term of the contract (B), must be provided in a clear and accurate manner, in writing, in an official language of the Member State of the commitment.

However, such information may be in another language if the policy holder so requests and the law of the Member State so permits or the policy holder is free to choose the law applicable.

A. *Before concluding the contract*

Information about the assurance undertaking

(a)1 The name of the undertaking and its legal form

(a)2 The name of the Member State in which the head office and, where appropriate, the agency or branch concluding the contract is situated

(a)3 The address of the head office and, where appropriate, of the agency or branch concluding the contract

Information about the commitment

(a)4 Definition of each benefit and each option

zusätzlich zu den in Anhang III genannten Auskünften verlangen, wenn diese für das tatsächliche Verständnis der wesentlichen Bestandteile der Versicherungspolice durch den Versicherungsnehmer notwendig sind.

4. *Die Durchführungsvorschriften zu diesem Artikel und zu Anhang III werden von dem Mitgliedstaat der Verpflichtung erlassen.*

12 Anhang III der Richtlinie, der die Überschrift „Informationen für den Versicherungsnehmer“ trägt, lautet:

Dem Versicherungsnehmer sind die nachfolgenden Informationen entweder (A) vor Abschluss des Vertrages oder (B) während der Laufzeit des Vertrages mitzuteilen. Die Informationen sind eindeutig und detailliert schriftlich in einer Amtssprache des Mitgliedstaats der Verpflichtung abzufassen.

Diese Informationen können jedoch in einer anderen Sprache abgefasst werden, sofern der Versicherungsnehmer dies wünscht und es nach dem Recht des Mitgliedstaats zulässig ist oder sofern der Versicherungsnehmer das maßgebende Recht frei wählen kann.

A. Vor Abschluss des Vertrages mitzuteilende Informationen

Informationen über das Versicherungsunternehmen

a.1 Firma und Rechtsform der Gesellschaft

a.2 Name des Mitgliedstaats, in dem sich der Sitz und gegebenenfalls die Agentur oder Zweigniederlassung befindet, die die Police ausstellt

a.3 Anschrift des Sitzes und gegebenenfalls der Agentur oder der Zweigniederlassung, die die Police ausstellt

Informationen über die Versicherungspolicen

a.4 Beschreibung jeder Garantie und jeder Option

(a)5 Term of the contract

(a)6 Means of terminating the contract

(a)7 Means of payment of premiums and duration of payments

(a)8 Means of calculation and distribution of bonuses

(a)9 Indication of surrender and paid-up values and the extent to which they are guaranteed

(a)10 Information on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate

(a)11 For unit-linked policies, definition of the units to which the benefits are linked

(a)12 Indication of the nature of the underlying assets for unit-linked policies

(a)13 Arrangements for application of the cooling-off period

(a)14 General information on the tax arrangements applicable to the type of policy

(a)15 The arrangements for handling complaints concerning contracts by policy holders, lives assured or beneficiaries under contracts including, where appropriate, the existence of a complaints body, without prejudice to the right to take legal proceedings

(a)16 Law applicable to the contract where the parties do not have a free choice or, where the parties are free to choose the law applicable, the law the assurer proposes to choose

a.5 Laufzeit der Police

a.6 Einzelheiten der Vertragsbeendigung

a.7 Prämienzahlungsweise und Prämienzahlungsdauer

a.8 Methoden der Gewinnberechnung und Gewinnbeteiligung

a.9 Angabe der Rückkaufwerte und beitragsfreien Leistungen und das Ausmaß, in dem diese Leistungen garantiert sind

a.10 Informationen über die Prämien für jede Leistung, und zwar sowohl Haupt- als auch Nebenleistungen, wenn sich derartige Informationen als sinnvoll erweisen

a.11 für fondsgebundene Policen: Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind

a.12 Angabe der Art der den fondsgebundenen Policen zugrunde liegenden Vermögenswerte

a.13 Modalitäten der Ausübung des Widerrufs und Rücktrittsrechts

a.14 allgemeine Angaben zu der auf die Policenart anwendbaren Steuerregelung

a.15 Bestimmungen zur Bearbeitung von den Vertrag betreffenden Beschwerden der Versicherungsnehmer, der Versicherten oder der Begünstigten des Vertrags, gegebenenfalls einschließlich des Hinweises auf eine Beschwerdestelle; dies gilt unbeschadet der Möglichkeit, den Rechtsweg zu beschreiten

a.16 das für den Vertrag maßgebende Recht für den Fall, dass die Parteien keine Wahlfreiheit haben oder, wenn die Parteien das maßgebende Recht frei wählen können, das von dem Versicherungsunternehmen vorgeschlagene Recht

B. During the term of the contract

In addition to the policy conditions, both general and special, the policy-holder must receive the following information throughout the term of the contract.

Information about the assurance undertaking

(b)1 Any change in the name of the undertaking, its legal form or the address of its head office and, where appropriate, of the agency or branch which concluded the contract

Information about the commitment

(b)2 All the information listed in points (a)(4) to (a)(12) of A in the event of a change in the policy conditions or amendment of the law applicable to the contract

(b)3 Every year, information on the state of bonuses

NATIONAL LAW

13 Liechtenstein has implemented the Life Assurance Directive by way of the Insurance Supervision Act ("VersAG"), LR 961.01, the Insurance Supervision Regulation ("VersAV"), LR 961.011, the Insurance Contracts Act ("VersVG"), LR 215.229.1, the International Private Law Act ("IPRG"), LR 290, and the International Insurance Contracts Act ("IVersVG"), LR 291.

14 Article 45 of the VersAG reads as follows:

Duties to inform policy holders

Prior to conclusion and during the term of insurance contracts, specific information shall be provided to policy holders for purposes of their

B. Während der Laufzeit des Vertrages mitzuteilende Informationen

Zusätzlich zu den allgemeinen und besonderen Versicherungsbedingungen muss der Versicherungsnehmer die folgenden Informationen während der Laufzeit des Vertrages erhalten:

Informationen über das Versicherungsunternehmen

b.1 Jede Änderung des Firmennamens der Gesellschaft, ihrer Rechtsform und der Anschrift ihres Sitzes oder gegebenenfalls der Agentur oder Zweigniederlassung, die die Police ausgestellt hat

Informationen über die Versicherungspolicen

b.2 Alle Angaben gemäß a.4 bis a.12 des Teils A im Fall eines Zusatzvertrages oder einer Änderung der für den Vertrag geltenden Rechtsvorschriften

b.3 Alljährlich Informationen über den Stand der Gewinnbeteiligung

NATIONALES RECHT

13 Liechtenstein hat die Lebensversicherungsrichtlinie im Wege des Versicherungsaufsichtsgesetzes (VersAG), LR 961.01, der Versicherungsaufsichtsverordnung (VersAV), LR 961.011, des Versicherungsvertragsgesetzes (VersVG), LR 215.229.1, des Gesetzes über das internationale Privatrecht (IPRG), LR 290, und des Gesetzes über das internationale Versicherungsvertragsrecht (IVersVG), LR 291, in nationales Recht umgesetzt.

14 Artikel 45 VersAG lautet:

Mitteilungspflichten gegenüber Versicherungsnehmern

Vor Abschluss und während der Laufzeit von Versicherungsverträgen sind zur Information und zum Schutz von Versicherungsnehmern diesen

information and protection. The content and scope of these duties to provide information are regulated in Annex 4.

15 Annex 4 to the VersAG reads as follows:

Duties to inform policy holders under Articles 45 and 49

Where the policy holder is a natural person, insurance undertakings shall inform him of the essential facts and rights pertaining to the insurance relationship prior to conclusion and during the term of a contract in accordance with the following provisions. In the case of insurance of large risks, it shall be sufficient to indicate the applicable law and the competent supervisory authority. Information shall be provided in writing.

Section I

1. Information required for all classes of insurance:

(a) name, address, legal form and registered office of the insurance undertaking and, where appropriate, any branch through which the contract is to be concluded;

(b) the general insurance conditions applicable to the insurance relationship, including the terms concerning scales of premiums, and indication of the law applicable to the contract;

(c) information on the nature, scope and maturity of the insurance undertaking benefits, where no general insurance conditions or where no terms concerning scales of premiums are applied;

(d) information on the term of the insurance relationship;

gegenüber spezielle Informationen abzugeben. Inhalt und Umfang dieser Mitteilungspflichten sind in Anhang 4 geregelt.

15 Anhang 4 VersAG lautet:

Mitteilungspflichten gegenüber Versicherungsnehmern gemäss Art. 45 und 49

Die Versicherungsunternehmen haben den Versicherungsnehmer, wenn es sich um eine natürliche Person handelt, über die für das Versicherungsverhältnis massgeblichen Tatsachen und Rechte vor Abschluss und während der Laufzeit eines Vertrages gemäss den nachfolgenden Bestimmungen zu unterrichten. Bei der Versicherung von Grossrisiken genügt die Angabe des anwendbaren Rechts und der zuständigen Aufsichtsbehörde. Die Informationen haben schriftlich zu erfolgen.

Abschnitt I

1. *Für alle Versicherungssparten notwendige Informationen:*

   a) *Name, Anschrift, Rechtsform und Sitz des Versicherungsunternehmens und der etwaigen Niederlassung, über die der Vertrag abgeschlossen werden soll;*

   b) *die für das Versicherungsverhältnis geltenden allgemeinen Versicherungsbedingungen einschliesslich der Tarifbestimmungen sowie die Angabe des auf den Vertrag anwendbaren Rechts;*

   c) *Angaben über Art, Umfang und Fälligkeit der Leistung des Versicherungsunternehmens, sofern keine allgemeinen Versicherungsbedingungen oder Tarifbestimmungen verwendet werden;*

   d) *Angaben zur Laufzeit des Versicherungsverhältnisses;*

(e) information on the amount of the premiums, which should be identified individually if the insurance relationship is to include several autonomous insurance contracts, and on the method of payment of premiums, as well as information on any additional fees or costs, with an indication of the total amount to be paid;

(f) information on the period for which the applicant is to be bound by the application;

(g) instructions concerning the right of cancellation or withdrawal;

(h) address of the competent supervisory authority which the policy holder may contact in the event of complaints about the insurance undertaking.

2. Additional information required for life assurance or accident insurance with premium refund:

(a) information on the calculation principles and criteria used for profit determination and profit participation;

(b) indication of surrender values;

(c) information on the minimum sum insured for conversion into a fully paid-up insurance policy and on the benefits from a fully paid-up insurance policy;

(d) information on the extent to which the benefits under (b) and (c) are guaranteed;

(e) for unit-linked insurance policies, information on the unit underlying the insurance policy and the nature of the assets contained therein;

(f) general information on the tax rules applicable to this type of insurance policy.

e) Angaben über die Prämienhöhe, wobei die Prämien einzeln auszuweisen sind, wenn das Versicherungsverhältnis mehrere selbständige Versicherungsverträge umfassen soll, und über die Prämienzahlungsweise sowie Angaben über etwaige Nebengebühren und Nebenkosten und Angabe des insgesamt zu zahlenden Betrages;

f) Angaben über die Frist, während der der Antragsteller an den Antrag gebunden sein soll;

g) Belehrung über das Recht zum Widerruf oder zum Rücktritt;

h) die Anschrift der zuständigen Aufsichtsbehörde, an die sich der Versicherungsnehmer bei Beschwerden über das Versicherungsunternehmen wenden kann.

2. Bei Lebensversicherungen und Unfallversicherungen mit Prämienrückgewähr zusätzlich notwendige Informationen:

a) Angaben über die für die Überschussermittlung und Überschussbeteiligung geltenden Berechnungsgrundsätze und Massstäbe;

b) Angabe der Rückkaufswerte;

c) Angaben über den Mindestversicherungsbetrag für eine Umwandlung in eine prämienfreie Versicherung und über die Leistungen aus prämienfreier Versicherung;

d) Angaben über das Ausmass, in dem die Leistungen nach den Bst. b und c garantiert sind;

e) bei fondsgebundenen Versicherungen Angaben über den der Versicherung zugrunde liegenden Fonds und die Art der darin enthaltenen Vermögenswerte;

f) allgemeine Angaben über die für diese Versicherungsart geltende Steuerregelung.

Section II

Information to be provided by the insurance undertaking during the term of an insurance contract

1. *changes of name, address, legal form and registered office of the insurance undertaking and any branch through which the contract is to be concluded;*
2. *changes to the information provided in accordance with Section I(1)(c) to (e) and (2)(a) to (e), where such changes stem from amendments of the law;*
3. *annual notification of the status of profit participation in life assurance and accident insurance policies with premium refund.*

III FACTS AND PROCEDURE

16 The cases before the national court concern the question whether, and if so, to what extent, a life assurance undertaking has an obligation to provide information to a person that acquires a life assurance policy from an existing policy holder ("second-hand life assurance policy").

17 The defendants, Swiss Life and Vienna Life, are registered in Liechtenstein and have a licence to provide life assurance.

18 With regard to the life assurance contract in each case, a Liechtenstein-based asset management firm, Swiss Select Asset Management AG ("SSAM"), was responsible for the asset management of the premium reserve funds on behalf of the defendants.

Abschnitt II

Während der Laufzeit eines Versicherungsvertrages vom Versicherungsunternehmen zu erteilende Informationen:

1. *Änderungen von Namen, Anschrift, Rechtsform und Sitz des Versicherungsunternehmens und der etwaigen Niederlassung, über die der Vertrag geschlossen worden ist;*
2. *Änderungen bei den nach Abschnitt I Nr. 1 Bst. c bis e und Nr. 2 Bst. a bis e erteilten Informationen, sofern sie sich aus Änderungen von Rechtsvorschriften ergeben;*
3. *jährliche Mitteilung über den Stand der Überschussbeteiligung in der Lebensversicherung und Unfallversicherung mit Prämienrückgewähr.*

III SACHVERHALT UND VERFAHREN

16 Die Rechtssachen vor dem nationalen Gericht beschäftigen sich mit der Frage, ob – und wenn ja, in welchem Ausmass – ein Lebensversicherungsunternehmen verpflichtet ist, einer Person, die eine Lebensversicherungspolice von einem bisherigen Versicherungsnehmer übernimmt („Secondhand-Lebensversicherungspolice“), Informationen mitzuteilen.

17 Die Beklagten, Swiss Life und Vienna-Life, haben ihren Sitz in Liechtenstein und besitzen eine Bewilligung zum Betrieb einer Lebensversicherung.

18 In beiden Rechtssachen war hinsichtlich der Lebensversicherungsverträge eine Vermögensverwaltungsgesellschaft mit Sitz in Liechtenstein, die Swiss Select Asset Management AG (im Folgenden: SSAM), für die Vermögensverwaltung des Deckungsstocks im Namen der Beklagten zuständig.

19 In Case E-15/15, a unit-linked life assurance policy was concluded on 30 December 2004 between Vienna Life, as the assurer, and Gold Bank Finance Ltd, as the policy holder. On 28 November 2006, the applicant, Mr Hagedorn, acquired this unit-linked life assurance policy. The policy transfer took place on 19 December 2006. An intermediary, Mass & Partner Kapitalmanagement GmbH, working on behalf of SSAM, brokered the sale of the life assurance policy from the original policy holder to Mr Hagedorn.

20 The purchase price and the total investment of Mr Hagedorn was EUR 500 000, an amount calculated by SSAM, and which became due upon the transfer of the original policy. At the time of acquisition, no premiums had been paid to Vienna Life.

21 In Case E-16/15, a unit-linked life assurance policy was concluded in 2003 between the defendant Swiss Life, as the assurer, and Werner Finzel and Ute Finzel-Heidinger, as the policy holders. The applicant, Mr Armbruster, acquired this unit-linked life insurance policy from the original policy holders through a purchase agreement dated 17 and 21 May 2007. The policy transfer took place on 9 July 2007. An intermediary, SSAM, brokered the sale of the life assurance policy from the original policy holders to Mr Armbruster.

22 The purchase price was EUR 243 000, an amount calculated by SSAM, and which became due upon the transfer of the original policy. The purchase price was paid to “the community of heirs of Werner Lorenz Finzel” on 4 June 2007. The total investment of Mr Armbruster amounted to EUR 750 000, of which EUR 250 000 was obtained by credit financing arranged through SSAM, with the Liechtensteinische Landesbank as the lender.

19 In der Rechtssache E-15/15 schloss die Gold Bank Finance Ltd als Versicherungsnehmerin am 30. Dezember 2004 bei Vienna-Life als Versicherungsunternehmen eine fondsgebundene Lebensversicherung ab. Am 28. November 2006 übernahm der Kläger, Franz-Josef Hagedorn, diese fondsgebundene Lebensversicherung. Die Übernahme der Police erfolgte am 19. Dezember 2006. Die Mass & Partner Kapitalmanagement GmbH, die im Auftrag der SSAM tätig war, vermittelte den Verkauf der Lebensversicherung von der ursprünglichen Versicherungsnehmerin an Franz-Josef Hagedorn.

20 Der Kaufpreis dieser einzigen Investition von Franz-Josef Hagedorn betrug 500 000 EUR. Dieser von der SSAM errechnete Betrag war zum Zeitpunkt der Übernahme der Originalpolice fällig. Zum Zeitpunkt der Übernahme waren keinerlei Prämien an Vienna-Life gezahlt worden.

21 In der Rechtssache E-16/15 schlossen Werner Finzel und Ute Finzel-Heidinger als Versicherungsnehmer 2003 bei Swiss Life als Versicherungsunternehmen eine fondsgebundene Lebensversicherung ab. Der Kläger, Rainer Armbruster, übernahm diese fondsgebundene Lebensversicherung von den ursprünglichen Versicherungsnehmern mittels Kaufvertrag vom 17. bzw. 21. Mai 2007. Die Übernahme der Police erfolgte am 9. Juli 2007. Die SSAM vermittelte den Verkauf der Lebensversicherung von den ursprünglichen Versicherungsnehmern an Herrn Armbruster.

22 Der Kaufpreis betrug 243 000 EUR. Dieser von der SSAM errechnete Betrag war zum Zeitpunkt der Übernahme der Originalpolice fällig. Der Kaufpreis wurde am 4. Juni 2007 an die „Erbengemeinschaft Werner Lorenz Finzel“ entrichtet. Die Gesamtanlage von Herrn Armbruster betrug 750 000 EUR. Auf Vermittlung der SSAM wurden 250 000 EUR von dieser Summe über einen Kredit bei der Liechtensteinischen Landesbank finanziert.

23 A document permitting a change of policy holder was signed by Ute Finzel-Heidinger, Mr Armbruster, a representative of SSAM and an authorised representative of Swiss Life. The document also includes the following passage:

The new policy holder was informed and expressly agreed that by entering into the assurance contract he acquires the same rights and the duties which applied to the existing policy holders at the time he entered into the contract. This also holds for all agreements made with the existing policy holders (e.g. investment strategy, risk disclosure, any ancillary arrangements, supplementary arrangements etc.).

24 Both applicants suffered substantial losses on their investments. The cases before the national court concern the defendants' liability for damages on the basis that they failed to fulfil their obligations to provide sufficient information, as provided for in Article 36 of the Directive and detailed in Annex III thereto.

25 The defendants, in contrast, submit that the duty to provide information is only applicable with regard to the original policy holder. Furthermore, the defendants claim that no new assurance relationship was created and that the transfer of the policies to new policy holders was not contingent on the defendants' consent.

26 By an order of 3 July 2015, the national court sought two advisory opinions: first, in the proceedings between Franz-Josef Hagedorn and Vienna Life, and, second, in the proceedings between Rainer Armbruster and Swiss Life. Both requests were received at the Court Registry on 9 July 2015.

23 Eine Urkunde mit dem Titel „Änderung des Versicherungsnehmers“ wurde von Ute Finzel-Heidinger, Rainer Armbruster, einem Vertreter der SSAM und einem vertretungsbefugten Organ von Swiss Life unterzeichnet. Darin findet sich u. a. der folgende Passus:

Der/die neuen Versicherungsnehmer wurden darauf hingewiesen und erklären sich damit ausdrücklich einverstanden, dass sie aufgrund ihres Eintritts in den Versicherungsvertrag die gleichen Rechte und Pflichten übernehmen, welche zum Zeitpunkt des Eintritts den bisherigen Versicherungsnehmern anhafteten. Dies gilt auch für alle mit den bisherigen Versicherungsnehmern getroffenen Vereinbarungen (z. B. Anlagestrategie, Risikoaufklärung, eventuelle Nebenabreden, Zusatzvereinbarungen, etc.).

24 Beide Kläger erlitten im Zusammenhang mit ihren Anlagen erhebliche Verluste. Die vor dem nationalen Gericht anhängigen Rechtssachen betreffen die Haftung der Beklagten für Schadenersatz, da sie ihrer Verpflichtung zur Mitteilung ausreichender Informationen, wie in Artikel 36 der Richtlinie vorgesehen und in deren Anhang III ausgeführt, nicht nachgekommen sind.

25 Demgegenüber bringen die Beklagten vor, dass die Verpflichtung zur Mitteilung von Informationen nur auf den ursprünglichen Versicherungsnehmer anwendbar ist. Die Beklagten stellen zudem fest, dass kein neues Versicherungsverhältnis zustande gekommen ist und die Übernahme der Policen durch die neuen Versicherungsnehmer nicht von der Zustimmung der Beklagten abhängig war.

26 Mit seinen Beschlüssen vom 3. Juli 2015 stellte das nationale Gericht Anträge auf Vorabentscheidung im Verfahren zwischen Franz-Josef Hagedorn und Vienna-Life sowie im Verfahren zwischen Rainer Armbruster und Swiss Life. Beide Anträge gingen beim Gerichtshof am 9. Juli 2015 ein.

27 By a decision of 5 November 2015, the Court, pursuant to Article 39 of the Rules of Procedure ("RoP") and after having received observations from the parties, joined the two cases for the purposes of the oral procedure and final judgment.

IV QUESTIONS

28 The following questions were referred to the Court in Case E-15/15:

1. Is Article 36(2) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance to be interpreted as meaning that the duties to provide information referred to therein and in Annex III(A)(a)(11) and (a)(12) and (B)(b)(2) for unit-linked life assurance policies must also be fulfilled in relation to a person who, by a legal transaction, acquires a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract ('second-hand policies')?

In the event that the Court answers the first question in the affirmative, the following additional questions are asked:

2(a) Is Article 36(2) of Directive 2002/83/EC concerning life assurance to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, only general information must be provided to the new policy holder or is the assurance company also required to provide the new policy holder with information specifically regarding the assurance product to be acquired by him, in particular regarding any differences between the

27 Mittels Beschluss vom 5. November 2015 hat der Gerichtshof die beiden Rechtssachen gemäss Artikel 39 der Verfahrensordnung nach Eingang der schriftlichen Erklärungen der Parteien zur Durchführung des mündlichen Verfahrens und zum Erlass eines rechtskräftigen Urteils verbunden.

IV FRAGEN

28 In der Rechtssache E-15/15 wurden dem Gerichtshof die folgenden Fragen vorgelegt:

1. Ist Art. 36 Abs. 2 der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 05.11.2002 über Lebensversicherungen dahingehend auszulegen, dass die dort und in Anhang III Bst. A.a.11 und a.12 bzw. B.b.2 für fondsgebundene Lebensversicherungen genannten Informationspflichten auch zu Gunsten einer Person bestehen, die eine fondsgebundene Lebensversicherung von einer anderen Person mit Zustimmung des Versicherers rechtsgeschäftlich im Wege der Vertragsübernahme übernimmt („Secondhand-Polizzen“)?

Für den Fall, dass der Gerichtshof die erste Frage bejaht, werden folgende weitere Fragen gestellt:

2.a) Ist Art. 36 Abs. 2 der Richtlinie 2002/83/EG über Lebensversicherungen dahin auszulegen, dass es sich im Fall der rechtsgeschäftlichen Übernahme einer fondsgebundenen Lebensversicherung bloss um allgemeine Informationen dem neuen Versicherungsnehmer gegenüber handeln muss oder ist die Versicherung diesem gegenüber auch zu Informationen konkret zu dem von ihm zu übernehmenden Versicherungsprodukt, insbesondere zu

investor or risk profiles of the existing policy holder and of the transferee?

In the event that Question 2(a) is answered in the negative, the following question is asked:

2(b) Is specific information to be given to the transferee of the contract regarding the assurance product to be acquired by him where the existing policy holder is an undertaking, while the transferee of the contract is a natural person or a consumer?

In the event that Question 2(b) is answered in the negative, the following question is asked:

2(c) Is specific information to be given to the transferee of the contract regarding the assurance product to be acquired by him where the transferor of the policy dispensed with information regarding the assurance product in question, for example because he did not disclose to the assurance company the information necessary in order to assess his own risk or investor profile?

Furthermore, the following additional question is asked:

3. Are the provisions concerning the assurer's obligations under Annex III(B)(b)(2) of Directive 2002/83/EC concerning life assurance effectively transposed into national law even if national law provides, in Annex 4(II)(2) of the Versicherungsaufsichtsgesetz (Law on insurance supervision), in the case of unit-linked assurance policies, that during the term of an assurance contract information must be provided on the units underlying the assurance

einem allenfalls abweichenden Anleger- bzw. Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers, verpflichtet?

Für den Fall der Verneinung der Frage 2.a) wird die folgende Frage gestellt:

2.b) Sind dem Vertragsübernehmer dann konkrete Informationen zu dem von ihm zu übernehmenden Versicherungsprodukt zu geben, wenn der bisherige Versicherungsnehmer ein Unternehmen, der Vertragsübernehmer jedoch eine natürliche Person oder ein Verbraucher ist?

Für den Fall der Verneinung der Frage 2.b) wird folgende Frage gestellt:

2.c) Sind dem Vertragsübernehmer dann konkrete Informationen zu dem von ihm zu übernehmenden Versicherungsprodukt zu geben, wenn der Veräusserer der Polizze auf Informationen zu dem gegenständlichen Versicherungsprodukt seinerseits verzichtete, so z. B. dadurch, dass er die zur Beurteilung seines eigenen Risiko- bzw. Anlegerprofils notwendigen Angaben der Versicherung gegenüber nicht offenlegte?

Darüber hinaus wird die folgende weitere Frage gestellt:

3. Sind die Bestimmungen über die Verpflichtungen des Versicherers gem. Anhang III B.b.2 der Richtlinie 2002/83/EG über Lebensversicherungen auch dann wirksam in das innerstaatliche Recht umgesetzt, wenn dieses in Anhang 4 Abschnitt II Z 2. VersAG eine Verpflichtung zur Erteilung von Informationen bei fondsgebundenen Versicherungen während der Laufzeit eines Versicherungsvertrags über den der Versicherung zugrundeliegenden Fonds und die Art der

policy and the nature of the assets contained therein only where the changes in the information provided stem from 'amendments of the law' but not also 'in the event of a change in the policy conditions' (Annex III(B)(b)(2) to Directive 2002/83/EC)?

29 In Case E-16/15, the first question referred is substantively the same as the first question in Case E-15/15, with the only difference being that the referring court writes "has acquired" instead of "acquires". The third question in Case E16/15 is identical to the third question in Case E-15/15. Finally, the second question in Case E-16/15, which is asked in the event that the Court answers the first question in the affirmative, is substantively similar to Question 2(a) in Case E-15/15 and is worded as follows:

2. **Is Article 36(2) of Directive 2002/83/EC concerning life assurance to be interpreted as meaning that, in the case of the legal transfer of the contract for a unit-linked life assurance policy, only general information must be provided to the new policy holder or is the assurance company also required to provide the new policy holder with information specifically regarding the assurance product to be acquired by him, in particular regarding any differences between the risk profiles of the existing policy holder and of the transferee?**

V WRITTEN OBSERVATIONS

30 Pursuant to Article 20 of the Statute of the Court and Article 97 of the RoP, written observations have been received in Case E15/15 from:

darin enthaltenen Vermögenswerte bloss dann vorsieht, wenn sich die Änderungen bei den erteilten Informationen aus „Änderungen von Rechtsvorschriften ergeben“, nicht aber auch „im Fall eines Zusatzvertrages“ (Anhang III B.b.2 der Richtlinie 2002/83/EG)?

29 Die erste vorgelegte Frage in der Rechtssache E-16/15 ist im Grunde identisch mit der ersten Frage in der Rechtssache E-15/15, wobei der einzige Unterschied darin besteht, dass das vorlegende Gericht anstelle der Formulierung „übernimmt“ die Formulierung „übernommen hat“ gewählt hat. Die dritte Frage in der Rechtssache E-16/15 ist identisch mit der dritten Frage in der Rechtssache E-15/15. Die zweite Frage in der Rechtssache E-16/15, die für den Fall gestellt wird, dass der Gerichtshof die erste Frage bejaht, ist im Wesentlichen mit Frage 2.a) in der Rechtssache E-15/15 identisch und lautet folgendermassen:

2. **Ist Art. 36 Abs. 2 der Richtlinie 2002/83/EG über Lebensversicherungen dahin auszulegen, dass es sich bei rechtsgeschäftlicher Vertragsübernahme der fondsgebundenen Lebensversicherung bloss um allgemeine Informationen dem neuen Versicherungsnehmer gegenüber handeln muss oder ist die Versicherung diesem gegenüber auch zu Informationen konkret zu dem von ihm zu übernehmenden Versicherungsprodukt, insbesondere zu einem allenfalls abweichenden Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers, verpflichtet?**

V SCHRIFTLICHE ERKLÄRUNGEN

30 Gemäss Artikel 20 der Satzung des Gerichtshofs und Artikel 97 der Verfahrensordnung haben in der Rechtssache E-15/15 schriftliche Erklärungen abgegeben:

- the applicant, represented by Helmut Schwärzler and Matthias Niedermüller, advocates;
- the defendant, represented by Moritz Blasy and Simon Ott, advocates.

31 Pursuant to the same provisions, written observations have been received in Case E-16/15 from:

- the applicant, represented by Helmut Schwärzler and Matthias Niedermüller, advocates;
- the defendant, represented by Peter Nägele and Thomas Nägele, advocates.

32 Similarly, pursuant also to the same provisions, written observations have been received in both cases from:

- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, and Monika Zelger-Jarnig, Senior Legal Officer, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Director, Maria Moustakali and Clémence Perrin, Senior Officers, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Joan Rius Riu and Karl-Philipp Wojcik, Members of its Legal Service, acting as Agents.

– der Kläger, vertreten durch Helmut Schwärzler und Matthias Niedermüller, Rechtsanwälte;

– die Beklagte, vertreten durch Moritz Blasy und Simon Ott, Rechtsanwälte.

31 Gemäss denselben Bestimmungen haben in der Rechtssache E-16/15 schriftliche Erklärungen abgegeben:

– der Kläger, vertreten durch Helmut Schwärzler und Matthias Niedermüller, Rechtsanwälte;

– die Beklagte, vertreten durch Peter Nägele und Thomas Nägele, Rechtsanwälte.

32 Gemäss denselben Bestimmungen haben in beiden Rechtssachen schriftliche Erklärungen abgegeben:

– die Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch, Direktorin, und Monika Zelger-Jarnig, leitende juristische Mitarbeiterin, von der Stabstelle EWR, als Bevollmächtigte;

– die EFTA-Überwachungsbehörde, vertreten durch Carsten Zatschler, Direktor, Maria Moustakali und Clémence Perrin, leitende Beamtinnen, sowie Marlene Lie Hakkebo, Beamtin (befristet), Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

– die Europäische Kommission (im Folgenden: Kommission), vertreten durch Joan Rius Riu und Karl-Philipp Wojcik, Mitarbeiter des Juristischen Dienstes der Kommission, als Bevollmächtigte.

VI SUMMARY OF THE ARGUMENTS SUBMITTED AND PROPOSED ANSWERS

ADMISSIBILITY

33 Vienna Life argues that the request for an advisory opinion in Case E15/15 is inadmissible. It submits that even if an assurance undertaking has a duty to provide information to the purchaser of a second-hand policy, which Vienna Life denies, violation of such duty could never be regarded as causal for damage resulting from the acquisition of the assurance policy. Therefore, Question 1 is purely hypothetical. According to Vienna Life, the same applies to Question 2(c) since a waiver by a primary policy holder of the right to be provided with the information stipulated in Annex III to the Directive has not been granted in the case. Finally, Vienna Life argues that Question 3 is also purely hypothetical since the transfer of the beneficial rights arising under a life assurance policy cannot be regarded as a change in the conditions of the life assurance policy at issue.

THE QUESTIONS REFERRED TO THE COURT

THE FIRST QUESTIONS IN CASES E-15/15 AND E-16/15

The applicants

34 First, the applicants submit, with regard to the scope of Article 36 of the Directive, that paragraphs 1 and 2 of that provision refer simply to a "policy holder" without distinguishing between the original policy holder and its legal successor. According to the applicants, it is therefore clear that the term "policy holder" used in Article 36(1) and (2) must also include any natural or legal person who by virtue of a

VI ZUSAMMENFASSUNG DER DEM GERICHTSHOF VORGELEGTEN AUSFÜHRUNGEN UND VORGESCHLAGENEN ANTWORTEN

ZULÄSSIGKEIT

33 Vienna-Life bringt vor, der Antrag auf Vorabentscheidung in der Rechtssache E-15/15 sei unzulässig. Selbst wenn ein Versicherungsunternehmen verpflichtet ist, dem Käufer einer gebrauchten Police Informationen mitzuteilen, was Vienna-Life bestreitet, könnte die Verletzung dieser Verpflichtung niemals als ursächlich für Schäden, die aus der Übernahme der Versicherungspolice entstanden sind, betrachtet werden. Dementsprechend ist Frage 1 rein hypothetischer Natur. Vienna-Life zufolge gilt dies auch für Frage 2.c), da eine Freistellung seitens des ursprünglichen Versicherungsnehmers von der Informationspflicht nach Anhang III der Richtlinie nicht erteilt wurde. Abschliessend macht Vienna-Life geltend, dass Frage 3 ebenfalls rein hypothetischer Natur ist, da die Übernahme der Ansprüche aus einer Lebensversicherungspolice nicht als Zusatzvertrag der gegenständlichen Lebensversicherungspolice gewertet werden kann.

DEM GERICHTSHOF VORGELEGTE FRAGEN

ZU DEN FRAGEN UNTER ZIFFER 1 IN DEN RECHTSSACHEN E-15/15 UND E-16/15

Die Kläger

34 Als erstes halten die Kläger mit Blick auf den Geltungsbereich des Artikels 36 der Richtlinie fest, dass sich die Absätze 1 und 2 dieser Bestimmung nur auf einen „Versicherungsnehmer" beziehen, ohne dabei zwischen dem ursprünglichen Versicherungsnehmer und dessen Rechtsnachfolger zu unterscheiden. Dementsprechend ist den Klägern zufolge klar, dass der Begriff „Versicherungsnehmer", wie in

legal transaction acquires an existing policy. A different conclusion would not only be incomprehensible, but also weaken the Directive as an instrument of consumer protection.

35 Second, although the referring court mentions only Article 36(2) in its first question, the applicants submit that it is only reasonable that the assurer provide its prospective contractual partner also with the information referred to in Article 36(1), which is listed in Annex III(A) to the Directive. The reason for this is that Article 36(1) imposes certain obligations on the assurer before the assurance contract is concluded. Since the new policy holder could also be said to conclude an assurance contract, the wording of Article 36(1) applies to the new policy holder as well. The applicants maintain that the spirit and purpose of the Directive, in particular as evidenced in recital 52 of the Directive, also support the interpretation advanced here.

36 With regard to the application of Article 36(1) of the Directive to the present case, the applicants observe that the case law of the Court confirms that life assurance contracts are generally of a complex nature, the details of which may be difficult to understand for the average consumer.[3] In addition, the legal transfer of the assurance contract requires the approval of the assurer. Thus, another contractual partner cannot be imposed on the assurer contrary to its will.

3 Reference is made to Case E-11/12 *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG* [2013] EFTA Ct. Rep. 272, paragraph 63.

Artikel 36 Absatz 1 und 2 verwendet, auch natürliche oder juristische Personen umfasst, die eine vorhandene Police rechtsgeschäftlich erwerben. Eine davon abweichende Schlussfolgerung wäre nicht nur unverständlich, sondern würde zudem die Richtlinie als Instrument des Verbraucherschutzes schwächen.

35 Zweitens argumentieren die Kläger – obwohl das vorlegende Gericht in seiner ersten Frage nur auf Artikel 36 Absatz 2 Bezug nimmt –, es sei nur vernünftig, dass das Versicherungsunternehmen seinem künftigen Vertragspartner ebenfalls die in Artikel 36 Absatz 1 genannten Angaben macht, die in Anhang III Buchstabe A der Richtlinie aufgeführt sind. Der Grund hierfür ist, dass Artikel 36 Absatz 1 dem Versicherungsunternehmen vor Abschluss des Versicherungsvertrags bestimmte Verpflichtungen auferlegt. Da der neue Versicherungsnehmer sozusagen einen Versicherungsvertrag abschliesst, ist der Wortlaut von Artikel 36 Absatz 1 auch auf den neuen Versicherungsnehmer anwendbar. Die Kläger heben hervor, dass der Sinn und Zweck der Richtlinie, wie er insbesondere aus Erwägungsgrund 52 der Richtlinie hervorgeht, diese Auslegung ebenfalls stützt.

36 Im Hinblick auf die Anwendung von Artikel 36 Absatz 1 der Richtlinie auf die gegenständliche Rechtssache führen die Kläger aus, dass die Rechtsprechung des Gerichtshofs bestätigt, dass Lebensversicherungsverträge in der Regel komplex sind und deren Einzelheiten für den Durchschnittsverbraucher schwierig zu verstehen sein können.[3] Darüber hinaus erfordert die rechtsgeschäftliche Übernahme der Versicherungspolice die Zustimmung des Versicherungsunternehmens. Folglich kann dem Versicherungsunternehmen nicht gegen seinen Willen ein anderer Vertragspartner aufgezwungen werden.

3 Es wird auf die Rechtssache E-11/12 *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG*, Slg. 2013, EFTA Court Report, S. 272, Randnr. 63, verwiesen.

37 In the event that the Court does not share the applicants' views concerning the application of Article 36(1) of the Directive, they submit that Article 36(2) applies all the same. According to that provision, a policy holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B) to the Directive. That annex provides that if a change in the policy conditions or an amendment of the applicable law takes place, all the information listed in points a(4) to a(12) in Annex III(A) must be provided to the policy holder. The applicants argue that both of these conditions cover the acquisition of an existing assurance policy by a new policy holder through the legal transfer of an assurance contract. In any case, they maintain that there are cases – such as the change of policy holder – where the assurer must realise that its new contractual partner is in need of comprehensive information.

38 The applicants both propose that the Court should provide the following answer to the first question:

In the case where a person who, by a legal transaction acquires a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract ('second-hand policies') Article 36(1) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance applies to the effect that the duties to provide information referred to therein and in Annex III(A) must be fulfilled.

In eventu:

Article 36(2) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance is to be interpreted as meaning that the duties to provide information referred to therein and in Annex III(A)(a)(11) and (a)(12) and (B)(b)(2) for unit-

37 Sollte der Gerichtshof die Ansicht der Kläger hinsichtlich der Anwendung von Artikel 36 Absatz 1 der Richtlinie nicht teilen, gilt Artikel 36 Absatz 2 nach Meinung der Kläger gleichwohl. Gemäss dieser Bestimmung muss der Versicherungsnehmer während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B der Richtlinie aufgeführten Angaben auf dem Laufenden gehalten werden. Dieser Anhang sieht vor, dass dem Versicherungsnehmer im Fall eines Zusatzvertrages oder einer Änderung der für den Vertrag geltenden Rechtsvorschriften alle Angaben gemäss Anhang III Buchstabe A.a.4 bis a.12 mitzuteilen sind. Die Kläger machen geltend, dass diese beiden Voraussetzungen die rechtsgeschäftliche Übernahme einer bestehenden Versicherungspolice durch einen neuen Versicherungsnehmer abdecken. Jedenfalls gibt es Situationen – wie bei der Änderung des Versicherungsnehmers – in denen dem Versicherungsunternehmen klar sein muss, dass sein neuer Vertragspartner umfassende Informationen benötigt.

38 Beide Kläger schlagen vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Für den Fall, dass eine Person eine fondsgebundene Lebensversicherung von einer anderen Person mit Zustimmung des Versicherers rechtsgeschäftlich im Wege der Vertragsübernahme übernimmt („Secondhand-Policen“), gilt Artikel 36 Absatz 1 der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen insoweit, als die darin und in Anhang III Buchstabe A genannten Informationspflichten bestehen.

Hilfsweise:

Artikel 36 Absatz 2 der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen ist dahingehend auszulegen, dass die dort und in Anhang III Buchstaben A.a.11 und a.12 bzw. B.b.2 für fondsgebundene

linked life assurance policies must also be fulfilled in the case where a person who, by a legal transaction, acquires a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract ('second-hand policies'). The transfer of the assurance contract constitutes a "change in policy conditions" and "amendment of the law applicable to the contract" according to Annex III(B)(b)(2). Ultimately, however, all the information listed in points (a)(4) to (a)(12) are also to be given where the assurer or its subordinates realise or should realise with due attention that the policy holder is in need of or is mistaken about any such information or where such information is itself subject to change.

The defendants

39 In the event that the Court does not view the first question in Case E15/15 as purely hypothetical, and thereby inadmissible, Vienna Life argues that it would hamper the secondary market for life assurance policies if assurance undertakings were obliged to provide the purchasers with the information specified in Annex III to the Directive. In addition, such an obligation would necessarily require contact between the assurance undertaking and the future purchaser prior to the acquisition of the policy. In contrast, Vienna Life submits that there can be no duty on an assurance undertaking to provide the purchaser of a second-hand life assurance policy with information on the policy in advance of the purchase since this is a mere two-party transaction to which the assurance undertaking is not a party.

40 Vienna Life submits further that the brokerage of second-hand life assurance policies only results in the transfer of existing rights and

Lebensversicherungen genannten Informationspflichten auch dann bestehen, wenn eine Person eine fondsgebundene Lebensversicherung von einer anderen Person mit Zustimmung des Versicherers rechtsgeschäftlich im Wege der Vertragsübernahme übernimmt („Secondhand-Policen"). Die Übernahme des Versicherungsvertrags stellt einen „Zusatzvertrag" bzw. eine „Änderung der für den Vertrag geltenden Rechtsvorschriften" im Sinne von Anhang III Buchstabe B.b.2 dar. Letztlich sind jedoch alle in den Abschnitten a.4 bis a.12 genannten Informationen mitzuteilen, wenn dem Versicherungsunternehmen oder dessen Verantwortlichen klar wird bzw. bei gebührender Aufmerksamkeit klar werden sollte, dass der Versicherungsnehmer Informationen benötigt bzw. hinsichtlich solcher Informationen ein Irrtum besteht oder wenn sich solche Informationen ändern.

Die Beklagten

39 Für den Fall, dass der Gerichtshof die erste Frage in der Rechtssache E-15/15 nicht als rein hypothetisch und damit unzulässig erachtet, macht Vienna-Life geltend, es würde den Sekundärmarkt für Lebensversicherungen behindern, wenn Versicherungsunternehmen verpflichtet wären, Käufern die Informationen gemäss Anhang III der Richtlinie mitzuteilen. Zudem würde eine solche Verpflichtung zwingend den Kontakt zwischen dem Versicherungsunternehmen und dem künftigen Käufer im Vorfeld der Übernahme der Police voraussetzen. Laut Vienna-Life kann jedoch keine Verpflichtung eines Versicherungsunternehmens bestehen, dem Käufer einer Secondhand-Lebensversicherungspolice vor der Übernahme Informationen über die Police mitzuteilen, da es sich um eine Transaktion zwischen zwei Parteien handelt und der Versicherer hieran nicht beteiligt ist.

40 Die Vermittlung von Secondhand-Lebensversicherungspolicen, so führt Vienna-Life weiter aus, führt nur zu einer Übernahme der bestehenden Rechte, begründet aber kein neues

does not create a new assurance relationship. In fact, such brokerage should be regarded as an investment advisory service, which means that it falls to the brokers on the secondary market to inform and advise the purchaser in accordance with Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

41 Vienna Life therefore proposes that the first question in Case E-15/15 be answered in the negative.

42 Swiss Life's arguments with regard to the first question in Case E-16/15 are substantively the same as those of Vienna Life. In addition, Swiss Life contends that, having regard to Liechtenstein law in general, a transfer of a contract entails that one party to the contract is replaced by a third party. The new party fully replaces the previous one, so that the latter completely withdraws from the contractual relationship. This means that the complete contractual legal status is transferred to an unrelated third party, the transferee of the contract, without any change of content or legal identity of the present contract. This entails that no new assurance relationship is established. Rather, the claims from an existing unchanged contract are transferred against payment.

43 Swiss Life proposes that the first question in Case E-16/15 be answered in the negative.

Government of the Principality of Liechtenstein

44 The Liechtenstein Government submits that the Directive does not address legal transactions such as those in which a unit-linked life assurance policy is transferred via a purchase agreement from one

Versicherungsverhältnis. Tatsächlich sollte eine derartige Vermittlung als Anlageberatung gelten, sodass es Aufgabe der Vermittler am Sekundärmarkt ist, den Käufer gemäss Richtlinie 2004/39/EG des Europäischen Parlaments und des Rates vom 21. April 2004 über Märkte für Finanzinstrumente, zur Änderung der Richtlinien 85/611/EWG und 93/6/EWG des Rates und der Richtlinie 2000/12/EG des Europäischen Parlaments und des Rates und zur Aufhebung der Richtlinie 93/22/EWG des Rates (ABl. 2004 L 145, S. 1) zu informieren und zu beraten.

41 Vienna-Life schlägt daher vor, die erste Frage in der Rechtssache E-15/15 zu verneinen.

42 Die Argumente von Swiss Life hinsichtlich der ersten Frage in der Rechtssache E-16/15 sind im Wesentlichen mit jenen von Vienna-Life identisch. Swiss Life trägt jedoch mit Blick auf das liechtensteinische Recht im Allgemeinen zusätzlich vor, dass im Zuge der Übernahme eines Vertrags eine Vertragspartei durch eine dritte Partei ersetzt wird. Die neue Partei tritt uneingeschränkt an die Stelle der früheren Partei, sodass sich diese vollkommen aus dem Vertragsverhältnis zurückzieht. Das bedeutet, der gesamte vertragliche Rechtsstatus geht ohne Änderung des Inhalts oder der Rechtspersönlichkeit des gegenständlichen Vertrags auf eine unbeteiligte dritte Partei – den Vertragsübernehmer – über. Dementsprechend entsteht kein neues Versicherungsverhältnis. Vielmehr werden Ansprüche aus einem bestehenden, unveränderten Vertrag gegen Entgelt übernommen.

43 Vienna-Life schlägt vor, die erste Frage in der Rechtssache E-16/15 zu verneinen.

Die Regierung des Fürstentums Liechtenstein

44 Der Regierung des Fürstentums Liechtenstein zufolge findet die Richtlinie auf Rechtsgeschäfte, wie der Übertragung einer fondsgebundenen Lebensversicherung durch Kaufvertrag von einer

person to another. In fact, it follows from Article 36(4) of the Directive that it is for the EEA State of commitment to lay down the detailed rules for implementing Article 36 and Annex III.

45 According to the Liechtenstein Government, it follows from Article 32 of the Directive that legal transactions concerning contracts falling within the Directive's scope are subject to the law of the respective EEA State. The Liechtenstein Government argues that this view is further supported by recital 44 of the Directive and case law of the Court.[4]

46 The Liechtenstein Government therefore concludes that it is for the referring court to assess all the facts of the case and determine according to the national law applicable to contracts relating to the activities of the Directive whether information duties exist and, if so, what they entail in the case of a transfer of a unit-linked life assurance policy via a purchase agreement.

47 In the event that the Court adopts a different interpretation, the Liechtenstein Government submits that the transfer of a unit-linked life assurance policy by a legal transaction does not constitute a change in the policy conditions. A change in the policy conditions means an additional or altered contract, in other words a "new" contract, as is the case, for example, where an additional risk is covered. This interpretation of the phrase "policy conditions", as used in Annex III(B)(b)(2), is strengthened by the German-language version of the Annex, which refers to a "Zusatzvertrag", which

4 Ibid., paragraphs 113 and 114.

Person auf eine andere, keine Anwendung. Tatsächlich ist Artikel 36 Absatz 4 der Richtlinie zu entnehmen, dass die Durchführungsvorschriften zur Umsetzung von Artikel 36 und Anhang III der Richtlinie vom EWR-Staat der Verpflichtung erlassen werden.

45 Laut der Regierung des Fürstentums Liechtenstein geht aus Artikel 32 der Richtlinie hervor, dass auf Rechtsgeschäfte über Verträge, die vom Geltungsbereich der Richtlinie umfasst sind, das Recht des jeweiligen EWR-Staats anwendbar ist. Diese Ansicht wird durch Erwägungsgrund 44 der Richtlinie und die Rechtsprechung des Gerichtshofs[4] weiter gestützt.

46 Die Regierung des Fürstentums Liechtenstein gelangt daher zu dem Schluss, es sei Aufgabe des vorlegenden Gerichts, den Sachverhalt in der Rechtssache zu prüfen und auf der Grundlage des auf Verträge im Zusammenhang mit von der Richtlinie abgedeckten Aktivitäten ‚anwendbaren nationalen Rechts festzustellen, ob Informationspflichten bestehen und wenn ja, was diese für die Übernahme einer fondsgebundenen Lebensversicherung mittels Kaufvertrag vorsehen.

47 Für den Fall, dass der Gerichtshof eine andere Auffassung vertreten sollte, merkt die Regierung des Fürstentums Liechtenstein an, dass die rechtsgeschäftliche Übernahme einer fondsgebundenen Lebensversicherung keinen Zusatzvertrag darstellt. Bei einem Zusatzvertrag handelt es sich um einen zusätzlichen oder abgeänderten Vertrag, in anderen Worten um einen „neuen“ Vertrag, wie es der Fall ist, wenn beispielsweise ein zusätzliches Risiko abgedeckt wird. Diese Auslegung des englischen Wortlauts „policy conditions“ laut Anhang III Buchstabe B.b.2 wird durch die deutsche Sprachfassung dieses Anhangs untermauert, in der wörtlich von

4 Ebenda, Randnrn. 113 und 114.

literally means “accessory contract”. In any event, the transfer of a unit-linked assurance policy cannot be interpreted as constituting a “change of policy conditions” since the existing policy is not being changed or supplemented.

48 The Liechtenstein Government proposes that the Court should provide the following answer to the first question:

The answer to the first question of the referring Court should be that it is for the referring Court to assess all the facts of the case and to determine according to the national law applicable to contracts relating to the activities referred to in Directive 2002/83/EC whether or which information duties have to be fulfilled in case of a transfer of a unit-linked life assurance policy via a purchase agreement from one person to another.

ESA

49 ESA argues that the referring court is mistaken in focusing its first question in each case on Article 36(2) of the Directive, concerning information to be provided “throughout the term of the contract”. Rather, ESA contends, the referring court should have focused on Article 36(1) of the Directive, concerning information to be provided “[b]efore the assurance contract is concluded”.

50 In order to answer the referring court’s first question, ESA submits that the starting point should be the rationale underlying Article 36 of the Directive, which is the protection of policy holders. That entails that Article 36(1) must be examined from the point of view of

einem „Zusatzvertrag“ die Rede ist. Die Übernahme einer fondsgebundenen Lebensversicherung kann keinesfalls als „Zusatzvertrag“ gewertet werden, da die bestehende Police nicht geändert oder ergänzt wird.

48 Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Die Antwort auf die erste Frage des vorlegenden Gerichts sollte lauten, dass es Aufgabe des vorlegenden Gerichts ist, den Sachverhalt in der Rechtssache zu prüfen und auf der Grundlage des auf Verträge im Zusammenhang mit von der Richtlinie 2002/83/EG abgedeckten Aktivitäten anwendbaren nationalen Rechts festzustellen, ob und welche Informationspflichten im Falle der Übertragung einer fondsgebundenen Lebensversicherung mittels Kaufvertrag von einer Person an eine andere bestehen.

Die EFTA-Überwachungsbehörde

49 Die EFTA-Überwachungsbehörde meint, dass das vorlegende Gericht irrt, wenn es seine erste Frage in den beiden Rechtssachen auf Artikel 36 Absatz 2 der Richtlinie stützt, der Angaben betrifft, über die der Versicherungsnehmer „während der gesamten Vertragsdauer“ auf dem Laufenden gehalten werden muss. Das vorlegende Gericht hätte sich, so die EFTA-Überwachungsbehörde, vielmehr auf Artikel 36 Absatz 1 der Richtlinie beziehen sollen, der sich mit Angaben beschäftigt, die „[v]or Abschluss des Versicherungsvertrags“ mitzuteilen sind.

50 Nach Ansicht der EFTA-Überwachungsbehörde sollte das Artikel 36 der Richtlinie zugrundeliegende Anliegen – der Schutz der Versicherungsnehmer – den Ausgangspunkt für die Beantwortung der ersten Frage des vorlegenden Gerichts bilden. Dementsprechend müsste Artikel 36 Absatz 1 vom Standpunkt der

policy holders.[5] In this regard, ESA adds that there is no difference from the point of view of the policy holder between the conclusion of a new contract and the acquisition of an existing one. Thus, the person acquiring the second-hand life assurance policy should be considered a new policy holder for the purposes of the obligation to provide information under the Directive and be entitled to the same information as any other new policy holder. With that in mind, ESA suggests that the Court should answer the questions referred on the basis of Article 36 as a whole and not simply on the basis of Article 36(2).

51 Furthermore, ESA argues that the information to be provided during the term of the contract is only effective and relevant if the policy holder has received the relevant information pursuant to Annex III(A) before the conclusion of the contract. If the policy holder has not first been provided with the information required under Article 36(1) of the Directive, he will not be in a position to fully understand the changes occurring to the life assurance product throughout its term. ESA further argues that the interpretation of the principles of national contract law, in particular those applying to the legal transaction that took place between the original and the second-hand policy holder, must be interpreted in a way which does not affect the effectiveness of the Directive.

5 Reference is made to recital 52 of the Directive, *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG*, cited above, paragraph 62, and Case E-1/05 *ESA* v *Kingdom of Norway* [2005] EFTA Ct. Rep. 234, paragraph 42.

Versicherungsnehmer aus betrachtet werden.[5] Die EFTA-Überwachungsbehörde fügt diesbezüglich hinzu, dass vom Standpunkt des Versicherungsnehmers aus kein Unterschied zwischen dem Abschluss eines neuen Vertrags und der Übernahme eines vorhandenen besteht. Die Person, die die Secondhand-Lebensversicherungspolice übernimmt, sollte daher für die Zwecke der Informationspflichten im Sinne der Richtlinie als neuer Versicherungsnehmer gelten und Anspruch auf dieselben Informationen haben wie jeder andere neue Versicherungsnehmer. In Anbetracht dessen schlägt die EFTA-Überwachungsbehörde vor, dass der Gerichtshof die auf der Grundlage von Artikel 36 vorgelegten Fragen gesamtheitlich und nicht nur mit Blick auf Artikel 36 Absatz 2 beantwortet.

51 Darüber hinaus argumentiert die EFTA-Überwachungsbehörde, die während der Laufzeit des Vertrages mitzuteilenden Informationen seien nur sinnvoll und relevant, wenn der Versicherungsnehmer die einschlägigen Informationen gemäss Anhang III Buchstabe A vor Vertragsabschluss erhalten hat. Wurden dem Versicherungsnehmer nicht zuerst die Angaben laut Artikel 36 Absatz 1 der Richtlinie mitgeteilt, wird er nicht in der Lage sein, die Veränderungen am Versicherungsprodukt während dessen Laufzeit vollkommen zu verstehen. Die EFTA-Überwachungsbehörde argumentiert weiter, dass die Auslegung allgemeiner Grundsätze des nationalen Vertragsrechts und insbesondere derjenigen Grundsätze, die auf das Rechtsgeschäft zwischen dem ursprünglichen Versicherungsnehmer und dem Übernehmer der gebrauchten Police Anwendung finden, in einer Weise stattfinden muss, welche die Wirksamkeit der Richtlinie nicht beeinträchtigt.

5 Es wird auf Erwägungsgrund 52 der Richtlinie, die Rechtssache *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG*, oben erwähnt, Randnr. 62, und die Rechtssache E-1/05 *ESA* v *Kingdom of Norway*, Slg. 2005, EFTA Court Report, S. 234, Randnr. 42, verwiesen.

52 ESA maintains that the transfer of the life assurance policy is undertaken with the consent of the assurer and that the assurance undertaking is thus made aware of the identity of the new potential policy holder before the transfer of the assurance policy takes place. The assurance undertaking is therefore in a position to communicate the information listed in Annex III(A) before the contract is transferred. In addition, in order to be effective, such information should be updated and reflect the situation as it stands at the time of the actual transfer. To take a different approach would run counter to the rationale and effectiveness of the Directive.[6]

53 ESA proposes that the Court should provide the following answer to the first question referred:

Article 36(1) of Directive 2002/83/EC concerning life assurance is to be interpreted as meaning that the duty to provide information referred to therein and in Annex III(A), including (a)(11) and (a)(12) for unit-linked life assurance policies, must also be fulfilled in the case where a person acquires by a legal transaction a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract. As such transaction amounts to the conclusion of a new contract for the purposes of the duty to provide information, Article 36(2) of the Directive is not applicable.

The Commission

54 The Commission's arguments, with regard to the first question in each case, are substantively the same as those of ESA. In addition, the Commission argues that, although neither Article 36(1) and (2) of

6 Reference is made to *ESA* v *Kingdom of Norway*, cited above, paragraph 43.

52 Die EFTA-Überwachungsbehörde führt aus, dass die Übertragung der Lebensversicherungspolice mit Zustimmung des Versicherers erfolgt und das Versicherungsunternehmen deshalb vor der Übernahme der Versicherungspolice über die Identität des neuen potenziellen Versicherungsnehmers in Kenntnis gesetzt wird. Das Versicherungsunternehmen ist daher durchaus in der Lage, die in Anhang III Buchstabe A aufgeführten Angaben vor der Vertragsübernahme mitzuteilen. Um wirksam zu sein, sollten solche Informationen zudem aktualisiert werden und die Lage zum Zeitpunkt der tatsächlichen Übernahme widerspiegeln. Jeder andere Ansatz würde dem Anliegen und der Wirksamkeit der Richtlinie entgegenstehen.[6]

53 Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die erste vorgelegte Frage folgendermassen beantwortet:

Artikel 36 Absatz 1 der Richtlinie 2002/83/EG über Lebensversicherungen ist dahingehend auszulegen, dass die dort und in Anhang III Buchstabe A einschliesslich a.11 und a.12 für fondsgebundene Lebensversicherungen genannte Informationspflicht auch dann besteht, wenn eine Person eine fondsgebundene Lebensversicherung von einer anderen Person mit Zustimmung des Versicherers rechtsgeschäftlich im Wege der Vertragsübernahme übernimmt. Da ein solches Geschäft für die Zwecke der Informationspflicht dem Abschluss eines neuen Vertrags gleichkommt, ist Artikel 36 Absatz 2 der Richtlinie nicht anwendbar.

Die Kommission

54 Die Argumente der Kommission hinsichtlich der ersten Frage sind in beiden Rechtssachen im Wesentlichen mit jenen der EFTA-Überwachungsbehörde identisch. Zudem bringt die Kommission vor,

6 Es wird auf die Rechtssache *ESA* v *Kingdom of Norway*, oben erwähnt, Randnr. 43, verwiesen.

the Directive nor Annex III to the Directive deal explicitly in their wording with the situation of a transfer of a unit-linked life assurance policy from one person to another with the consent of the assurer, the objective of the Directive should nevertheless lead to an interpretation whereby the pre-contractual information requirements and the information requirements during the duration of the contract also apply to such situations.

55 The Commission concedes that, when the second-hand buyer acquires the assurance policy from the original purchaser, an assurance contract already exists. However, this does not preclude the possibility that the acquisition of the insurance policy can be regarded as the conclusion of another assurance contract distinct from the initial one. Moreover, this interpretation is supported by recital 5 of the Directive. Furthermore, in the Commission's view, the transfer of an assurance contract requires the consent of the assurance undertaking as this is a contract of mutual obligations.

56 Finally, the Commission maintains that if its interpretation of the Directive is not accepted, that might entail a risk that the information requirements set out therein are circumvented.

57 The Commission proposes that the Court should provide the following answer to the first question:

The Directive is to be interpreted in such a way that Article 36(1) and (2) of the Directive in connection with Annex III, and in particular Annex III(A)(a)(11)(12) and (B)(b)(2) for unit-linked life assurance policies are applicable to cases where a person, by a legal transaction, acquires a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract ('second-hand policies').

dass die Zielsetzung der Richtlinie – obschon weder Artikel 36 Absatz 1 und 2 noch Anhang III der Richtlinie in ihrem Wortlaut ausdrücklich auf die Möglichkeit der Übertragung einer fondsgebundenen Lebensversicherung mit Zustimmung des Versicherungsunternehmens von einer Person auf eine andere eingehen – trotzdem zu einer Auslegung führen sollte, in der die vorvertraglichen Informationspflichten sowie die Informationspflichten, die während der Laufzeit des Vertrags bestehen, auch auf solche Umstände anwendbar sind.

55 Die Kommission vertritt die Auffassung, dass der Versicherungsvertrag zum Zeitpunkt der Übernahme der gebrauchten Versicherungspolice durch den Käufer bereits existiert. Dies schliesst jedoch die Möglichkeit nicht aus, die Übernahme der Versicherungspolice als Abschluss eines weiteren, vom ursprünglichen Vertrag getrennten Versicherungsvertrags zu betrachten. Diese Auslegung wird zudem durch Erwägungsgrund 5 der Richtlinie untermauert. Nach Ansicht der Kommission erfordert die Übernahme des Versicherungsvertrags zudem die Zustimmung des Versicherungsunternehmens, da der Vertrag Verpflichtungen für beide Seiten vorsieht.

56 Wenn, so die Kommission abschliessend, ihre Auslegung der Richtlinie nicht anerkannt wird, könnte dies dazu führen, dass die darin festgelegten Informationspflichten umgangen werden.

57 Die Kommission schlägt vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Die Richtlinie ist dahingehend auszulegen, dass Artikel 36 Absatz 1 und 2 der Richtlinie in Verbindung mit Anhang III und insbesondere Anhang III Buchstaben A.a.11 und 12 bzw. B.b.2 auf fondsgebundene Lebensversicherungen in Fällen anwendbar sind, in denen eine Person eine fondsgebundene Lebensversicherung von einer anderen Person mit Zustimmung des Versicherers rechtsgeschäftlich im Wege der Vertragsübernahme übernimmt („Secondhand-Policen“).

THE SECOND QUESTIONS IN CASES E-15/15 AND E-16/15

58 If the Court answers the first question in the affirmative, the referring court then asks Question 2(a) in Case E-15/15 and Question 2 in Case E16/15. In addition, in Case E-15/15, if Question 2(a) is answered in the negative, then Question 2(b) is asked. If this is also answered in the negative, finally Question 2(c) is asked.

The applicants

59 With regard to Question 2(a) in Case E-15/15, Mr Hagedorn submits that the wording of Annex III(B)(b)(2) unmistakeably requires the assurer also to provide information concerning the assurance product to be acquired. In this regard, Mr Hagedorn reiterates that it is the purpose of the Directive to ensure that the consumer receives clear and accurate information on the essential characteristics of the assurance product offered to him to be able to choose the insurance product best suited to his needs.[7]

60 Mr Hagedorn maintains that, although the Court made it clear in *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG* that the Directive does not impose any obligation on the assurer to provide advice, there is no reason for subjecting consumers to entirely different standards of protection depending on whether they purchase a direct investment product, falling under the

7 Reference is made to recital 52 of the Directive and to *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG*, cited above, paragraph 64.

ZU DEN FRAGEN UNTER ZIFFER 2 IN DEN RECHTSSACHEN E-15/15 UND E-16/15

58 Für den Fall, dass der Gerichtshof die erste Frage bejaht, stellt das vorlegende Gericht in der Rechtssache E-15/15 zusätzlich Frage 2.a) und in der Rechtssache E-16/15 zusätzlich Frage 2. Darüber hinaus wird in der Rechtssache E-15/15 für den Fall der Verneinung der Frage 2.a) zusätzlich Frage 2.b) gestellt. Wird auch diese Frage verneint, wird schliesslich noch Frage 2.c) gestellt.

Die Kläger

59 Zu Frage 2.a) in der Rechtssache E-15/15 bringt Franz-Josef Hagedorn vor, der Wortlaut von Anhang III Buchstabe B.b.2 fordere vom Versicherungsunternehmen unmissverständlich, auch Informationen über das zu übernehmende Versicherungsprodukt mitzuteilen. In diesem Zusammenhang weist Franz-Josef Hagedorn darauf hin, dass der Zweck der Richtlinie darin besteht zu gewährleisten, dass der Verbraucher klare und genaue Angaben über die wesentlichen Merkmale des ihm angebotenen Versicherungsprodukts erhält, die ihn in die Lage versetzen, jenes Versicherungsprodukt wählen zu können, das seinen individuellen Bedürfnissen am ehesten entspricht.[7]

60 Franz-Josef Hagedorn macht geltend, obwohl der Gerichtshof in der Rechtssache *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG* klargestellt habe, dass die Richtlinie dem Versicherungsunternehmen keinerlei Verpflichtung zur Beratung auferlege, gebe es keinen Grund, Verbraucher nach vollkommen unterschiedlichen Standards zu schützen, je nachdem, ob sie ein

7 Es wird auf Erwägungsgrund 52 der Richtlinie und die Rechtssache *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG*, oben erwähnt, Randnr. 64, verwiesen.

MiFID Directive,[8] or purchase the very same product contained within an assurance policy.

61 With regard to Question 2(b) in Case E-15/15, Mr Hagedorn submits that the assurer is obliged to provide the new policy holder with comprehensive information irrespective of whether the transferee is an undertaking or a natural person. However, Mr Hagedorn also observes that the possibilities for natural persons to obtain information are generally not comparable to those of undertakings.

62 With regard to Question 2(c) in Case E-15/15, Mr Hagedorn submits that the assurer's duties to inform the original policy holder and its duties to inform the new policy holder have nothing to do with each other. The assurer's duty to inform the new policy holder is separate and has to be distinguished from the duty to inform the original policy holder. Moreover, the Directive does not provide for the possibility to dispense with providing the information.

63 Mr Hagedorn proposes that the Court should provide the following answers to the second question in Case E-15/15:

2(a) Article 36(2) of Directive 2002/83/EC concerning life assurance is to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, not only general information must be provided to the new policy holder, but all

8 Reference is made to Directive 2004/39/EC and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349).

Direktanlageprodukt, auf das die Richtlinie über Märkte für Finanzinstrumente anwendbar ist,[8] oder dasselbe Produkt im Rahmen einer Versicherungspolice erwerben.

61 Hinsichtlich Frage 2.b) in der Rechtssache E-15/15 hält Franz-Josef Hagedorn fest, dass das Versicherungsunternehmen verpflichtet ist, dem neuen Versicherungsnehmer unabhängig davon, ob es sich beim Übernehmer um ein Unternehmen oder eine natürliche Person handelt, umfassende Informationen mitzuteilen. Franz-Josef Hagedorn weist auch darauf hin, dass die Möglichkeiten natürlicher Personen, sich Informationen zu verschaffen, mit jenen von Unternehmen in der Regel nicht vergleichbar sind.

62 Zu Frage 2.c) in der Rechtssache E-15/15 trägt Franz-Josef Hagedorn vor, dass die Informationspflichten des Versicherungsunternehmens gegenüber dem ursprünglichen und gegenüber dem neuen Versicherungsnehmer voneinander unabhängig sind. Die Verpflichtung des Versicherungsunternehmens, den neuen Versicherungsnehmer zu informieren, ist getrennt von der Informationspflicht gegenüber dem ursprünglichen Versicherungsnehmer und von dieser zu unterscheiden. Zudem sieht die Richtlinie keine Möglichkeit vor, auf die Mitteilung von Informationen zu verzichten.

63 Franz-Josef Hagedorn schlägt vor, dass der Gerichtshof die zweite Frage in der Rechtssache E-15/15 folgendermassen beantwortet:

2.a) Artikel 36 Absatz 2 der Richtlinie 2002/83/EG über Lebensversicherungen ist dahin auszulegen, dass es sich im Fall der rechtsgeschäftlichen Übernahme einer fondsgebundenen Lebensversicherung nicht bloss um allgemeine Informationen dem

8 Es wird auf Richtlinie 2004/39/EG und Richtlinie 2014/65/EU des Europäischen Parlaments und des Rates vom 15. Mai 2014 über Märkte für Finanzinstrumente sowie zur Änderung der Richtlinien 2002/92/EG und 2011/61/EU (ABl. 2014 L 173, S. 349) verwiesen.

information listed in points (a)(4) to (a)(12) in Annex III(B)(b)(2) of Directive 2002/83/EC including information specifically regarding the assurance product to be acquired by him, in particular regarding any differences between the investor or risk profiles of the existing policy holder and of the transferee.

2(b) In the event that a unit-linked life assurance policy is acquired by a natural person or consumer from an undertaking, the assurer has to provide to the natural person or consumer all information listed in points (a)(4) to (a)(12) in Annex III(B)(b)(2) of Directive 2002/83/EC including information specifically regarding the assurance product and in particular also regarding any differences between the investor or risk profiles of the existing policy holder and of the transferee.

2(c) Directive 2002/83/EC does not provide for the possibility of dispensation with information regarding the assurance product. Therefore, no assurer can rely on dispensation of information given by the policy holder.

In eventu:

The transferee's right to be informed about the assurance product shall, in no way, be affected by any dispensation of information given to the assurer by the transferor.

64 With regard to the second question in Case E-16/15, Mr Armbruster's arguments are substantively the same as those of Mr Hagedorn in relation to Question 2(a) in Case E-15/15.

neuen Versicherungsnehmer gegenüber handeln muss, sondern um alle in Buchstabe A.a.4 bis a.12 genannten Angaben, auf die in Anhang III Buchstabe B.b.2 der Richtlinie 2002/83/EG verwiesen wird, einschliesslich Informationen konkret zu dem von ihm zu übernehmenden Versicherungsprodukt, insbesondere zu einem allenfalls abweichenden Anleger- bzw. Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers.

2.b) Im Fall der Übernahme einer fondsgebundenen Lebensversicherung durch eine natürliche Person oder einen Verbraucher von einem Unternehmen muss das Versicherungsunternehmen der natürlichen Person bzw. dem Verbraucher alle in Buchstabe A.a.4 bis a.12 genannten Angaben, auf die in Anhang III Buchstabe B.b.2 der Richtlinie 2002/83/EG verwiesen wird, einschliesslich Informationen konkret zu dem Versicherungsprodukt und insbesondere auch zu einem allenfalls abweichenden Anleger- bzw. Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers, mitteilen.

2.c) Richtlinie 2002/83/EG sieht keine Möglichkeit vor, auf Informationen zum Versicherungsprodukt zu verzichten. Dementsprechend kann sich kein Versicherungsunternehmen auf einen Informationsverzicht seitens des Versicherungsnehmers berufen.

Hilfsweise:

Das Recht des Vertragsübernehmers auf Informationen über das Versicherungsprodukt kann durch einen etwaigen Informationsverzicht des Veräusserers gegenüber dem Versicherungsunternehmen keinesfalls eingeschränkt werden.

64 Mit Blick auf die zweite Frage in der Rechtssache E-16/15 argumentiert Rainer Armbruster im Wesentlichen wie Franz-Josef Hagedorn zu Frage 2.a) in der Rechtssache E-15/15.

65 Mr Armbruster proposes that the Court should provide the following answer to the second question in Case E-16/15:

Article 36(2) of Directive 2002/83/EC concerning life assurance is to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, not only general information must be provided to the new policy holder, but all information listed in points (a)(4) to (a)(12) in Annex III(B)(b)(2) of Directive 2002/83/EC including information specifically regarding the assurance product to be acquired by him, in particular regarding any differences between risk profiles of the existing policy holder and of the transferee.

The defendants

66 With regard to Question 2(a) in Case E-15/15, Vienna Life submits that this question reveals that the referring court has understood neither the Directive nor the judgment of the Court in *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG*. According to that judgment, the Directive only provides for a duty to provide information and is not to be interpreted as requiring an assurance undertaking to provide advice to the policy holder. The purely factual information to be given under the Directive is not in any way affected by the risk profile or the investor profile of the individual policy holder.

67 Vienna Life therefore proposes that the Court should answer Question 2(a) in Case E-15/15 by stating that the issue cannot be resolved by an interpretation of the Directive, but must be answered in accordance with Liechtenstein contract law.

65 Rainer Armbruster schlägt vor, dass der Gerichtshof die zweite Frage in der Rechtssache E-16/15 folgendermassen beantwortet:

Artikel 36 Absatz 2 der Richtlinie 2002/83/EG über Lebensversicherungen ist dahin auszulegen, dass es sich im Fall der rechtsgeschäftlichen Übernahme einer fondsgebundenen Lebensversicherung nicht bloss um allgemeine Informationen dem neuen Versicherungsnehmer gegenüber handeln muss, sondern um alle in Buchstabe A.a.4 bis a.12 genannten Angaben, auf die in Anhang III Buchstabe B.b.2 der Richtlinie 2002/83/EG verwiesen wird, einschliesslich Informationen konkret zu dem von ihm zu übernehmenden Versicherungsprodukt, insbesondere zu einem allenfalls abweichenden Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers.

Die Beklagten

66 Zu Frage 2.a) in der Rechtssache E-15/15 bringt Vienna-Life vor, dass diese Frage zeigt, dass das vorlegende Gericht weder die Richtlinie noch das Urteil des Gerichtshofs in der Rechtssache *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG* verstanden hat. Diesem Urteil zufolge sieht die Richtlinie nur eine Informationspflicht vor, kann jedoch nicht dahingehend ausgelegt werden, dass sie einem Versicherungsunternehmen eine Verpflichtung zur Beratung des Versicherungsnehmers auferlegt. Auf die rein sachlichen Informationen, die laut Richtlinie mitzuteilen sind, hat das Risiko- oder Anlegerprofil des einzelnen Versicherungsnehmers keinerlei Einfluss.

67 Vienna-Life schlägt daher vor, der Gerichtshof solle Frage 2.a) in der Rechtssache E-15/15 dahingehend beantworten, dass der Rechtsstreit nicht durch eine Auslegung der Richtlinie, sondern nur unter Berücksichtigung des liechtensteinischen Vertragsrechts geklärt werden kann.

68 With regard to Question 2(b) in Case E-15/15, Vienna Life submits that, according to the Directive, it does not make any difference with regard to the obligation to provide the policy holder with information whether the policy holder is a legal entity or a natural person. The information specified in Annex III to the Directive is regarded by the European legislative bodies as sufficient to protect consumers.

69 Vienna Life therefore proposes that the Court should answer Question 2(b) in Case E-15/15 by stating that it does not make any difference with regard to the obligation to provide the policy holder with information whether the policy holder is a legal entity or a natural person.

70 In the event that the Court does not view Question 2(c) in Case E-15/15 as purely hypothetical, and thereby inadmissible, Vienna Life maintains that although the primary policy holder waived its right to receive advice from the broker it did not waive its right to be provided with the information specified in Annex III to the Directive.

71 According to Vienna Life, the question whether a waiver by the primary policy holder of the right to receive advice has any consequences for the purchaser of the second-hand policy has already been answered in its observations on Question 2(a), where it argued that, according to the Directive itself and the case law of the Court, the Directive does not impose any obligation to provide advice to policy holders.

72 Swiss Life submits with regard to the second question in Case E-16/15 that the assurance undertaking is required only to provide written information and not counselling. In support of this argument, Swiss Life cites *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG.*

68 Im Hinblick auf Frage 2.b) in der Rechtssache E-15/15 betont Vienna-Life, es mache laut Richtlinie in Bezug auf die Informationspflichten gegenüber dem Versicherungsnehmer keinen Unterschied, ob es sich beim Versicherungsnehmer um eine juristische oder eine natürliche Person handelt. Die in Anhang III der Richtlinie genannten Informationen werden von den europäischen Rechtsetzungsorganen als für den Verbraucherschutz ausreichend angesehen.

69 Vienna-Life schlägt daher vor, der Gerichtshof solle Frage 2.b) in der Rechtssache E-15/15 dahingehend beantworten, dass es betreffend die Informationspflichten gegenüber dem Versicherungsnehmer keinen Unterschied macht, ob es sich beim Versicherungsnehmer um eine juristische oder eine natürliche Person handelt.

70 Falls der Gerichtshof Frage 2.c) in der Rechtssache E-15/15 nicht als rein hypothetisch einstuft, weist Vienna-Life daraufhin, dass der ursprüngliche Versicherungsnehmer zwar auf sein Recht auf Beratung durch den Vermittler verzichtet hat, nicht jedoch auf die in Anhang III der Richtlinie genannten Informationen.

71 Die Frage, ob ein Verzicht des ursprünglichen Versicherungsnehmers auf sein Recht auf Beratung Folgen für den Käufer der gebrauchten Police hat, wurde Vienna-Life zufolge bereits in der Stellungnahme des Unternehmens zu Frage 2.a) beantwortet, wo Vienna-Life ausführte, dass die Richtlinie selbst und die Rechtsprechung des Gerichtshofs keine Verpflichtung zur Beratung von Versicherungsnehmern vorsehen.

72 Zur zweiten Frage in der Rechtssache E-16/15 trägt Swiss Life vor, dass das Versicherungsunternehmen nur zur Mitteilung schriftlicher Informationen, nicht jedoch zur Beratung verpflichtet ist. Zur Untermauerung dieses Arguments beruft sich Swiss Life auf die Rechtssache *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG*.

73 Swiss Life therefore proposes that the Court should answer the second question in Case E-16/15 by stating that the Court has already provided an answer to the question in *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG*.

Government of the Principality of Liechtenstein

74 With regard to Questions 2(a), 2(b) and 2(c) in Case E-15/15, the Liechtenstein Government refers to its answer to the first question, where it contends that the first question should not be answered in the affirmative.

75 In the event that the Court adopts a different interpretation, the Liechtenstein Government submits in relation to Question 2(a) that the Directive has to be interpreted as meaning that an assurance undertaking has to communicate to a policy holder at least the information listed in Annex III(A) when a new contract is concluded or the information listed in Annex III(B) during the term of the contract. The Directive does not specify any further information duties in such cases or establish that the assurance undertaking has to provide any advice.[9] Moreover, it does not address the issue of a legal transfer of a contract for a unit-linked life assurance policy.

76 With regard to Question 2(b) in Case E-15/15, the Liechtenstein Government submits that the term "consumer" is not used in the Directive except in recital 52. It contends that the scope of the Directive is not specifically consumer protection but protection of

9 Reference is made to *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG*, cited above, paragraphs 65, 68 and 69.

73 Swiss Life schlägt daher vor, dass der Gerichtshof die zweite Frage in der Rechtssache E-16/15 dahingehend beantwortet, dass der Gerichtshof die Antwort auf die Frage bereits in der Rechtssache *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG* gegeben hat.

Die Regierung des Fürstentums Liechtenstein

74 Zu den Fragen 2.a), 2.b) und 2.c) in der Rechtssache E-15/15 verweist die Regierung des Fürstentums Liechtenstein auf ihre Antwort auf die erste Frage, in der sie zu dem Schluss gelangt, dass die erste Frage nicht bejaht werden sollte.

75 Für den Fall, dass der Gerichtshof eine andere Auffassung vertreten sollte, äussert die Regierung des Fürstentums Liechtenstein in Bezug auf Frage 2.a), dass die Richtlinie dahin auszulegen ist, dass ein Versicherungsunternehmen einem Versicherungsnehmer zumindest bei Abschluss eines neuen Vertrages die in Anhang III Buchstabe A aufgeführten Angaben bzw. während der Laufzeit des Vertrages die in Anhang III Buchstabe B aufgeführten Angaben mitzuteilen hat. Die Richtlinie sieht für solche Fälle keine weiteren Informations- oder Beratungspflichten seitens des Versicherungsunternehmens vor.[9] Auch die Thematik der rechtsgeschäftlichen Vertragsübernahme einer fondsgebundenen Lebensversicherung wird nicht behandelt.

76 Betreffend Frage 2.b) in der Rechtssache E-15/15 macht die Regierung des Fürstentums Liechtenstein darauf aufmerksam, dass der Begriff „Verbraucher“ in der Richtlinie mit Ausnahme von Erwägungsgrund 52 keine Verwendung findet. Die Regierung des

9 Es wird auf die Rechtssache *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG*, oben erwähnt, Randnrn. 65, 68 und 69, verwiesen.

policy holders to the extent that they may be able to make their choice based on information.

77 The Liechtenstein Government also reiterates that the Directive does not specify any further information duties in such cases or establish that the assurance undertaking has to provide any advice. In its view, the fact that the existing policy holder is an undertaking, while the transferee of the contract is a natural person or a consumer, does not change this legal assessment.

78 With regard to Question 2(c) in Case E-15/15, the Liechtenstein Government refers to case law of the Court, arguing that it establishes that even though assurance contracts are in general of a complex nature, the details of which may be difficult to understand for the average consumer, the Directive only requires the information listed to be communicated to the policy holder. The Directive does not impose any obligation on the assurance undertaking to provide advice.[10]

79 Furthermore, the Liechtenstein Government maintains that the Directive does not address the issue whether specific information is to be given to the transferee of a contract regarding the assurance product acquired by him where the transferor of the policy dispensed with information regarding the assurance product in question.

80 The Liechtenstein Government proposes that the Court should provide the following answers to the second question in Case E-15/15:

10 Ibid., paragraph 69.

Fürstentums Liechtenstein kommt zu dem Schluss, dass das Ziel der Richtlinie nicht primär der Verbraucherschutz ist, sondern der Schutz der Versicherungsnehmer dadurch, dass diese im Besitz der notwendigen Informationen sein sollten, wenn sie ihre Wahl treffen.

77 Die Richtlinie, so die Regierung des Fürstentums Liechtenstein weiter, sieht für solche Fälle keine weiteren Informations- oder Beratungspflichten seitens des Versicherungsunternehmens vor. Nach Ansicht der Regierung des Fürstentums Liechtenstein spielt die Tatsache, dass es sich beim bisherigen Versicherungsnehmer um ein Unternehmen handelt, während der Vertragsübernehmer eine natürliche Person ist, für die rechtliche Beurteilung keine Rolle.

78 In Bezug auf Frage 2.c) in der Rechtssache E-15/15 zitiert die Regierung des Fürstentums Liechtenstein die Rechtsprechung des Gerichtshofs, in der es heisst, dass – obwohl Versicherungsverträge in der Regel komplex sind und deren Einzelheiten für den Durchschnittsverbraucher schwierig zu verstehen sein können –, dem Versicherungsnehmer gemäss Richtlinie nur die aufgeführten Angaben mitzuteilen sind. Die Richtlinie erlegt dem Versicherungsunternehmen keinerlei Verpflichtung zur Beratung auf.[10]

79 Darüber hinaus stellt die Regierung des Fürstentums Liechtenstein fest, dass sich die Richtlinie nicht mit der Frage beschäftigt, ob einem Vertragsübernehmer konkrete Informationen zu dem von ihm zu übernehmenden Versicherungsprodukt zu geben sind, wenn der Veräusserer der Police auf Informationen zu dem gegenständlichen Versicherungsprodukt seinerseits verzichtete.

80 Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die zweite Frage in der Rechtssache E-15/15 folgendermassen beantwortet:

10 Ebenda, Randnr. 69.

2. *In light of the proposed answer to the first of the referring questions, it is no longer necessary to consider the second questions.*

2(a) *In eventu, the answer to question 2 (a) should be that Article 36(2) of Directive 2002/83/EC is not to be interpreted as imposing an obligation for the assurance undertaking to provide the new policy holder in the event of the legal transfer of the contract for a unit-linked life assurance policy with general information or information specifically regarding the assurance product to be acquired by him, and in particular regarding any differences between the risk profiles of the existing policy holder and the transferee.*

2(b) *In eventu, the answer to question 2 (b) should be that Directive 2002/83/EC does not impose an obligation to give specific information to the transferee of the contract regarding the assurance product to be acquired by him where the existing policy holder is an undertaking, while the transferee of the contract is a natural person or a consumer.*

2(c) *In eventu, the answer to question 2 (c) should be that Directive 2002/83/EC does not stipulate that specific information is to be given to the transferee of the contract regarding the assurance product to be acquired by him where the transferor of the policy dispensed with information regarding the assurance product in question, for example because he did not disclose to the assurance company the information necessary in order to assess his own risk or investor profile.*

2. *Angesichts der für die erste vorgelegte Frage vorgeschlagenen Antwort kann die Beantwortung der unter Ziffer 2 gestellten Fragen entfallen.*

   2.a) *Hilfsweise sollte die Antwort auf Frage 2.a) lauten, dass Artikel 36 Absatz 2 der Richtlinie 2002/83/EG nicht dahin auszulegen ist, dass das Versicherungsunternehmen dem neuen Versicherungsnehmer gegenüber bei rechtsgeschäftlicher Vertragsübernahme einer fondsgebundenen Lebensversicherung zur Mitteilung allgemeiner Informationen oder Informationen konkret zu dem von ihm zu übernehmenden Versicherungsprodukt, und insbesondere zu einem allenfalls abweichenden Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers, verpflichtet ist.*

   2.b) *Hilfsweise sollte die Antwort auf Frage 2.b) lauten, dass Richtlinie 2002/83/EG keine Verpflichtung vorsieht, dem Vertragsübernehmer dann konkrete Informationen zu dem von ihm zu übernehmenden Versicherungsprodukt zu geben, wenn der bisherige Versicherungsnehmer ein Unternehmen, der Vertragsübernehmer jedoch eine natürliche Person oder ein Verbraucher ist.*

   2.c) *Hilfsweise sollte die Antwort auf Frage 2.c) lauten, dass Richtlinie 2002/83/EG nicht verlangt, dass dem Vertragsübernehmer dann konkrete Informationen zu dem von ihm zu übernehmenden Versicherungsprodukt zu geben sind, wenn der Veräusserer der Police auf Informationen zu dem gegenständlichen Versicherungsprodukt seinerseits verzichtete, so z. B. dadurch, dass er die zur Beurteilung seines eigenen Risiko- bzw. Anlegerprofils notwendigen Angaben der Versicherung gegenüber nicht offenlegte.*

81 The Liechtenstein Government's arguments with regard to the second question in Case E-16/15 are substantively the same as those it submitted on Question 2(a) in Case E-15/15.

82 The Liechtenstein Government proposes that the Court should provide the following answer to the second question in Case E-16/15:

> *2. In light of the proposed answer to the first of the referring questions, it is no longer necessary to consider the second question.*
>
> *In eventu, the answer to the second question should be that Article 36(2) of Directive 2002/83/EC is not to be interpreted as imposing an obligation for the assurance undertaking to provide the new policy holder in the event of the legal transfer of the contract for a unit-linked life assurance policy with general information or information specifically regarding the assurance product to be acquired by him, and in particular regarding any differences between the risk profiles of the existing policy holder and the transferee.*

ESA

83 With regard to Question 2(a) in Case E-15/15, ESA submits that it understands the phrase "general information" as referring to the information listed in Annex III(A) to the Directive and "specific information" as referring to information based on the investment and risk profile of the second-hand policy buyer. In its view, the latter information goes beyond the scope of the Directive. However, with regard to "general information", ESA maintains that the obligation imposed on the assurance undertaking under the Directive should be limited to the provision of the information listed

81 Mit Blick auf die zweite Frage in der Rechtssache E-16/15 argumentiert die Regierung des Fürstentums Liechtenstein im Wesentlichen wie zu Frage 2.a) in der Rechtssache E-15/15.

82 Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die zweite Frage in der Rechtssache E-16/15 folgendermassen beantwortet:

2. Angesichts der für die erste vorgelegte Frage vorgeschlagenen Antwort kann die Beantwortung der zweiten Frage entfallen.

Hilfsweise sollte die Antwort auf die zweite Frage lauten, dass Artikel 36 Absatz 2 der Richtlinie 2002/83/EG nicht dahin auszulegen ist, dass das Versicherungsunternehmen dem neuen Versicherungsnehmer gegenüber bei rechtsgeschäftlicher Vertragsübernahme einer fondsgebundenen Lebensversicherung zur Mitteilung allgemeiner Informationen oder Informationen konkret zu dem von ihm zu übernehmenden Versicherungsprodukt, und insbesondere zu einem allenfalls abweichenden Risikoprofil des bisherigen Versicherungsnehmers zu jenem des Übernehmers, verpflichtet ist.

Die EFTA-Überwachungsbehörde

83 Zu Frage 2.a) in der Rechtssache E-15/15 führt die EFTA-Überwachungsbehörde aus, dass sie die Formulierung „allgemeine Informationen“ so auffasst, dass sie sich auf die Angaben in Anhang III Buchstabe A der Richtlinie bezieht, während es sich bei „konkreten Informationen“ um Angaben über das Anleger- bzw. Risikoprofil des Käufers der gebrauchten Police handelt. Nach ihrer Ansicht gehen die Informationen im letzteren Fall über den Anwendungsbereich der Richtlinie hinaus. Im Hinblick auf „allgemeine Informationen“ hält die EFTA-Überwachungsbehörde jedoch fest, dass die dem Versicherungsunternehmen im Rahmen der Richtlinie auferlegte Verpflichtung auf die Mitteilung der in

in Annex III(A) of the Directive. It adds, however, that the Directive does not preclude national legislation establishing an obligation to provide specific information concerning the unit-linked life assurance to the second-hand buyer, provided that this does not affect the effectiveness of the Directive and as long as the additional information is necessary, clear and accurate.[11]

84 As in ESA's view Question 2(a) in Case E-15/15 should be answered in the affirmative, it does not consider it necessary to answer Questions 2(b) and 2(c). Instead, it reiterates its arguments on Question 2(a).

85 ESA's arguments with regard to the second question in Case E-16/15 are substantively the same as those it submitted in relation to Question 2(a) in Case E-15/15.

86 ESA proposes that the Court should provide the following answer to the second questions in Cases E-15/15 and E-16/15:

Article 36(1) of Directive 2002/83/EC concerning life assurance is to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, only the information listed in Annex III(A) must be communicated to the new policy holder. The Directive does not however preclude national legislation establishing an obligation to provide specific information concerning the unit-linked life assurance to the "second hand" buyer provided that this does not affect the effectiveness of the Directive and as long as the additional information is necessary, clear and accurate.

11 Reference is made to *Beatrix Koch, Lothar Hummel and Stefan Müller* v *Swiss Life (Liechtenstein) AG*, cited above, paragraph 77, and for comparison to Case C-51/13 *Nationale-Netherlanden*, judgment of 29 April 2015, reported electronically, paragraphs 22 and 24.

Anhang III Buchstabe A der Richtlinie aufgeführten Angaben beschränkt sein sollte. Sie fügt jedoch hinzu, dass die Richtlinie der Schaffung einer Verpflichtung zur Mitteilung konkreter Informationen über die fondsgebundene Lebensversicherung an den Käufer der gebrauchten Police im nationalen Recht nicht entgegensteht, solange die Wirksamkeit der Richtlinie dadurch nicht berührt wird und die zusätzlichen Informationen notwendig, klar und genau sind.[11]

84 Da Frage 2.a) in der Rechtssache E-15/15 nach Auffassung der EFTA-Überwachungsbehörde bejaht werden sollte, hält sie eine Beantwortung der Fragen 2.b) und 2.c) nicht für erforderlich. Stattdessen verweist sie auf ihr Vorbringen zu Frage 2.a).

85 Mit Blick auf die zweite Frage in der Rechtssache E-16/15 argumentiert die EFTA-Überwachungsbehörde im Wesentlichen wie zu Frage 2.a) in der Rechtssache E-15/15.

86 Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die unter Ziffer 2 gestellten Fragen in den Rechtssachen E-15/15 und E-16/15 folgendermassen beantwortet:

Artikel 36 Absatz 1 der Richtlinie 2002/83/EG über Lebensversicherungen ist dahin auszulegen, dass dem neuen Versicherungsnehmer im Fall der rechtsgeschäftlichen Übernahme einer fondsgebundenen Lebensversicherung nur die in Anhang III Buchstabe A aufgeführten Angaben mitgeteilt werden müssen. Die Richtlinie steht der Schaffung einer Verpflichtung zur Mitteilung konkreter Informationen über die fondsgebundene Lebensversicherung an den Käufer der „gebrauchten" Police im nationalen Recht nicht entgegen, solange die Wirksamkeit der Richtlinie dadurch nicht berührt wird und die zusätzlichen Informationen notwendig, klar und genau sind.

11 Es wird auf die Rechtssache *Beatrix Koch, Lothar Hummel und Stefan Müller ./. Swiss Life (Liechtenstein) AG*, oben erwähnt, Randnr. 77, und zum Vergleich entsprechend auf Rechtssache C-51/13 *Nationale-Netherlanden*, Urteil vom 29. April 2015, in elektronischer Form veröffentlicht, Randnrn. 22 und 24, verwiesen.

The Commission

87 With regard to the second question in each case, the Commission argues that it follows from its reply to the first question, namely that Article 36 and Annex III of the Directive apply irrespective of whether technically there is a new policy or the transfer of an existing policy with the consent of the assurance undertaking, that the prospective policy holder will need to receive all the relevant information set out in Annex III pre-contractually and during the term of the contract. For this reason, the Commission does not consider it warranted to distinguish between general information and product-specific information.

88 The Commission proposes that the Court should provide the following answer to the second questions in Cases E-15/15 and E-16/15:

Article 36(1) and (2) of the Directive in connection with Annex III are to be interpreted in such a way that, irrespective of whether technically there is a new policy or the transfer of an existing policy with the consent of the insurance undertaking, the prospective policy holder will need to receive all the relevant information pre-contractually and during the term of the contract which are set out in Annex III.

THE THIRD QUESTIONS IN CASES E-15/15 AND E-16/16

The applicants

89 Both applicants argue that the Liechtenstein Government has implemented the Directive too narrowly in national law and propose that the Court should provide the following answer to the third question:

Die Kommission

87 Zur zweiten Frage in den beiden Rechtssachen stellt die Kommission fest, dass aus ihrer Antwort auf die erste Frage – nämlich dass Artikel 36 und Anhang III der Richtlinie unabhängig davon anwendbar sind, ob es sich eigentlich um eine neue Police oder die Übernahme einer bestehenden Police mit Zustimmung des Versicherungsunternehmens handelt – folgt, dass der künftige Versicherungsnehmer alle relevanten Informationen gemäss Anhang III vor Abschluss und während der Laufzeit des Vertrags erhalten muss. Aus diesem Grund hält es die Kommission nicht für gerechtfertigt, zwischen allgemeinen und konkreten Informationen zum Produkt zu unterscheiden.

88 Die Kommission schlägt vor, dass der Gerichtshof die unter Ziffer 2 gestellten Fragen in den Rechtssachen E-15/15 und E-16/15 folgendermassen beantwortet:

Artikel 36 Absatz 1 und 2 der Richtlinie in Verbindung mit Anhang III sind dahin auszulegen, dass der künftige Versicherungsnehmer unabhängig davon, ob es sich eigentlich um eine neue Police oder um die Übernahme einer bestehenden Police mit Zustimmung des Versicherungsunternehmens handelt, alle relevanten Informationen gemäss Anhang III vor Abschluss und während der Laufzeit des Vertrags erhalten muss.

ZU DEN FRAGEN UNTER ZIFFER 3 IN DEN RECHTSSACHEN E-15/15 UND E-16/15

Die Kläger

89 Beide Kläger stehen auf dem Standpunkt, dass die Regierung des Fürstentums Liechtenstein die Richtlinie bei der Umsetzung in innerstaatliches Recht zu eng ausgelegt hat und schlagen vor, dass der Gerichtshof die dritte Frage folgendermassen beantwortet:

The provisions concerning the assurer's obligations under Annex III(B)(b)(2) of Directive 2002/83/EC concerning life assurance are not effectively implemented into national law if national law provides, in Annex 4(II)(2) of the ASA, in the case of unit-linked life assurance policies, that during the term of an assurance contract information must be provided on the units underlying the assurance policy and the nature of the assets contained therein only where the changes in the information provided stem from 'amendments of the law' but not also 'in the event of a change in policy conditions' (Annex III(B)(b)(2) to Directive 2002/83/EC). Moreover, the said provisions are not effectively implemented into national law if national law provides, in Annex 4(II)(2) of the VersAG, that during the term of an assurance contract only changes of information listed in points I(1)(c) to (e) and (2)(a) to (e) are to be given in the event of amendments of the law, but not all information listed in points I(1)(c) to (e) and (2)(a) to (e).

The defendants

90 Vienna Life submits that the third question is purely hypothetical and need not be answered.

91 Swiss Life argues that due to its lack of relevance, the Court does not have to answer the third question.

Die Bestimmungen über die Verpflichtungen des Versicherers gemäss Anhang III Buchstabe B.b.2 der Richtlinie 2002/83/EG über Lebensversicherungen sind nicht wirksam in das innerstaatliche Recht umgesetzt, wenn dieses in Anhang 4 Abschnitt II Nummer 2 VersAG eine Verpflichtung zur Erteilung von Informationen bei fondsgebundenen Lebensversicherungen während der Laufzeit eines Versicherungsvertrags über den der Versicherung zugrundeliegenden Fonds und die Art der darin enthaltenen Vermögenswerte bloss dann vorsieht, wenn sich die Änderungen bei den erteilten Informationen aus „Änderungen von Rechtsvorschriften ergeben“, nicht aber auch „im Fall eines Zusatzvertrages“ (Anhang III Buchstabe B.b.2 der Richtlinie 2002/83/EG). Zudem sind die genannten Bestimmungen nicht wirksam in das innerstaatliche Recht umgesetzt, wenn dieses in Anhang 4 Abschnitt II Nummer 2 VersAG vorsieht, dass während der Laufzeit eines Versicherungsvertrags bei Änderungen von Rechtsvorschriften nur Informationen über Änderungen der Angaben in Abschnitt I Nummer 1 Buchstaben c bis e und Nummer 2 Buchstaben a bis e erteilt werden, nicht jedoch über alle in Abschnitt I Nummer 1 Buchstaben c bis e und Nummer 2 Buchstaben a bis e angeführten Angaben.

Die Beklagten

90 Vienna-Life bringt vor, dass die dritte Frage rein hypothetischer Natur ist und nicht beantwortet werden muss.

91 Swiss Life argumentiert, dass der Gerichtshof die dritte Frage aufgrund ihrer fehlenden Relevanz nicht zu beantworten braucht.

Government of the Principality of Liechtenstein

92 The Liechtenstein Government submits that it is not for the Court to assess under the advisory opinion procedure whether national law is compatible with EEA law. Therefore, the third question is for the referring court to decide.

93 The Liechtenstein Government proposes that the Court should provide the following answer to the third question:

The answer to the third question should be that it is for the referring Court to decide on whether or not the provisions concerning the assurer's obligations under Annex III(B)(b)(2) of Directive 2002/83/EC are effectively transposed into national law.

ESA

94 ESA argues that it is for the national court to assess whether it is possible in the present case to interpret the national provisions transposing Article 36(2) of the Directive into the Liechtenstein legal order in a manner harmonious with the actual meaning of the Directive, i.e. that the policy holders shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).

95 ESA proposes that the Court should provide the following answer to the third question:

While the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement, such as that of Annex III(B)(b)(2) of Directive 2002/83/EC, is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA

Die Regierung des Fürstentums Liechtenstein

92 Die Regierung des Fürstentums Liechtenstein führt aus, dass es nicht Aufgabe des Gerichtshofs ist, im Rahmen des Vorabentscheidungsverfahrens zu beurteilen, ob das nationale Recht mit dem EWR-Recht vereinbar ist. Über die dritte Frage hat daher das vorlegende Gericht zu entscheiden.

93 Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die dritte Frage folgendermassen beantwortet:

Die Antwort auf die dritte Frage sollte lauten, dass es Aufgabe des vorlegenden Gerichts ist zu entscheiden, ob die Bestimmungen über die Verpflichtungen des Versicherers gemäss Anhang III Buchstabe B.b.2 der Richtlinie 2002/83/EG wirksam in das innerstaatliche Recht umgesetzt wurden.

Die EFTA-Überwachungsbehörde

94 Der EFTA-Überwachungsbehörde zufolge obliegt es dem nationalen Gericht zu prüfen, ob es im vorliegenden Fall möglich ist, die nationalen Bestimmungen zur Umsetzung von Artikel 36 Absatz 2 der Richtlinie in die liechtensteinische Rechtsordnung im Einklang mit der tatsächlichen Bedeutung der Richtlinie – d. h. dass die Versicherungsnehmer während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B aufgeführten Angaben auf dem Laufenden gehalten werden – auszulegen.

95 Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die dritte Frage folgendermassen beantwortet:

Während das EWR-Abkommen nicht verlangt, dass eine Bestimmung einer Richtlinie, die in das EWR-Abkommen aufgenommen wurde – wie Anhang III Buchstabe B.b.2 der Richtlinie 2002/83/EG –, direkt anwendbar ist und Vorrang vor einer nationalen Vorschrift hat, die die

rule correctly into national law, such as that of Annex 4(II)(2) of the Versicherungsaufsichtsgesetz, the national court is obliged, as far as possible, to ensure that the result sought by the Directive at issue is achieved through the conforming interpretation of the national law with the EEA law provision.

The Commission

96 The Commission submits that any transposition of Annex III(B)(b)(2) of the Directive needs to ensure the necessary information requirements in two distinct cases, i.e. when there is, first, a change in the policy conditions, and, second, an amendment of the law applicable to the contract. Whether Liechtenstein legislation can be interpreted in a way that reflects the requirements of the Directive is a matter for the national court to establish.

97 The Commission proposes that the Court should provide the following answer to the third question:

Annex III(B)(b)(2) of the Directive is to be interpreted in such a way that the information set out there is to be provided in two distinct events, i.e. when there is (i) a change in the policy conditions, and (ii) an amendment of the law applicable to the contract.

Páll Hreinsson
Judge-Rapporteur

entsprechende Bestimmung des EWR-Rechts nicht ordnungsgemäss in das innerstaatliche Recht umsetzt – wie Anhang 4 Abschnitt II Nummer 2 des Versicherungsaufsichtsgesetzes –, ist das nationale Gericht doch verpflichtet, soweit möglich sicherzustellen, dass das von der Richtlinie angestrebte Ergebnis durch die übereinstimmende Auslegung des nationalen Rechts mit der Bestimmung des EWR-Rechts erreicht wird.

Die Kommission

96 Der Kommission zufolge muss jede Umsetzung von Anhang III Buchstabe B.b.2 der Richtlinie die Mitteilung von Informationen in zwei verschiedenen Fällen gewährleisten, d. h. erstens bei einem Zusatzvertrag und zweitens bei einer Änderung der für den Vertrag geltenden Rechtsvorschriften. Ob das liechtensteinische Recht so ausgelegt werden kann, dass es den Anforderungen der Richtlinie entspricht, ist durch das nationale Gericht festzustellen.

97 Die Kommission schlägt vor, dass der Gerichtshof die dritte Frage folgendermassen beantwortet:

Anhang III Buchstabe B.b.2 der Richtlinie ist so auszulegen, dass die darin genannten Informationen in zwei verschiedenen Fällen mitzuteilen sind, d. h. (i) bei einem Zusatzvertrag und (ii) bei einer Änderung der für den Vertrag geltenden Rechtsvorschriften.

Páll Hreinsson
Berichterstatter

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 to 31 December 2016. In addition, it has a short section on the Judges and the staff and the Court's activities in 2016.

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