REPORT OF THE EFTA COURT 2016

Book 2

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Book 2

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Summary of the Judgment

1 Under Article 9 of Directive 2006/123/EC, an authorisation scheme for establishment may not be maintained unless it is non-discriminatory, justified by an overriding reason relating to the public interest, and satisfies the principle of proportionality.

2 Protection of service recipients and the fight against fraud and tax evasion are capable of justifying the authorisation scheme. However, such a scheme is not proportionate, if a subsequent inspection system could be equally effective. Liechtenstein therefore failed to demonstrate that the prior authorisation scheme at issue is proportionate as required under Article 9(1)(c) of the Directive.

3 The conditions of necessary personnel and adequate command of German, laid down in the Liechtenstein Trade Act, constitute infringements of Article 10(2)(d) of the Directive, which requires the criteria for authorisation schemes to be clear and unambiguous. Moreover, the absence of a safeguard in the Trade Act against duplicating requirements and controls that a service provider has already fulfilled in another EEA State, constitutes a breach of Article 10(3) of the Directive. Similarly, the lack of clarity in the Trade Act on the authorisation procedure constitutes a breach of Article 13 of the Directive.

4 The authorisation scheme for cross-border services amounts to a requirement which, under Article 16 of the Directive, cannot be imposed unless it is non-discriminatory, justified for reasons of public policy, public security, public health or the protection of the environment, and also proportionate. Independently of the question whether grounds of justification are applicable, a requirement such as that laid down in Article 21 of the Trade Act would not satisfy the proportionality test.

5 The justifications put forward by Liechtenstein also fail to satisfy a proportionality test under Article 33 EEA. The authorisation schemes are therefore in breach of Articles 31 and 36 EEA to the extent that they apply to services not covered by the Directive.

Judgment of the Court

10 May 2016

(Failure by an EEA/EFTA State to fulfil its obligations – Prior authorisation schemes for establishment and cross-border services – Directive 2006/123/EC – Article 31 EEA – Article 36 EEA – Justification – Proportionality)

In Case E-19/15,

EFTA Surveillance Authority, *represented by Markus Schneider, Deputy Director, Clémence Perrin, Senior Officer, and Marlene Lie Hakkeboe, Temporary 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 Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents,*

— defendant,

APPLICATION for a declaration that by maintaining in force national rules on prior authorisation schemes for undertakings willing to establish themselves and/or to provide cross-border services in Liechtenstein, the Principality of Liechtenstein has breached its obligations arising from Articles 9, 10, 13 and 16 of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement under its Protocol 1, and, to the extent that establishment and the provision of cross-border services fall outside the scope of that act, its obligations arising from Articles 31 and 36 of the EEA Agreement,

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 applicant, and the written observations of the European Commission, represented by Hélène Tserepa Lacombe and Luigi Malferrari, 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 Markus Schneider and Clémence Perrin; the defendant, represented by Dr Andrea Entner-Koch and Thomas Bischof; the Norwegian Government, represented by Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent; and the European Commission, represented by Hélène Tserepa Lacombe and Luigi Malferrari, at the hearing on 2 March 2016,

gives the following

Judgment

I INTRODUCTION

1 By an application lodged at the Court Registry on 29 July 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 that the Principality of

Liechtenstein has breached its obligations arising from Articles 9, 10, 13 and 16 of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market) (OJ 2006 L 376, p. 36) ("the Directive"), as adapted to the EEA Agreement under its Protocol 1, and, to the extent that establishment and the provision of cross-border services fall outside the scope of the Directive, its obligations arising from Articles 31 and 36 of the EEA Agreement ("EEA"); (a) by maintaining in force Article 7 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings wishing to establish themselves in Liechtenstein; and, (b) by maintaining in force Article 8(1) of the Liechtenstein Trade Act in so far as it imposes conditions that are not clear and unambiguous for granting prior authorisation for undertakings wishing to establish themselves in Liechtenstein (namely the obligation to have the necessary personnel and the obligation to have an adequate command of the German language); and, (c) by failing to ensure that requirements, which are equivalent or essentially comparable as regards their purpose to which the service provider is already subject in another EEA State or in the same EEA State, in the procedure for prior authorisation for undertakings intending to establish themselves in Liechtenstein are not duplicated and that the procedure and formalities concerning the authorisation scheme under the Trade Act are clearly laid down; and, (d) by maintaining in force Article 21 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings intending to provide cross-border services in Liechtenstein.

II RELEVANT LAW

EEA LAW

2 Article 31(1) EEA reads:

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.

3 Article 33 EEA reads:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

4 Article 36(1) EEA reads:

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

5 Article 39 EEA reads:

The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter.

6 The Directive is referred to at point 1 of Annex X to the EEA Agreement (Services in general), following the adoption of Joint Committee Decision No 45/2009 (OJ 2009 L 162, p. 23), which entered into force on 1 May 2010. The time limit for the EEA/EFTA States to implement the Directive expired on the same date.

7 Recitals 2, 5, 39, 41 to 43 and 54 of the Directive read:

(2) A competitive market in services is essential in order to promote economic growth and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises (SMEs), from extending their operations beyond their national borders and from taking full advantage of the internal market. This weakens the worldwide competitiveness of European Union providers. A free market which compels the Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.

...

(5) It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty. Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within

the internal market either by becoming established in a Member State or by making use of the free movement of services. Providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State.

...

(39) The concept of 'authorisation scheme' should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.

...

(41) The concept of 'public policy', as interpreted by the Court of Justice, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. Similarly, the concept of public security includes issues of public safety.

(42) The rules relating to administrative procedures should not aim at harmonising administrative procedures but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings therefrom.

(43) One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length

and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, inter alia through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the 'red tape' involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States.

...

(54) The possibility of gaining access to a service activity should be made subject to authorisation by the competent authorities only if that decision satisfies the criteria of non-discrimination, necessity and proportionality. That means, in particular, that authorisation schemes should be permissible only where an a posteriori inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned a posteriori, due account being taken of the risks and dangers which could arise in the absence of a prior inspection. ...

8 Article 3(3) of the Directive reads:

Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.

9 Article 4 of the Directive reads:

Definitions

For the purposes of this Directive, the following definitions shall apply:

…

6) 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

7) 'requirement' means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

8) 'overriding reasons relating to the public interest' means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the

national historic and artistic heritage; social policy objectives and cultural policy objectives;

10 Article 9(1) of the Directive reads:

Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

11 Article 10(1) to (5) of the Directive reads:

Conditions for the granting of authorisation

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.

5. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

12 Article 13(1) to (4) of the Directive reads:

Authorisation procedures

1. Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.

2. Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and

proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.

3. *Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.*

4. *Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.*

13 Article 16(1) to (3) of the Directive reads in extract:

Freedom to provide services

1. *Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.*

   The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

   Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

   (a) *non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in*

the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

…

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

…

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

NATIONAL LAW

14 Article 2 of the Act of 22 June 2006 on Trade and Commerce (*Gewerbegesetz*, LR 930.1) ("the Trade Act") reads:

> *1. Subject to the provisions of Article 3, this act applies to all commercially pursued and not legally prohibited activities.*
>
> *2. An activity is regarded as commercially pursued if it is pursued on a self-employed and regular basis and with the intention to gain a profit or other economic benefit, regardless of the purpose for which that profit is used.*
>
> *3. For the purposes of this act, an activity is pursued on a self-employed basis if it is pursued at one's own risk and for one's own account.*

15 Article 7 of the Trade Act reads:

> *1. Subject to the provisions of Articles 20 to 23, a person wishing to pursue an economic activity within the meaning of Article 2 requires an authorisation from the Office of Economic Affairs (trade authorisation).*
>
> *2. The trade authorisation is personal and non-transferable.*
>
> *3. The Government may establish by ordinance exemptions from the obligation to obtain authorisation for the pursuit of a simple profession.*

16 Article 8(1) of the Trade Act reads:

> *The trade authorisation will be granted if the applicant:*
>
> *(a) is capable of acting;*
>
> *(b) is reliable (Article 9);*

(c) is a national of an EEA Member State or of Switzerland or is a third country national with an uninterrupted domicile in the country of 12 years or more and which is maintained continuously;

(d) is qualified for the pursuit of a qualified profession (Article 10);

(e) has business premises on the national territory and the necessary personnel at his disposal (Article 11);

(f) has indicated a domestic address for service; this can be, in particular, the address of the business premises on the national territory or of a representative appointed according to the provisions of company law;

(g) has an adequate command of the German language.

17 Article 16(1) to (3) of the Trade Act reads:

1. The trade authorisation will be granted when the applicant fulfils the requirements specified in Articles 8 to 14.

2. In special circumstances, the trade authorisation may be granted for a limited duration and include obligations and conditions.

3. The economic activity applied for may only be pursued after the trade authorisation has been issued.

18 Article 21 of the Trade Act reads in extract:

1. Service providers shall notify in writing to the Office of Economic Affairs using an official form the first provision of services in Liechtenstein.

2. The notification shall be renewed annually if the service provider intends to provide services temporarily or occasionally in Liechtenstein during the year in question.

3. When first notifying the service provision the service provider shall submit the following documents:

(a) a certificate confirming

1. that the service provider lawfully pursues the activity in question in the State of establishment;

2. that the service provider is not prohibited, not even temporarily, from pursuing that activity at the time the certificate is submitted;

(b) a proof of professional qualification;

(c) a proof of nationality;

…

4. The service may only be provided after the Office of Economic Affairs has confirmed that the correct notification has been submitted. If no confirmation is issued within seven working days from receipt of the notification, the confirmation shall be deemed granted.

19 Article 29b of the Trade Act reads:

Any person not complying with the notification requirement specified in Article 21 may be excluded by the Office of Economic Affairs from cross-border service provision for a period not exceeding one year.

20 Article 4 of the Act of 20 October 2010 on the provision of services (*Gesetz über die Erbringung von Dienstleistungen*, LR 930.4) ("the Services Act") reads:

The provisions of this act only apply to the extent that special legislation does not make other provision.

21 Article 11 of the Services Act reads:

Procedure for granting an authorisation

1. Unless special legislation makes other provision, the competent authority shall decide by order on an application for an

authorisation within six weeks. The period may be extended reasonably by the authority once if this is necessary because of the difficulty of the matter. The extension must be reasoned and communicated to the parties of the proceedings before the expiry of the deadline for the decision.

2. *The period within which a decision must be taken referred to in paragraph 1 begins to run once the complete application has been received. The applicant shall be informed, in the relevant case, of the incompleteness of the application and of the resulting legal consequences.*

3. *The authorisation of an application shall be considered granted if the competent authority does not take a decision within the period established in paragraph 1 or the special legislation.*

4. *The competent authority shall confirm immediately in writing the grant of an authorisation under paragraph 3. This confirmation shall be sent to the parties of the proceedings. Each party shall have the right, within four weeks of receipt of this confirmation, to request an order stating that an authorisation has been issued in accordance with paragraph 3.*

22 Article 13 of the Services Act reads:

Exemption from requirements and controls

For the purposes of granting an authorisation, a service provider shall be exempted from requirements and controls if he has been granted an authorisation in Liechtenstein or another EEA State conditional on requirements and controls that are equivalent to those of the procedure in question or that are comparable as regards their purpose.

III FACTS AND PRE-LITIGATION PROCEDURE

23 In December 2010, the Liechtenstein Government notified to ESA the national measures to ensure implementation of the Directive. ESA informed Liechtenstein that it had undertaken an own initiative case to examine whether the Trade Act complied with the requirements set out in the Directive, in particular as regards the authorisation schemes contained in that act.

24 In February 2012, ESA sent a letter to Liechtenstein requesting information on the interpretation of the Trade Act and its compliance with the Directive. Liechtenstein responded to that letter in May 2012. Further exchanges of information and views on the matter also took place during 2012 and 2013.

25 On 3 July 2013, ESA issued a letter of formal notice, concluding that several provisions of the Trade Act were in breach of the Directive. In particular, ESA considered that Articles 7 and 21 of the Trade Act amounted to authorisation schemes for companies wishing to establish themselves or to provide cross-border services for Liechtenstein. The provisions did not satisfy the requirements specified in Articles 9 and 16 of the Directive. The authorisation schemes were also in breach of Articles 31 and 36 EEA to the extent that the Trade Act applies beyond the scope of the Directive. In any event, ESA argued that certain requirements were in breach of Article 10(2)(d), Article 10(3) and Article 13(1) of the Directive.

26 On 2 October 2013, Liechtenstein responded to the letter of formal notice, stating that the authorisation schemes for establishment and cross-border services were as such compatible with the Directive and Articles 31 and 36 EEA. On the other hand, Liechtenstein accepted the conclusions of ESA with regard to the breach of Article 10(2)(d), Article 10(3) and Article 13(1) of the Directive. A proposal to Parliament accommodating ESA's concerns would be presented. No time frame for those amendments was mentioned.

27 On 24 April 2014, ESA delivered a reasoned opinion to Liechtenstein, 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. Upon request, ESA extended this deadline to 19 August 2014. On 19 August 2014, Liechtenstein replied to the reasoned opinion, maintaining the conclusions set out in its response to the letter of formal notice. On 3 June 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

28 ESA lodged the present application at the Court Registry on 29 July 2015. ESA requests the Court to:

1. *Declare that the Principality of Liechtenstein has breached its obligations arising from Articles 9, 10, 13 and 16 of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement by Protocol 1 thereto, and, to the extent that establishments and the provisions of cross-border services fall outside the scope of that Act, its obligations arising from Articles 31 and 36 of the EEA Agreement:*

   (a) *by maintaining in force Article 7 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings willing to establish themselves in Liechtenstein; and,*

   (b) *by maintaining in force Article 8(1) of the Liechtenstein Trade Act in so far as it imposes conditions that are not clear and unambiguous for granting prior authorisation for undertakings willing to establish themselves in Liechtenstein (namely the*

obligation to have the necessary personnel and the obligation to have an adequate command of the German language); and,

(c) by failing to ensure that requirements, which are equivalent or essentially comparable as regard their purpose to which the service provider is already subject in another EEA State or in the same EEA State, in the procedure for prior authorisation for undertakings intending to establish themselves in Liechtenstein are not duplicated and that the procedure and formalities concerning the authorisation scheme under the Trade Act are clearly laid down; and,

(d) by maintaining in force Article 21 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings intending to provide cross-border services in Liechtenstein; and

2. Order the Principality of Liechtenstein to bear the costs of the proceedings.

29 The application was served on Liechtenstein on 5 August 2015. Liechtenstein did not lodge a defence within the time limit of 5 October 2015. A subsequent request for an extension of that time limit was not granted. However, ESA waived its right under Article 90 of the Rules of Procedure ("RoP") to apply for a judgment by default.

30 On 20 December 2015, the European Commission ("the Commission") submitted written observations. The Commission concludes that ESA's application should be granted, and that Liechtenstein should be ordered to pay the costs.

31 Liechtenstein presented oral argument at the hearing on 2 March 2016 and requested the Court to declare that by maintaining in force Articles 7 and 21 of the Trade Act, Liechtenstein has not breached its obligations arising from Articles 9, 10, 13 and 16 of the Directive and

Articles 31 and 36 EEA. Liechtenstein requested the Court to order each party to bear its own costs.

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

V ASSESSMENT

INTRODUCTORY REMARKS

33 The objectives of the Directive are the elimination of barriers to the freedom of establishment for service providers in EEA States and to the free provision of services between EEA States (see recital 116 of the Directive). In this regard, a fundamental difficulty faced by undertakings, in particular small and medium enterprises, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. Delays, costs and dissuasive effects resulting from unnecessary or excessively complex and burdensome national procedures, the paperwork involved in submitting documents and the arbitrary use of powers by the competent authorities should be eliminated by administrative simplification. Therefore, the Directive aims at removing overly burdensome authorisation schemes, procedures and formalities. Moreover, the Directive intends to limit the obligation of prior authorisation to cases in which it is essential (see recitals 42 and 43 of the Directive).

34 As regards the freedom of establishment, pursuant to Article 9 of the Directive, EEA States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the

scheme is non-discriminatory, justified by an overriding reason relating to the public interest and its objective cannot be attained through a less restrictive measure. As regards the freedom to provide services, pursuant to Article 16 of the Directive, EEA States may not impose an obligation on the provider to obtain an authorisation from the competent authorities, unless such requirement is non-discriminatory, is justified by reasons of public policy, public security, public health or the protection of the environment, and is proportionate.

35 In the present case, Article 7 of the Trade Act requires undertakings intending to establish themselves in Liechtenstein to obtain a prior authorisation from the Office of Economic Affairs. In addition, Article 21 of the Trade Act requires undertakings to notify in writing to the Office of Economic Affairs their intention to provide cross-border services in Liechtenstein. According to information provided at the oral hearing, it appears that in Article 6 of the Posted Workers Act of 15 March 2000 (*Gesetz vom 15. März 2000 über die Entsendung von Arbeitnehmern*, LR 823.21) Liechtenstein also has a provision requiring prior notification before any posted work may be performed.

36 ESA's application consists of four pleas. ESA alleges, first, that Liechtenstein has breached Article 9 of the Directive by maintaining in force a prior authorisation scheme for establishment. Second, several of the conditions and rules applying to that authorisation scheme are in breach of Articles 10 and 13 of the Directive pertaining to the conditions for the granting of authorisations and the authorisation procedures. Third, Liechtenstein has breached Article 16 of the Directive by making the provision of cross-border services subject to a notification procedure that amounts to an authorisation scheme. Fourth, these administrative procedures for establishment and cross-border services are in breach of Articles 31 and 36 EEA, to the extent that they apply to services not covered by the Directive.

FIRST PLEA – BREACH OF ARTICLE 9 OF THE DIRECTIVE – FREEDOM OF ESTABLISHMENT AND AUTHORISATION SCHEMES

PLEAS AND OBSERVATIONS SUBMITTED TO THE COURT

37 ESA submits that Article 7 of the Trade Act, whereby in order to establish itself in Liechtenstein an undertaking has to obtain a prior authorisation from the Office of Economic Affairs, amounts to an authorisation scheme within the meaning of Article 4(6) of the Directive.

38 ESA observes that, according to Article 9(1) of the Directive, EEA States shall not impose an authorisation scheme unless it is non-discriminatory, justified by an overriding reason in the public interest, and proportionate. In ESA's view, while the authorisation scheme at issue is non-discriminatory, it is neither justified nor proportionate.

39 According to ESA, the authorisation scheme at issue cannot be justified by any of the three public interest objectives put forward by Liechtenstein during the pre-litigation procedure, namely, the protection of service recipients including consumers, the fight against fraud and tax evasion, and legal certainty.

40 ESA acknowledges that, pursuant to Article 4(8) of the Directive, the protection of service recipients is an overriding reason in the public interest. However, the authorisation scheme at stake does not satisfy the proportionality test laid down in Article 9(1)(c) of the Directive. Liechtenstein's argument that all services may pose a risk to safety, life or health cannot justify that *any* undertaking willing to establish itself in Liechtenstein has to obtain a prior authorisation, irrespective of the services it provides. Less restrictive measures were available. For instance, prior authorisations could have been required for certain services only, such as electrical and building

services where fatal work accidents may occur. *A posteriori* inspections would be sufficient for other services.

41 As regards the fight against fraud and tax evasion, ESA does not dispute that this may constitute an overriding reason relating to the public interest within the meaning of Article 4(8) of the Directive. However, less restrictive measures could have been adopted. Liechtenstein could have targeted specific areas or professions where fraud or tax evasion have been detected instead of a blanket measure covering all services under the Trade Act. Moreover, tax filings and financial statements could allow for more efficient detection of fraud or tax evasion than a prior authorisation scheme.

42 ESA does not exclude the possibility that legal certainty could constitute an overriding reason in the public interest within the meaning of Article 4(8) of the Directive. However, Liechtenstein has failed to demonstrate that the principle does, in fact, amount to an overriding reason in the public interest. In any event, the authorisation scheme at issue is not appropriate to achieve legal certainty. Nor is it proportionate, since there would not be a lack of legal certainty for undertakings if they were required simply to notify their intention to establish themselves in Liechtenstein and undergo on-site inspections.

43 Consequently, ESA, supported by the Commission, submits that, by maintaining in force Article 7 of the Trade Act, Liechtenstein has infringed its obligations under Article 9(1) of the Directive.

44 Liechtenstein has not submitted written pleadings. However, at the hearing, Liechtenstein argued that, although Article 7 of the Trade Act amounts to an authorisation scheme within the meaning of Article 4(6) of the Directive, it fulfils the three conditions set out in Article 9(1) of the Directive and it may thus be imposed upon service providers. The prevention of tax evasion and the protection of service recipients including consumers may justify the authorisation

scheme. As regards proportionality, Liechtenstein contends, in particular, that *a posteriori* inspections would not be genuinely effective, since although certain services pose a higher risk to safety, life or health, no service may be considered as wholly without risk.

FINDINGS OF THE COURT

45 Liechtenstein does not dispute that Article 7 of the Trade Act amounts to an authorisation scheme within the meaning of Article 4(6) of the Directive. Pursuant to that article, any procedure under which a services provider is required to obtain from a competent authority a formal decision concerning access to a service activity constitutes an authorisation scheme. Article 7 of the Trade Act provides that an undertaking has to obtain an authorisation prior to establishing itself in Liechtenstein. Consequently, that provision must be regarded as an authorisation scheme within the meaning of the Directive.

46 It follows from recital 43 of the Directive that the obligation of prior authorisation should be limited to cases in which it is essential. According to Article 9(1) of the Directive, EEA States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following three conditions are satisfied: (a) the scheme does not discriminate against the provider in question, (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest, and (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an *a posteriori* inspection would take place too late to be genuinely effective. These conditions apply cumulatively. Since ESA has acknowledged in its written pleadings that the scheme is non-discriminatory, the dispute concerns only the conditions in points (b) and (c) of Article 9(1).

47 Liechtenstein has sought to justify the authorisation scheme pursuant to Article 9(1)(b) of the Directive by referring to the protection of service recipients and the fight against fraud and tax evasion. The concept of overriding reasons relating to the public interest is defined in Article 4(8). The definition covers reasons recognised as such in the case law of the Court of Justice of the European Union ("ECJ"), including, in particular, the protection of service recipients and combating fraud.

48 The list of overriding reasons in Article 4(8) of the Directive is not exhaustive. It is settled case law that the objectives of ensuring the effectiveness of fiscal supervision, the need to safeguard the cohesion of the national tax system, preserving the allocation of powers of taxation between the EEA States, and preventing tax avoidance, constitute overriding requirements in the general interest, capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the EEA Agreement (see Joined Cases E-3/13 and E20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 221). Accordingly, the reasons invoked by Liechtenstein are capable of justifying the authorisation scheme.

49 However, the authorisation scheme must also satisfy a test of proportionality. Reasons invoked by an EEA State as justification for a restriction on one of the fundamental freedoms must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure, and precise evidence enabling its arguments to be substantiated (see Case E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, paragraph 57). Measures aiming at preventing tax evasion are permissible only if they target purely artificial contrivances to circumvent tax law. A general presumption of tax avoidance or evasion is not sufficient to justify a measure that adversely affects the objectives of the fundamental freedoms (compare the judgment in *K*, C-322/11, EU:C:2013:716, paragraph 60, and the case law cited).

50 Liechtenstein has stated that a risk to safety, life and health cannot be excluded in relation to any service. In its view, an *a posteriori* inspection would therefore be too late to be effective in ensuring protection. However, the argument that a risk cannot be excluded is too broad and too general to constitute evidence of proportionality. Allowing an EEA State to lay down and enforce a prior authorisation scheme for the provision of all services on the sole ground that the possibility cannot be excluded that a service might pose a risk to safety, life or health would effectively undermine the aim of the Directive to limit the obligation to obtain prior authorisation to cases in which it is essential. Prior authorisation must be the exception rather than the rule.

51 Liechtenstein has acknowledged that it is not in a position to give ESA concrete examples which show that prior controls are more efficient than ex-post controls. Nonetheless, it is of the firm opinion that precisely the lack of concrete examples demonstrates that the prior authorisation scheme works well in practice. The Court notes, however, that the claim that a restrictive measure is justified and proportionate must be supported by reasonable and appropriate evidence. The absence of concrete examples cannot constitute such evidence. The Liechtenstein statement must effectively be seen as an admission of the fact that the prior authorisation scheme cannot be justified.

52 As pointed out by ESA, it would seem that an *a posteriori* inspection system could be equally effective with a view to protecting service recipients and combating fraud and tax evasion. Alternatively, the prior authorisation scheme could be limited to specific sectors or businesses where it has been established by experience or objective risk assessments that a need for the protection of service recipients exists, or where fraud or tax evasion have been observed.

53 During the pre-litigation procedure, Liechtenstein argued that legal certainty may, in principle, justify restrictions on fundamental

freedoms. This argument was reiterated at the hearing upon a question from the bench. However, it is the removal of barriers to the freedom of establishment between EEA States that guarantees legal certainty, whereas administrative procedures may create legal uncertainty (see recitals 5 and 43 of the Directive). In the present context, the principle of legal certainty is intended to shield commercial activity against undue restrictions and cannot therefore be invoked to justify a restriction.

54 The Court finds that Liechtenstein has failed to demonstrate that the prior authorisation scheme at issue is proportionate as required under Article 9(1)(c) of the Directive. ESA's first plea is therefore well-founded.

SECOND PLEA – BREACH OF ARTICLES 10 AND 13 OF THE DIRECTIVE – FREEDOM OF ESTABLISHMENT, CONDITIONS FOR THE GRANTING OF AUTHORISATION AND AUTHORISATION PROCEDURES

PLEAS AND OBSERVATIONS SUBMITTED TO THE COURT

55 ESA, which is supported by the Commission, submits that certain conditions imposed by the prior authorisation scheme for establishment are in breach of the Directive. In particular, the obligations set out in Article 8(1)(e) and (g) of the Trade Act requiring an applicant to have the necessary personnel and an adequate command of the German language in order to obtain an authorisation are contrary to Article 10(1) read in conjunction with Article 10(2)(d) of the Directive as they are not clear and unambiguous.

56 In response to the argument by Liechtenstein that these requirements are practised liberally, ESA contends that this is still insufficient to ensure compliance with the Directive. Even if a

national measure is not enforced, this does not constitute an appropriate way to remedy a breach of EEA law.

57 Furthermore, ESA notes that the Trade Act does not contain any provision similar to Article 13 of the Services Act, under which the holder of an authorisation issued by an EEA State whose controls are equivalent to those exercised by Liechtenstein is exempted from controls in Liechtenstein. By failing to insert a provision of that kind in the Trade Act, Liechtenstein has infringed Article 10(3) of the Directive, which provides that the conditions for granting authorisation cannot duplicate equivalent requirements to which the provider is already subject in another EEA State.

58 Finally, ESA submits that, since, unlike the Services Act, the Trade Act does not expressly lay down the time-frame and the procedure for the assessment of applications, it infringes Article 13(1) of the Directive, which requires authorisation procedures and formalities to be, in particular, clear and made public in advance.

59 During the pre-litigation phase and at the oral hearing, Liechtenstein has not disputed ESA's conclusions under the second plea and assured ESA that it would amend the Trade Act accordingly. However, ESA notes that to date Liechtenstein has not adopted such amendments. Nor has it provided ESA with a time frame for the adoption of the necessary amendments.

FINDINGS OF THE COURT

60 Article 8 of the Trade Act specifies certain conditions for the granting of an application. In particular, it follows from points (e) and (g) of Article 8(1) that an applicant must have the necessary personnel and an adequate command of the German language. The terms "necessary personnel" and "adequate command" may give rise to varying interpretations. Therefore, the Court agrees with ESA that those conditions constitute infringements of Article 10(2)(d) of the

Directive, which requires the criteria for authorisation schemes to be clear and unambiguous. Whether or not these requirements are practised liberally is of no consequence. Mere administrative practices may by their nature be altered at the whim of the authorities and lack the appropriate publicity. This creates legal uncertainty (compare the judgment in *Commission* v *Italy*, 145/82, EU:C:1983:75, paragraph 10).

61 Pursuant to Article 10(3) of the Directive, the conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another EEA State or in the same EEA State. Liechtenstein has implemented this provision in Article 13 of the Services Act. According to that provision a service provider is exempted from any requirements and controls in Liechtenstein if he has been granted an authorisation in another EEA State whose requirements and controls are equivalent to those exercised by Liechtenstein. However, the Trade Act does not contain any provision similar to Article 13 of the Services Act nor does it refer to that provision.

62 The need to ensure that EEA law is applied requires EEA States not only to bring their legislation in line with EEA law but also to adopt rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know the full extent of their rights (see Case E-2/11 *STX and Others* [2012] EFTA Ct. Rep. 4, paragraph 32). The Court thus finds that even if Article 13 of the Services Act is applicable to situations covered by Article 7 of the Trade Act, there is a lack of clarity in Liechtenstein law with regard to the obligation in Article 10(3) of the Directive, in that applicants for authorisation may not be aware of the former provision. Such lack of clarity entails that the obligation in Article 10(3) of the Directive has not been properly implemented into national law.

63 Article 13(1) of the Directive requires authorisation procedures and formalities to be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially. Article 11 of the Services Act lays down the time-frame and authorisation procedure. However, the Trade Act does not contain any provision similar to Article 11 of the Services Act. Nor does it make reference to that provision. Regardless of whether Article 11 of the Services Act applies to authorisations granted pursuant to Article 7 of the Trade Act, the Court finds that, due to the lack of an explicit link between Article 11 of the Services Act and the Trade Act, the latter fails to satisfy the requirement for clarity laid down in Article 13(1) of the Directive.

64 ESA's second plea is therefore also well-founded.

THIRD PLEA – BREACH OF ARTICLE 16 OF THE DIRECTIVE – FREEDOM TO PROVIDE SERVICES

PLEAS AND OBSERVATIONS SUBMITTED TO THE COURT

65 ESA submits that Article 21 of the Trade Act amounts to an authorisation scheme within the meaning of Article 4(6) of the Directive.

66 Such an authorisation scheme may be imposed only if it is justified by a reason listed in Article 16(3) of the Directive. This list is exhaustive, since on that point the Directive has achieved full harmonisation. Therefore, the reasons put forward by Liechtenstein, namely the high intensity of cross-border services in Liechtenstein, the protection of service recipients including consumers and the prevention of social dumping, cannot justify an authorisation scheme such as that contained in Article 21 of the Trade Act, since none of those reasons are listed in Article 16(3) of the Directive. In

any event, ESA contends that Article 21 of the Trade Act fails to meet the proportionality test of Article 16(1)(c).

67 During the pre-litigation phase and at the oral hearing, Liechtenstein has not disputed that Article 21 of the Trade Act amounts to an authorisation scheme within the meaning of Article 4(6) of the Directive. Nor has Liechtenstein disputed that Article 21 of the Trade Act is prohibited unless it is justified pursuant to Article 16(1) and (3) of the Directive.

68 However, Liechtenstein submits that an authorisation scheme such as the one at stake may be justified not only on the four grounds expressly set out in Article 16(3) of the Directive, but also on other overriding reasons in the public interest as identified in case law, such as the protection of service recipients including consumers, as well as the prevention of social dumping. Liechtenstein adds that the proportionality test under Article 16(1)(c) of the Directive is satisfied and refers to its high intensity of cross-border services.

69 At the hearing, the Norwegian Government submitted that the list of grounds in Article 16(3) of the Directive is not exhaustive. EEA States may only be precluded from invoking justification grounds guaranteed by primary EEA law where secondary law has fully harmonised such grounds. This has not been achieved by the Directive. The Norwegian Government also refers to the recent judgment in *Commission* v *Hungary* (C-179/14, EU:C:2016:108), which is to be read as a sign that the ECJ views with scepticism the position of the Commission, and in the present case of ESA, namely that the grounds in Article 16(3) are exhaustive.

70 The Commission shares ESA's view that Article 21 of the Trade Act constitutes an authorisation scheme within the meaning of Article 4(6) of the Directive. In a situation where a service provider physically crosses the Liechtenstein border in order to provide services there, EEA States may only justify an authorisation scheme

by one of the four reasons expressly mentioned in Article 16(3) of the Directive. In the present case, Liechtenstein has not established that the measure at stake may be justified by any of these reasons, nor, in any event, that it is proportionate. In a situation where the service provider does not physically cross the Liechtenstein border, Article 16(3) of the Directive cannot be invoked, as it applies only to the EEA State "to which the provider moves".

FINDINGS OF THE COURT

71 Article 21 of the Trade Act obliges service providers to notify in writing to the Office of Economic Affairs their intention to provide services in Liechtenstein. Article 21(4) of the Trade Act specifies that the service may only be provided after the Office of Economic Affairs has confirmed that the correct notification has been submitted or on the expiry of a period of seven working days following receipt of the notification.

72 ESA submits that Article 21 of the Trade Act constitutes an authorisation scheme within the meaning of Article 4(6) of the Directive. The Commission concurs, and Liechtenstein does not dispute that qualification.

73 The Court notes that Article 16 of the Directive makes reference to requirements, not to authorisation schemes. Article 4(7) defines a requirement as any obligation, prohibition, condition or limit provided for, *inter alia*, in the laws of an EEA State. Consequently, the authorisation scheme, whether express or implied, provided for in Article 21 of the Trade Act must be regarded also as a requirement within the meaning of the Directive.

74 Article 16(1) of the Directive provides that EEA States shall not demand compliance with any requirements which do not respect the principles of non-discrimination, necessity and proportionality. Article 16(2) draws up a list of requirements which EEA States may

not impose on service providers established in another EEA State. Among these is the obligation to obtain an authorisation from their competent authorities. Finally, pursuant to Article 16(3), requirements imposed by the EEA State to which the service provider moves may be justified by reasons of public policy, public security, public health or the protection of the environment where the conditions of Article 16(1) are fulfilled. It is settled case law that justification on public policy grounds can only be accepted in the case of a genuine and sufficiently serious threat affecting one of the fundamental interests of society (see Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 42). This is also expressed in recital 41 of the Preamble of the Directive.

75 Liechtenstein has sought to justify the obligation imposed on a service provider under Article 21 of the Trade Act by invoking the protection of service recipients including consumers, and the prevention of social dumping. Since the whole territory of Liechtenstein is a border area and cross-border services are frequent, *a posteriori* inspections would, according to Liechtenstein, not work.

76 However, the Court finds that, in order to assess whether Article 21 of the Trade Act complies with Article 16 of the Directive, no distinction may be made between border areas and other territorial areas. Moreover, neither the protection of service recipients nor the prevention of social dumping is an objective listed as a ground for justification in Article 16(1)(b) and Article 16(3) of the Directive.

77 Irrespective of whether a requirement imposed on a service provider that is prohibited under Article 16(2) of the Directive can be justified, the restrictive measure needs to be proportionate. As is the case with the authorisation scheme for establishment in Liechtenstein, the requirement governing the provision of services applies indistinctly to all cross-border provision of services. Liechtenstein has failed to demonstrate that the protection of service recipients and the prevention of social dumping require that *a priori* controls be

imposed on the provision of all services, whether or not they pose any risk to the safety, life or health of service recipients and whether or not they are particularly exposed to social dumping. The Court also refers to the findings above under the first plea.

78 As argued by ESA, it seems that less restrictive measures could have been adopted in order to achieve the objectives sought, for example the implementation of a system of targeted *a posteriori* controls and appropriate penalties.

79 Consequently, independently of the question whether the grounds of justification put forward by Liechtenstein are applicable, a requirement such as that laid down in Article 21 of the Trade Act would not satisfy the proportionality test (compare the ECJ judgment in *Commission* v *Hungary*, cited above, paragraph 116).

80 Consequently, ESA's third plea is well-founded.

FOURTH PLEA - BREACH OF ARTICLES 31 AND 36 EEA - ON THE RIGHT OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES

PLEAS AND OBSERVATIONS SUBMITTED TO THE COURT

81 ESA notes that the Trade Act covers services that fall outside the scope of the Directive. The Trade Act must therefore be analysed also under Articles 31 and 36 EEA to the extent that it applies to instances of establishment and provision of cross-border services not covered by the Directive.

82 In this connection, ESA submits that Article 7 of the Trade Act, in so far as it applies to services not covered by the Directive, constitutes a restriction on the freedom of establishment guaranteed by Article 31 EEA. Moreover, ESA contends that Article 21 of the Trade Act, in so far as it applies to services not covered by the Directive, amounts to a restriction on the freedom to provide services enshrined in Article 36

EEA. ESA refers to its arguments under the first and third pleas and contends that Liechtenstein has failed to demonstrate that the measures at stake are justified by one of the public interest objectives listed in Article 33 EEA or by an overriding reason in the public interest and that, in any event, they are not proportionate.

83 At the hearing, Liechtenstein referred to its arguments under the first and third pleas.

FINDINGS OF THE COURT

84 Articles 2 and 3 of the Trade Act appear to cover services that do not fall within the scope of the Directive as defined in its Article 2. Therefore, in so far as the authorisation schemes laid down by the Trade Act apply to services outside the scope of the Directive, it is necessary to assess their compatibility with Articles 31 and 36 EEA.

85 Article 31 EEA prohibits restrictions on the freedom of establishment of nationals of an EEA State in the territory of any other EEA State. Similarly, Article 36 EEA prohibits restrictions on the freedom of nationals of an EEA State established in an EEA State to provide services to recipients in another EEA State. All measures which prohibit, impede or render less attractive the exercise of those freedoms must be regarded as restrictions (see, as regards establishment, Case E17/14 *ESA* v *Liechtenstein*, judgment of 31 March 2015, not yet reported, paragraph 38, and, as regards services, Case E-2/11 *STX and Others*, cited above, paragraph 75). It is settled case law that prior authorisation schemes amount to a restriction on the freedom to provide services (compare the ECJ judgment in *Commission* v *Belgium*, C-355/98, EU:C:2000:1143, paragraph 35).

86 It is undisputed that the authorisation schemes under Articles 7 and 21 of the Trade Act constitute restrictions on the freedom of establishment and the freedom to provide services. Restrictions on the freedom of establishment and the freedom to provide services

are permissible only as derogations expressly provided for in Article 33 EEA, read, in the case of services, in conjunction with Article 39 EEA, or if justified by overriding reasons in the public interest as recognised in case law. However, even then the application of a derogation must be able to secure the attainment of the objective which it pursues and must not go beyond what is necessary to attain that objective (see Case E7/14 *ESA* v *Norway* [2014] EFTA Ct. Rep. 840, paragraph 35).

87 Under its assessment of the first and third pleas, the Court has concluded that the authorisation schemes fail to satisfy the proportionality tests under Article 9(1)(c) and Article 16(1)(c) of the Directive. The same applies to a proportionality test under Article 33 EEA.

88 ESA's fourth plea is therefore well-founded.

VI COSTS

89 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. ESA has requested that Liechtenstein be ordered to pay the costs. Since Liechtenstein has been unsuccessful, and none of the exceptions in Article 66(3) RoP apply, it must therefore be ordered to pay the costs. The costs incurred by the Norwegian Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that the Principality of Liechtenstein has breached its obligations arising from Articles 9, 10, 13 and 16 of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement under its Protocol 1:**

   (a) by maintaining in force Article 7 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings intending to establish themselves in Liechtenstein;

   (b) by maintaining in force Article 8(1) of the Liechtenstein Trade Act in so far as it imposes conditions that are not clear and unambiguous for granting prior authorisation for undertakings wishing to establish themselves in Liechtenstein, namely the conditions to have the necessary personnel and to have an adequate command of the German language;

   (c) by failing to ensure that the conditions for the prior authorisation laid down by the Liechtenstein Trade Act do not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the service provider is already subject in another EEA State;

   (d) by failing to ensure that the procedure and formalities concerning the prior authorisation under the Liechtenstein Trade Act are clearly laid down; and,

(e) by maintaining in force Article 21 of the Liechtenstein Trade Act which requires undertakings to notify in advance their intention to provide cross-border services in Liechtenstein.

2. Declares that, to the extent that the services covered by the Liechtenstein Trade Act fall outside the scope of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement under its Protocol 1, the Principality of Liechtenstein has breached its obligations arising from Articles 31 and 36 of the EEA Agreement:

(a) by maintaining in force Article 7 of the Liechtenstein Trade Act; and,

(b) by maintaining in force Article 21 of the Liechtenstein Trade Act.

3. 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
10 May 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Report for the Hearing

in Case E-19/15

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

EFTA Surveillance Authority

and

The Principality of Liechtenstein

seeking a declaration that by maintaining in force national rules on prior authorisation schemes for undertakings willing to establish themselves and/or to provide cross-border services in Liechtenstein, the Principality of Liechtenstein has breached its obligations arising from Articles 9, 10, 13 and 16 of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement under its Protocol 1, and, to the extent that establishment and the provision of cross-border services fall outside the scope of that Act, its obligations arising from Articles 31 and 36 of the EEA Agreement:

I LEGAL BACKGROUND

EEA LAW

1 Article 31(1) EEA reads:

> *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 33 EEA reads:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

3 Article 36(1) EEA reads:

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

4 Article 39 EEA reads:

The provisions of Article 30 and 32 to 34 shall apply to the matters covered by this Chapter.

5 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) ("the Directive") was made part of the EEA Agreement by Joint Committee Decision No 45/2009 of 9 June 2009

(OJ 2009 L 162, p. 23), and is referred to at point 1 of Annex X to the Agreement (Services in general). That decision entered into force on 1 May 2010, and the time limit for the EEA/EFTA States to implement the Directive expired on the same date.

6 Recitals 39, 42, 43 and 54 to the Directive read:

(39) The concept of 'authorisation scheme' should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.

...

(42) The rules relating to administrative procedures should not aim at harmonising administrative procedures but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings therefrom.

(43) One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, inter alia through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of

time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the 'red tape' involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States.

...

(54) The possibility of gaining access to a service activity should be made subject to authorisation by the competent authorities only if that decision satisfies the criteria of non-discrimination, necessity and proportionality. That means, in particular, that authorisation schemes should be permissible only where an a posteriori inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned a posteriori, due account being taken of the risks and dangers which could arise in the absence of a prior inspection. ...

7 Under Chapter I (General provisions), Article 4 of the Directive reads:

Definitions

For the purposes of this Directive, the following definitions shall apply:

...

5) 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

...

7) 'overriding reasons relating to the public interest' means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

...

8 Under Chapter III (Freedom of establishment for providers), Article 9(1) of the Directive reads:

Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

9 Article 10(1) to (5) of the Directive reads:

Conditions for the granting of authorisation

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.

5. *The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.*

10 Article 13(1) to (4) of the Directive reads:

Authorisation procedures

1. *Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.*

2. *Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.*

3. *Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.*

4. *Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.*

11 Under Chapter IV (Free movement of services), Article 16(1) to (3) of the Directive reads in extract:

Freedom to provide services

1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

…

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their

territory, except where provided for in this Directive or other instruments of Community law;

...

3. *The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.*

NATIONAL LAW

12 Article 2 of the Act of 22 June 2006 on trade and commerce (*Gewerbegesetz, LR 930.1*) ("the Trade Act") reads:

1. *Subject to the provisions of Article 3, this act applies to all commercially pursued and not legally prohibited activities.*

2. *An activity is regarded as commercially pursued if it is pursued on a self-employed and regular basis and with the intention to gain a profit or other economic benefit, regardless of the purpose for which that profit is used.*

3. *For the purposes of this act, an activity is pursued on a self-employed basis if it is pursued at one's own risk and for one's own account.*

13 Article 7 of the Trade Act reads:

1. *Subject to the provisions of Articles 20 to 23, a person wishing to pursue an economic activity within the meaning of Article 2 requires an authorisation from the Office of Economic Affairs (trade authorisation).*

2. The trade authorisation is personal and non-transferable.

3. The Government may establish by ordinance exemptions from the obligation to obtain authorisation for the pursuit of a simple profession.

14 Article 8 of the Trade Act reads:

1. The trade authorisation will be granted if the applicant:

(a) is capable of acting;

(b) is reliable (Article 9);

(c) is a national of an EEA member state or of Switzerland or is a third country national with an uninterrupted domicile in the country of 12 years or more and which is maintained continuously;

(d) is qualified for the pursuit of a qualified profession (Article 10);

(e) has business premises on the national territory and the necessary personnel at his disposal (Article 11);

(f) has indicated a domestic address for service; this can be, in particular, the address of the business premises on the national territory or of a representative appointed according to the provisions of company law;

(g) has an adequate command of the German language.

2. A trade authorisation will be granted to legal entities with legal capacity and to general and limited partnerships [Kollektiv- und Kommanditgesellschaften] if they fulfil the requirements of points (b), (e) and (f) of paragraph 1 and have appointed a managing director (Article 12) and where required an operations manager (Article 12a). The same applies for branches of legal entities or general and limited partnerships with domicile abroad.

3. For business carried out in the form of an industrial enterprise no proof of professional qualification (Article 10) is needed.

15 Article 16(1) to (3) of the Trade Act reads:

1. The trade authorisation will be granted when the applicant fulfils the requirements specified in Articles 8 to 14.

2. In special circumstances, the trade authorisation may be granted for a limited duration and include obligations and conditions.

3. The economic activity applied for may only be pursued after the trade authorisation has been issued.

16 Article 21 of the Trade Act reads:

1. Service providers shall notify in writing to the Office of Economic Affairs using an official form the first provision of services in Liechtenstein.

2. The notification shall be renewed annually if the service provider intends to provide services temporarily or occasionally in Liechtenstein during the year in question.

3. When first notifying the service provision the service provider shall submit the following documents:

(a) A certificate confirming

1. that the service provider lawfully pursues the activity in question in the State of establishment;

2. that the service provider is not prohibited, not even temporarily, from pursuing that activity at the time the certificate is submitted;

(b) A proof of professional qualification;

(c) A proof of nationality;

...

4. *The service may only be provided after the Office of Economic Affairs has confirmed that the correct notification has been submitted. If no confirmation is issued within seven working days from receipt of the notification, the confirmation shall be deemed granted.*

...

17 Article 29b of the Trade Act reads:

Any person not complying with the notification requirement specified in Article 21 may be excluded by the Office of Economic Affairs from cross-border service provision for a period not exceeding one year.

18 Article 4 of the Act of 20 October 2010 on the Provision of Services (*Gesetz* über *die Erbringung von Dienstleistungen, LR 930.4*) ("the Services Act") reads:

The provisions of this act only apply to the extent that special legislation does not make other provision.

19 Article 11 of the Services Act reads:

Procedure for granting an authorisation

1. *Unless special legislation makes other provision, the competent authority shall decide by order on an application for an authorisation within six weeks. The period may be extended reasonably by the authority once if this is necessary because of the difficulty of the matter. The extension must be reasoned and communicated to the parties of the proceedings before the expiry of the deadline for the decision.*

2. *The period within which a decision must be taken referred to in paragraph 1 begins to run once the complete application has been received. The applicant shall be informed, in the relevant case, of*

the incompleteness of the application and of the resulting legal consequences.

3. *The authorisation of an application shall be considered granted if the competent authority does not take a decision within the period established in paragraph 1 or the special legislation.*

4. *The competent authority shall confirm immediately in writing the grantof an authorisation under paragraph 3. This confirmation shall be sent to the parties of the proceedings. Each party shall have the right, within four weeks of receipt of this confirmation, to request an order stating that an authorisation has been issued in accordance with paragraph 3.*

20 Article 13 of the Services Act reads:

Exemption from requirements and controls

For the purposes of granting an authorisation, a service provider shall be exempted from requirements and controls if he has been granted an authorisation in Liechtenstein or another EEA State conditional on requirements and controls that are equivalent to those of the procedure in question or that are comparable as regards their purpose.

II PRE-LITIGATION PROCEDURE

21 In December 2010, the Liechtenstein Government notified to the EFTA Surveillance Authority ("ESA") the national measures considered to ensure implementation of the Directive. ESA subsequently informed Liechtenstein that it had undertaken an own initiative case to examine whether the Trade Act complied with the requirements set out in the Directive, in particular as regards the authorisation schemes contained in that act.

22 In February 2012, ESA sent a letter to Liechtenstein requesting information on the interpretation of the Trade Act and its

compliance with the Directive. Liechtenstein responded to that letter in May 2012. Further exchanges of information and views on the matter also took place during 2012 and 2013.

23 On 3 July 2013, ESA issued a letter of formal notice, concluding that several provisions of the Trade Act were in breach of the Directive. In particular, ESA considered that Articles 7 and 21 of the Trade Act amounted to authorisation schemes for companies wishing to establish themselves or to provide cross-border services in Liechtenstein, which did not satisfy the requirements specified in Articles 9 and 16 of the Directive.

24 In the event that the authorisation schemes for establishment as such were considered compatible with the Directive, ESA argued that certain requirements were nonetheless in breach of Article 10(2)(d) and (3) and Article 13(1) of the Directive.

25 On 2 October 2013, Liechtenstein responded to the letter of formal notice, maintaining that the authorisation schemes for establishment and cross-border services were as such compatible with the Directive and Articles 31 and 36 EEA. On the other hand, Liechtenstein accepted the conclusions of ESA with regard to some aspects of the authorisation schemes. A proposal to Parliament accommodating ESA's concerns would be presented. No time frame for those amendments was mentioned.

26 On 24 April 2014, ESA delivered a reasoned opinion to Liechtenstein, maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), ESA required Liechtenstein to take the necessary measures to comply with the reasoned opinion within two months following the notification, i.e. no later than 24 June 2014. Upon request, ESA extended this deadline to 19 August 2014.

27 On 19 August 2014, Liechtenstein replied to the reasoned opinion, maintaining the conclusions set out in its response to the letter of formal notice.

28 On 3 June 2015, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

III PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

29 ESA lodged the present application at the Court Registry on 29 July 2015 requesting the Court to:

1. Declare that the Principality of Liechtenstein has breached its obligations arising from Articles 9, 10, 13 and 16 of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement by Protocol 1 thereto, and, to the extent that establishments and the provisions of cross-border services fall outside the scope of that Act, its obligations arising from Articles 31 and 36 of the EEA Agreement:

(a) by maintaining in force Article 7 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings willing to establish themselves in Liechtenstein; and,

(b) by maintaining in force Article 8(1) of the Liechtenstein Trade Act in so far as it imposes conditions that are not clear and unambiguous for granting prior authorisation for undertakings willing to establish themselves in Liechtenstein (namely the obligation to have the necessary personnel and the obligation to have an adequate command of the German language); and,

(c) by failing to ensure that requirements, which are equivalent or essentially comparable as regard their purpose to which the

service provider is already subject in another EEA State or in the same EEA State, in the procedure for prior authorisation for undertakings intending to establish themselves in Liechtenstein are not duplicated and that the procedure and formalities concerning the authorisation scheme under the Trade Act are clearly laid down; and,

(d) by maintaining in force Article 21 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings intending to provide cross-border services in Liechtenstein; and

2. Order the Principality of Liechtenstein to bear the costs of the proceedings.

30 The application was served on Liechtenstein on 5 August 2015. The time limit for lodging a defence under Article 35(1) of the Rules of Procedure ("RoP") expired on 5 October 2015. After expiry Liechtenstein sent a letter to the Court requesting an extension of the time limit for lodging the defence. The missed deadline was explained by the fact that ESA's application was only served on the Liechtenstein Mission in Brussels and not on the EEA Coordination Unit of the Liechtenstein Government. Since the Liechtenstein Mission had assumed that the application had also been served on the EEA Coordination Unit, it had not forwarded the application to the latter.

31 By letter of 7 October 2015, the Court informed Liechtenstein that the President had decided not to grant an extension of the time limit.

32 By letter of 9 October 2015, ESA informed the Court that it waived its right to apply for a judgment by default under Article 90 RoP.

33 On 20 December 2015, the European Commission ("the Commission") submitted written observations.

IV WRITTEN PROCEDURE BEFORE THE COURT

34 Written arguments have been received from the applicant:

- ESA, represented by Markus Schneider, Deputy Director, Clémence Perrin, Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents.

35 Pursuant to Article 20 of the Statute of the Court and Article 97 RoP, written observations have been received from:

- the Commission, represented by Hélène Tserepa-Lacombe and Luigi Malferrari, members of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS AND OBSERVATIONS SUBMITTED TO THE COURT

ESA

36 ESA's application consists of four pleas. First, Liechtenstein has breached Article 9 of the Directive by maintaining in force a prior authorisation procedure for establishment. Second, several of the conditions and rules applying to that authorisation procedure are in breach of Articles 10 and 13 of the Directive. Third, Liechtenstein has breached Article 16 of the Directive by maintaining in force a prior authorisation procedure for the provision of cross-border services. And fourth, the prior authorisation procedures for establishment and cross-border services, to the extent that they apply to establishment and services outside the scope of the Directive, are in breach of Articles 31 and 36 EEA.

FIRST PLEA – BREACH OF ARTICLE 9 OF THE DIRECTIVE

37 ESA submits that the rules on establishment under Liechtenstein law amount to a prior authorisation scheme. In order to establish itself legally in Liechtenstein, any undertaking has to first file an application to the Liechtenstein authorities and then wait either for a decision on the application or, alternatively, for the expiry of a six-week period specified under Liechtenstein law. This, in effect, amounts to an authorisation scheme, within the meaning of Article 4(6) of the Services Directive. That finding is not contested by Liechtenstein.

38 ESA observes that, according to Article 9(1) of the Directive, an authorisation scheme in the field of establishment can only be imposed if it is non-discriminatory, justified by an overriding reason in the public interest, and proportionate. In ESA's view, the authorisation scheme at issue is neither justified nor proportionate.

39 Liechtenstein has put forward three public interest objectives to justify the scheme, namely, the protection of service recipients, the fight against fraud and tax evasion, and the protection of legal certainty. However, in ESA's view, Liechtenstein has failed to put forward evidence to substantiate those claims.

40 Although the protection of service recipients is mentioned in Article 4(8) of the Directive as a permissible overriding reason in the public interest, ESA argues that Liechtenstein has failed to provide any evidence substantiating the reasons why the authorisation scheme is required to protect the recipients of services and how the scheme is proportionate in light of the aim sought.[1]

1 Reference is made to Cases E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, paragraph 57; E-16/10 *Philip Morris Norway* [2011] EFTA Ct. Rep. 330, paragraph 85; judgment in *Atral*, C-14/02, EU:C:2003:265, paragraph 69; and judgment in *Commission* v *Belgium*, C-254/05, EU:C:2007:319, paragraph 37.

41 ESA submits that, by applying to all instances of establishment without making any distinction according to the nature of the services provided by the undertaking and the potential risks for service recipients, the authorisation scheme is not appropriate for ensuring effective protection of service recipients. Such a general and wide scope runs counter to the aim of the Directive which is to limit prior authorisation schemes.

42 Liechtenstein has sought to justify the wide ranging authorisation scheme by stating that a risk to safety, life and health cannot be excluded for any service. Therefore, an *a posteriori* inspection would be too late to be effective in ensuring the protection of service providers and recipients. ESA contends that such general statements cannot suffice as evidence, as this would be tantamount to reversing the rule and exception regime under the Directive in relation to prior authorisation schemes.

43 ESA submits that an *a posteriori* inspection, taking place shortly after the date of establishment or otherwise as appropriate, could be considered as an alternative to the prior authorisation scheme. Another alternative would be to limit the authorisation scheme to specific sectors where it has been established and evidenced that there is an actual need for the protection of service recipients. Therefore, alternative methods of control might offer a protection to service recipients and still offer the legal certainty required for undertakings to establish themselves in Liechtenstein.

44 As for Liechtenstein's second justification, ESA does not dispute that combating fraud and tax evasion may constitute overriding reasons relating to the public interest within the meaning of Article 4(8) of the Directive.[2] However, ESA contends that Liechtenstein has failed

2 Reference is made to judgment in Établissements *Rimbaud*, C-72/09, EU:C:2010:645, paragraphs 33 and 34, and Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraphs 166 and 167.

to demonstrate that the prior authorisation scheme at issue is required in order to avoid fraud and tax avoidance and how the authorisation scheme is the only effective measure to ensure the required level of protection against such risks.[3]

45 ESA submits that less restrictive measures could have been adopted in order to tackle fraud and tax evasion. For example, Liechtenstein could have targeted specific areas or professions where fraud or tax evasion have been detected rather than adopting a blanket measure covering all services under the Trade Act. In addition, it appears doubtful whether a prior authorisation scheme is the most effective system for the detection of such fraudulent or evasive practices, as, for example, tax filings and financial statements would appear to provide a better insight into the business practices of such firms.

46 As for the protection of legal certainty, ESA understands Liechtenstein's view to the effect that tradesmen and consumers have more legal certainty with a prior authorisation scheme than under a notification scheme with subsequent inspections. ESA considers that legal certainty is a fundamental principle of EEA law but claims that Liechtenstein has failed to show that, aside from being a fundamental principle of law, it also amounts to an overriding reason in the public interest within the meaning of Article 4(8) of the Directive. In fact, recital 5 to the Directive explicitly refers to the principle of legal certainty not as a reason to justify restrictions but, on the contrary, as one of the main reasons why unnecessary barriers to the fundamental rights of establishment and the freedom to provide services should be removed by the Directive.

3 Reference is made to judgments in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 53, and Établissements *Rimbaud*, EU:C:2010:645, paragraph 34.

47 Even if the protection of legal certainty could be suited to justify an authorisation scheme, ESA submits that Liechtenstein has not demonstrated that the authorisation scheme at issue is appropriate to achieve that aim. In particular, Liechtenstein has failed to address the fact that the alleged advantage of legal certainty comes at the cost of an administrative burden actually impacting on the legal certainty of businesses.

48 In any event, ESA contends that the prior authorisation scheme goes beyond what is necessary to ensure legal certainty. ESA fails to see that commercial activities would lack legal certainty if only a notification scheme with on-site inspections applied. Such argument ignores the very spirit and purpose of the Directive. Liechtenstein could also ensure that the relevant regulations applying in the context of establishment are sufficiently clear and accessible such that undertakings wishing to establish themselves in Liechtenstein have the necessary information and can obtain appropriate assistance from the competent national authorities.

49 Consequently, ESA submits that Article 7 of the Trade Act amounts to an authorisation scheme in breach of the Directive since it does not fulfil the three cumulative conditions expressly mentioned in Article 9(1) of the Directive.

SECOND PLEA - BREACH OF ARTICLES 10 AND 13 OF THE DIRECTIVE

50 Even if the authorisation scheme addressed above were considered non-discriminatory, justified and proportionate, ESA submits that certain conditions imposed by the scheme are in breach of the Directive. In particular, the obligations pursuant to Article 8(1)(e) and (g) of the Trade Act, which set out the requirements to have the necessary personnel and an adequate command of the German language in order to obtain an authorisation, are contrary to Article

10(1) read in conjunction with 10(2)(d) of the Directive as they are not clear and unambiguous.

51 In response to the argument by Liechtenstein that these requirements are practised very liberally, ESA contends that this would still be insufficient to ensure compliance with the Directive. Even if a national measure is not enforced, this does not constitute an appropriate way to remedy a breach of EEA law.[4]

52 Furthermore, ESA argues that the Trade Act fails to ensure adequate legal certainty with regard to the obligation in Article 10(3) of the Directive not to duplicate comparable requirements and controls. A provision to this effect in Article 13 of the Services Act is not sufficient as the Trade Act is considered a *lex specialis*. This means that the provisions of the Services Act apply as long as the Trade Act does not provide for any deviating rules. Applicants and the national administration might therefore not be aware of the duty to consider the comparable requirements which an applicant has already fulfilled in its home State of establishment. In any event, the absence of any reference to Article 13 of the Services Act in the Trade Act leads to a lack of legal certainty for actual and potential applicants for authorisation.

53 Finally, ESA submits that, contrary to Article 13 of the Directive, the Trade Act fails to lay down the procedures and formalities concerning the authorisation scheme applying to establishment. It is not sufficient that those procedures and formalities are laid down in Article 11 of the Services Act. Rather, a provision such as Article 11 of the Services Act should be inserted in the Trade Act, or at least a reference to the Services Act should be included in the Trade Act.

4 Reference is made to judgments in *Commission* v *France*, 167/73, EU:C:1974:35, paragraph 42, and *Commission* v *Germany*, 29/84, EU:C:1985:229, paragraph 17.

54 ESA notes that Liechtenstein has not contested the conclusions concerning the compatibility of all such provisions (i.e. Article 8(1)(e), (g), the obligation not to duplicate comparable requirements and controls and the obligation to set up clear authorisation procedures and formalities) with Articles 10 and 13 of the Directive. However, Liechtenstein has not provided ESA with any time frame for the adoption or entry into force of the necessary amendments. ESA submits in this regard that practices, circumstances or situations prevailing in the domestic legal order are the responsibility of the EEA/EFTA States and cannot justify failure to observe obligations arising under EEA law.[5]

THIRD PLEA - BREACH OF ARTICLE 16 OF THE DIRECTIVE

55 ESA submits that the rules under Article 21 of the Trade Act on cross-border services amount to an authorisation scheme with a tacit acceptance period of seven days and is as such prohibited under Article 16(2)(b) of the Directive. That finding is not contested by Liechtenstein.

56 ESA contends that an authorisation scheme may be imposed on the provision of cross-border services only if it is justified by one of the public interest objectives expressly listed under Article 16(3) of the Directive, and provided that such measure is non-discriminatory, necessary and proportionate to the objective sought, in accordance with Article 16(1)(a) to (c). In ESA's view, the authorisation scheme at issue cannot be justified and is not proportionate.

57 ESA submits that the list set out in Article 16(3) of the Directive is exhaustive in nature. The Directive harmonises all the areas falling within its scope. Any national measure must therefore be assessed in

5 Reference is made to Case E-19/14 *ESA* v *Norway*, judgment of 19 June 2015, not yet reported, paragraph 48.

the light of the provisions of the Directive, and not in the light of the more general articles of the main text of the EEA Agreement.[6] There is no indication in the wording of Article 16(3) that the list should also include other public interest objectives. Therefore, only the justifications listed in Article 16(3) are acceptable.[7] The application of Article 3(3) of the Directive does not alter that conclusion.[8]

58 Liechtenstein has sought to justify the authorisation scheme by reference to the high intensity of cross-border services provision in Liechtenstein, in which an ordinary notification procedure with an *a posteriori* inspection would not be workable. In addition, the authorisation scheme allegedly prevents social dumping from employers in neighbouring countries with lower wages, and protects the public by establishing the reliability and professional competence of cross-border service providers. However, ESA argues that none of those considerations are listed under Article 16(3) of the Directive. They are therefore not permissible in the present circumstances.

59 ESA submits that the concepts of public policy, public security and public health, which are the justifications listed in Article 16(3) of the Directive, have been interpreted strictly in case law. Such justifications require the State to show a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[9] This case law is explicitly referred to in recital 41 of the Directive. However, Liechtenstein has provided no information or arguments to

6 Reference is made to judgment in *Lidl Magyarország*, C-132/08, EU:C:2009:281, paragraph 42.

7 Reference is made to the Commission's Handbook on the implementation of the Services Directive, paragraph 7.1.3.1.

8 Reference is made to judgment in *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 37.

9 Reference is made to Cases E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 42 (concerning Article 33 EEA); E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 42 (concerning Article 40 EEA); judgment in Église *de scientologie*, C-54/99, EU:C:2000:124, paragraph 17; and judgment in *Commission* v *Austria*, C-257/05, EU:C:2006:785, paragraph 25.

demonstrate that the alleged threat in the absence of the authorisation scheme is genuine and sufficiently serious to warrant recourse to any justification ground.

60 Even if the considerations relied on by Liechtenstein were permissible under Article 16(3) of the Directive, ESA submits that they would still fail to meet the proportionality test, as the prior authorisation scheme is not suitable for attaining the objective pursued, goes beyond what is necessary to attain those objectives and is not proportionate.

61 In this regard, ESA submits that other measures could have been adopted in order to achieve the objectives sought, for example the implementation of a system of *a posteriori* controls, together with deterrent penalties to prevent and/or to identify instances of fraud. Although an *ex ante* control applicable to all provision of cross-border services may be more efficient in preventing risks, it constitutes a disproportionate restriction on the freedom to provide services.

FOURTH PLEA - BREACH OF ARTICLES 31 AND 36 EEA

62 ESA notes that the scope of the Trade Act is broader than that of the Directive. The Trade Act will therefore also be analysed under Articles 31 and 36 EEA to the extent it applies to instances of establishment and provision of cross-border services that are not covered by the Directive.

63 ESA submits that any national measure, although applicable without discrimination on grounds of nationality, which is liable to hinder or render less attractive the exercise by EEA nationals of the freedom of establishment guaranteed by the EEA Agreement constitutes a

restriction within the meaning of Article 31 EEA.[10] In ESA's view, the authorisation scheme for establishment in Liechtenstein is a measure of that kind.

64 Liechtenstein has advanced the same justification grounds for the restriction under Article 31 EEA as under Article 9 of the Directive. ESA refers to its arguments made under the first plea. It contends that Liechtenstein has failed to demonstrate that the prior authorisation scheme is required in order to protect any of the overriding reasons in the public interest that Liechtenstein relies on. ESA also submits that the authorisation scheme is neither proportionate nor suitable for ensuring attainment of the objectives pursued in that it goes beyond what is necessary to achieve those objectives.

65 As for the freedom to provide services enshrined in Article 36 EEA, ESA submits that the authorisation procedure for cross-border service providers established by the Trade Act qualifies as an authorisation scheme, which amounts to a restriction on that freedom.[11]

66 Liechtenstein has advanced basically the same justification grounds for the restriction under Article 36 EEA as under Article 16 of the Directive. However, ESA takes the view that Liechtenstein has failed to provide any explanation, supported by evidence, why the authorisation scheme can be justified under any of the public interest

10 Reference is made to judgments in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37; *Caixabank France*, C-442/02, EU:C:2004:586, paragraph 11; E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 64; E-4/00 *Dr Johann Brändle* [2000-2001] EFTA Ct. Rep. 123, paragraph 12; E-5/00 *Dr Josef Mangold* [2000-2001] EFTA Ct. Rep. 163, paragraph 13; and E-6/00 *Dr Jürgen Tschannett* [2000-2001] EFTA Ct. Rep. 203, paragraph 12.

11 Reference is made to judgments in *Säger*, C-76/90, EU:C:1991:331, paragraph 14; *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 15; and *Commission* v *Belgium*, C-355/98, EU:C:2000:113, paragraph 35.

objectives listed in Article 33 EEA, or demonstrated any overriding reasons relating to the public interest developed under this Article. ESA also submits that the restrictive measure is neither proportionate nor suitable for ensuring attainment of the objectives pursued in that it goes beyond what is necessary to achieve those objectives.

67 In ESA's view, Liechtenstein could have relied on other administrative measures to control the provision of cross-border services than case by case analysis under the authorisation scheme, which is the most restrictive form of limitation on the freedom to provide services.[12] In addition, in the field of the freedom to provide services, EEA States have to take into account controls operated in the EEA State of establishment.[13]

THE COMMISSION

68 The Commission agrees with the legal arguments developed by ESA. It limits itself to highlighting selected legal aspects which it deems of particular importance.

12 Reference is made to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22). Both directives have been incorporated into the EEA Agreement.

13 Reference is made to judgments in *Webb*, 279/80, EU:C:1981:314, paragraphs 19 to 21; *Commission* v *Italy*, C-134/05, EU:C:2007:435, paragraph 25; *Commission* v *Portugal*, C-171/02, EU:C:2004:270, paragraph 60; and *Commission* v *Netherlands*, C-189/03, EU:C:2004:597, paragraph 18.

AUTHORISATION OBLIGATION FOR THE ESTABLISHMENT OF SERVICE PROVIDERS – THE DIRECTIVE

69 The Commission concurs with ESA in considering the requirement for authorisation for the establishment of service providers to breach Article 9 of the Directive as it is neither justified nor proportionate. In this regard, Article 29(1) of the Directive already provides for administrative cooperation mechanisms among EEA States through which the Liechtenstein administration could obtain the same information without imposing burdensome formalities on service providers.

70 The Commission agrees with ESA's assessment of the requirements in the Trade Act for a service provider to have the necessary personnel and an adequate command of the German language. In addition, the Commission points out that the requirement in Article 8(1)(b) of the Trade Act that the service provider must be reliable appears not to be based on clear and objective criteria set out in advance and thus in breach of Article 10(2)(d), (e) and (g) of the Directive. Furthermore, the requirement in Article 8(1)(e) of the Trade Act to have business premises in Liechtenstein breaches Article 10(2)(b) and (c) of the Directive for certain categories of service providers, such as door-to-door salesmen.

71 With regard to the overriding reason of combating fraud and tax evasion, the Commission notes that the requirement for authorisation for the establishment of service providers is unsuitable for achieving that objective, because a large number of cross-border service providers are likely to remain fiscally resident in their country of establishment. The measure also goes beyond what is necessary because more targeted controls on tax issues can be deployed.[14]

14 Reference is made to judgment in *Lasteyrie du Saillant*, C-9/02, EU:C:2004:138.

72 The Commission stresses that Liechtenstein cannot invoke legal certainty as an overriding reason of general interest capable of justifying a restriction on fundamental freedoms. Rather, legal certainty is a general principle of EU law, which requires legal rules to be sufficiently clear and precise, and their legal implications foreseeable. Also, sufficient information must be made public to enable parties to know what the law is and how to comply with it. These aspects are reflected in recital 5, Article 10(2)(d) to (g) and Article 13(1) of the Directive. From the viewpoint of legal certainty, the requirement for authorisation for the establishment of service providers is in fact problematic. In particular, there is a lack of clarity regarding the applicability of the tacit approval rule, given the condition of written confirmation set out in Article 11(4) of the Services Act in breach of Article 13(4) of the Directive.

AUTHORISATION OBLIGATION FOR THE ESTABLISHMENT OF SERVICE PROVIDERS – ARTICLE 31 EEA

73 The Commission agrees with ESA that the requirement for authorisation for the establishment of service providers in Liechtenstein amounts to an unjustifiable and disproportionate restriction on the freedom of establishment guaranteed under Article 31 EEA.

AUTHORISATION OBLIGATION FOR THE PROVISION OF SERVICES – THE DIRECTIVE

74 As for the obligation on providers of services to notify the authorities under Article 21 of the Trade Act, the Commission shares the view of ESA that this constitutes in fact an authorisation scheme. The Commission distinguishes between situations where a foreign EEA-established service provider physically crosses the Liechtenstein border and provides its services in Liechtenstein, and situations

where the foreign EEA-established service provider is not physically present on Liechtenstein territory.

75 In situations where the service provider physically moves to Liechtenstein, Article 16(3) of the Directive provides for the possibility to impose requirements with regard to the provision of services on grounds of public policy, public security, public health or the protection of the environment, on condition that they are non-discriminatory, necessary and proportionate. The Commission considers this list of overriding reasons relating to the public interest to constitute an exhaustive list.

76 The Commission argues that this view is supported, first, by the wording of Article 16. Only four public interests are mentioned in that provision. These are the original three mentioned in the Treaty together with environmental protection. The drafting of Article 16 in this particular way reflects a conscious choice by the Union legislative bodies, as can be seen from its legislative history.[15]

77 Second, the teleology of the provision also supports this interpretation. The Commission refers to recitals 6, 43 and 116 of the Directive. Moreover, to adopt a different interpretation based on Article 3(3) of the Directive would deprive Article 16 of any purpose. It follows from case law that when adopting secondary legislation, such as the Directive, giving effect to a fundamental freedom the EU legislature is entitled to restrict certain derogations.[16]

78 Third, the scheme of the Directive itself also indicates that the list of public interests in Article 16 is exhaustive. The idea underlying Articles 29 to 33 and 35 of the Directive regarding administrative cooperation among EEA States is that the responsibility for the

15 Reference is made in particular to the Commission's original proposal (SEC(2004) 21) as well as to the Commission's second proposal (COM(2006) 160 final, p. 10).

16 Reference is made, by analogy, to *Rina Services and Others*, EU:C:2015:399, paragraphs 36 to 38 and 40.

regulation of service providers lies with the EEA State of establishment.

79 The Commission agrees with ESA that Liechtenstein has not provided any evidence that the authorisation scheme for the provision of services can be justified by any of the overriding reasons mentioned in Article 16(3).

80 In any event, the Commission also shares the view of ESA on the disproportionate nature of the authorisation scheme for service providers. There is a strong presumption that the requirements listed in Article 16(2) of the Directive cannot be justified because they are particularly harmful to the freedom to provide services.[17]

81 In a situation where the service provider physically does not cross the Liechtenstein border but provides services from a distance, the Commission considers it doubtful whether Article 16(3) of the Directive can be invoked, as it applies only to the EEA State to which the service provider moves.[18] The wording of Article 16(2) is clear: it provides for a prohibition for EEA States and does not set out any possibility for justification.[19] A different interpretation would render Article 16(3) redundant, given that the latter provision has a more limited scope.[20]

17 Reference is made to the Opinion of Advocate General Bot in *Commission* v *Hungary*, C-179/14, EU:C:2015:619, point 157.

18 Reference is made to the Opinion of Advocate General Bot in *Commission* v *Hungary*, EU:C:2015:619, point 156, and to the Opinion of Advocate General Cruz Villalón in *Rina Services and Others*, EU:C:2015:159, point 46 et seq.

19 Reference is made, by analogy, to judgment in *Rina Services and Others*, EU:C:2015:399, paragraph 30.

20 Ibid., paragraph 37.

AUTHORISATION OBLIGATION FOR THE PROVISION OF SERVICES – ARTICLE 36 EEA

82 In relation to services not covered by the Directive and to which only Article 36 EEA is applicable, the Commission shares the view expressed by ESA that the requirement for authorisation under Article 21 of the Trade Act should be deemed an unjustifiable and disproportionate restriction on the freedom to provide services guaranteed by Article 36 EEA.

83 The Commission considers the justification put forward by Liechtenstein to be unconvincing on a number of accounts. First, the fight against alleged lower levels of wages in neighbouring countries does not constitute as such an overriding reason of public interest under the EU law on fundamental freedoms. Undertakings from different EEA States are in competition with each other and may offer their products or services on a cross-border basis; and, in that regard, the level of wages in each EEA State depends on a number of factors, including social and fiscal charges. To fight against the difference in wage levels from one EEA State to another would be tantamount to fighting the very notion of the freedom to provide services.[21]

84 Second, a proportionality analysis is barely possible with regard to a requirement for authorisation which applies to all services. An authorisation scheme can be justified only if there are precise, detailed and substantiated reasons why it is necessary in a specific

21 Reference is made to judgment in *Commission* v *Luxembourg*, 2/62 and 3/62, EU:C:1962:45, p. 434.

field.[22] In addition, no presumption of fraud or violation of rules can be permitted in relation to foreign-established service providers.[23]

85 Third, the authorisation scheme for the provision of services is not suitable to attain the objective of combating bogus self-employment. The authorisation provided for in Article 21 of the Trade Act and the ensuing paper-based control will not be able to cast any light on the real substance of the service provider concerned. For similar reasons, the requirement for authorisation is also unsuitable to attain the objective of consumer protection or to ensure reliability and professional competence of EEA-established cross-border service providers.

86 Fourth, the Commission considers the authorisation scheme to go beyond what is necessary, as its scope is not limited to categories which are particularly prone to abuse or to specified situations of dangers. Furthermore, the reliability and professional competence of the service provider, and to an extent also consumer protection, is generally ensured by the EEA State of establishment on the basis of its legislation and through its controls. Moreover, a generalised risk for consumer protection ensuing from any cross-border service provider cannot be accepted.

87 Fifth, the Commission agrees with ESA that there are alternative but less restrictive measures, such as ad hoc inspections, which could allow the Liechtenstein authorities to attain the objectives pursued.

22 Reference is made to judgment in *Commission* v *Luxembourg*, C-319/06, EU:C:2008:350, paragraph 51; the Opinion of Advocate General Szpunar in *Trijber and Harmsen*, C-340/14 and C-341/14, EU:C:2015:505, point 80 and the case law cited; and judgment in *Commission* v *Austria*, C-161/07, EU:C:2008:759, paragraph 37.

23 Reference is made to judgments in *Commission* v *Belgium*, C-433/04, EU:C:2006:702, paragraph 37; *Commission* v *Belgium*, EU:C:2012:814, paragraph 53; *Lasteyrie du Saillant*, EU:C:2004:138, paragraph 51; and *Commission* v *Denmark*, C-464/02, EU:C:2005:546, paragraphs 66 and 67.

88 Sixth, the Commission stresses that an administrative scheme must be based on objective and non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion.[24] In the present case the criteria used by the Liechtenstein authorities to decide on a request for authorisation to provide services in Liechtenstein are not laid down in the Trade Act.

Per Christiansen
Judge-Rapporteur

24 Reference is made to judgment in *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 64 and the case law cited.

Case

E-2/16

Gerhard Spitzer

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EFTA Surveillance Authority

(Preliminary objection to admissibility – Refusal to commence infringement proceedings – Directive 2002/47/EC – Challengeable Measures – Time limit – Admissibility)

Table of Contents

Summary of the Order

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

2 Pursuant to the second paragraph of Article 36 SCA, any natural or legal person may, under the same conditions as an EFTA State, institute proceedings before the Court against a decision of the EFTA Surveillance Authority ("ESA") addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

3 The action was brought under the Article 36(2) SCA based on the contention that ESA had infringed its duty to initiate the procedure laid down in Article 31 SCA.

4 According to settled case law, ESA alone is competent to decide whether it is appropriate to bring proceedings under the first paragraph of Article 31 SCA for failure to fulfil obligations. Consequently, a private applicant has no right to challenge a refusal by ESA to initiate infringement proceedings against an EFTA State. That conclusion is not affected by the applicant's argument that ESA allegedly infringed his procedural rights by failing to state reasons.

5 The decision by ESA to close the complaint case, in which the applicant claimed that Liechtenstein had failed to respect and correctly apply Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, did, therefore, not constitute a challengeable decision. The application was therefore dismissed as manifestly inadmissible.

Order of the Court

24 May 2016

(Preliminary objection to admissibility – Refusal to commence infringement proceedings – Directive 2002/47/EC – Challengeable measures – Time limit – Admissibility)

In Case E-2/16,

Gerhard Spitzer, represented by Antonius Falkner, Rechtsanwalt,
— applicant,

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EFTA Surveillance Authority, represented by Carsten Zatschler and Marlene Lie Hakkebo, Members of its Department of Legal & Executive Affairs, acting as Agents,
— defendant,

APPLICATION under Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice for the annulment of EFTA Surveillance Authority Decision No 425/15/COL of 25 November 2015 on financial collateral arrangements in Liechtenstein,

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,

makes the following

Order

I FACTS AND PROCEDURE

1 The applicant is an Austrian citizen residing in South Africa. He held a current account and a securities deposit account with the Liechtensteinische Landesbank AG ("the bank"). He traded in shares, currencies and precious metals. In connection with these activities he took out loans from the bank on several occasions. In 2000, he concluded a "financial security collateral agreement" with the bank, granting as security for any loans from the bank all of his present and future assets held at the bank. During the financial crisis in 2008, the financial situation of the applicant deteriorated, which led the bank to take ownership of his assets at the bank under the financial security collateral agreement.

2 In January 2009, the applicant brought proceedings against the bank before the Liechtenstein courts, claiming that the bank had acted contrary to provisions laid down, *inter alia*, in Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ 2002 L 168, p. 43) ("the Directive"). The case file does not include a copy of the judgments rendered in the applicant's case. However, he states that as a result of the proceedings he was found not to fall within the scope of the Directive. This result was later upheld by the Supreme Court of the Principality of Liechtenstein (*Fürstlicher Oberster Gerichtshof*).

3 In October 2013, the applicant lodged a complaint with the State Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*), seeking the annulment of the judgment of the Supreme Court.

4 In January 2014, before the State Court delivered its decision in the applicant's case, he lodged a complaint against Liechtenstein with the EFTA Surveillance Authority ("ESA"), alleging that Liechtenstein had failed to respect and correctly apply the Directive. Following the complaint, ESA informed the applicant that it intended to await the result of the State Court proceedings. In April 2014, the State Court rejected the applicant's claim.

5 By Decision No 425/15/COL of 25 November 2015 ("the contested decision"), ESA closed the complaint case, considering that there were no grounds for pursuing the case further under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

6 By an application registered at the Court on 23 February 2016, the applicant brought an action against ESA under Article 36(2) SCA. The applicant requests the Court:

(a) to annul the EFTA Surveillance Authority Decision No 425/15/COL from 25th November 2015, to the incorrect approach of the Principality of Liechtenstein on the implementation of the Directive 2002/47/EC void and releases within the meaning of article without substitution these 36 paragraph SCA; and

(b) to order the EFTA Surveillance Authority to bear the costs of the proceedings.

7 The action is based on the contention that ESA infringed its duty to initiate the procedure laid down in Article 31 SCA.

8 On 18 March 2016, ESA lodged an application for a decision on the admissibility of the action as a preliminary matter pursuant to Article 87(1) of the Rules of Procedure ("RoP"). ESA claims that the Court should:

(1) dismiss the application as inadmissible; and

(2) order the applicant to pay the costs.

9 On 29 April 2016, the applicant submitted, pursuant to Article 87(2) RoP, his observations on the preliminary objection, requesting the Court:

(1) to dismiss the defendant's plea of inadmissibility; and

(2) to order the defendant to bear the costs of the proceedings.

II LEGAL BACKGROUND

10 ESA's functions are defined, *inter alia*, in Article 31 SCA, which reads:

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

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

11 Article 36 SCA concerns actions against ESA's decisions. The first three paragraphs of that provision read:

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.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

12 Article 87(1) and (2) RoP reads:

1. A party applying to the Court for a decision on a preliminary objection or other preliminary plea not going to the substance of the case shall make the application by a separate document. The application must state the pleas of fact and law relied on and the form of order sought by the applicant; any supporting documents must be annexed to it.

2. As soon as the application has been lodged, the President shall prescribe a period within which the opposite party may lodge a document containing a statement of the form of order sought by that party and its pleas in law.

13 Article 88(1) RoP reads:

Where it is clear that the Court has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, and without taking further steps in the proceedings, give a decision on the action.

III ARGUMENTS OF THE PARTIES ON THE PRELIMINARY OBJECTION TO ADMISSIBILITY

14 ESA submits that the application is inadmissible on three separate and independent grounds. First, established case law holds that a decision whether to initiate the procedure laid down in Article 31 SCA is not subject to judicial review (reference is made to Cases E-13/10 *Aleris Ungplan* v *ESA* [2011] EFTA Ct. Rep. 3 and E-2/13 *Bentzen Transport* v *ESA* [2013] EFTA Ct. Rep. 802).

15 Second, ESA argues that the application is time barred as it was registered with the Court on 23 February 2016, more than two months after the day on which the contested decision came to the applicant's knowledge. This does not satisfy the requirements of in line with Article 36(3) SCA.

16 Third, ESA contends that the application fails to set out the applicant's pleas in a coherent and intelligible manner. In this regard, ESA refers to Article 33(1)(c) RoP, which states that applications should include the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. ESA adds that it is established case law that the information given in the application must be sufficiently clear and precise to enable the defendant to prepare the defence, and the Court to rule on the application without having to request further information (reference is made, *inter alia*, to Case E-8/12 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 148, paragraph 95, and case law cited). Finally, numerous passages of the application are wholly unintelligible from a linguistic point of view.

17 The applicant submits, first, that the decision is an act reviewable under Article 36 SCA which the applicant has a legal interest in asking the Court to annul. In this regard, the applicant states that his application should be read in conjunction with Article 16 SCA, which obliges ESA to state the reasons for its decisions. According to

the applicant, a lack of such reasons in the present case renders the contested decision incomprehensible.

18 Second, the applicant contends that his application was in fact submitted to the Court on 28 January 2016, and thus within the period laid down in Article 36(3) SCA.

19 Third, the applicant objects to ESA's submission that the application fails to set out the applicant's pleas in a coherent and intelligible manner. The applicant maintains that ESA has misunderstood the essential content of his application.

IV FINDINGS OF THE COURT

20 ESA has submitted a preliminary objection to the admissibility of the application. After considering the submissions of the parties on the preliminary objection pursuant to Article 87(1) and (2) RoP, the Court has decided to deal with the case on the basis of Article 88(1) RoP. Under that provision, the Court may, where an action is manifestly inadmissible, by reasoned order, and without taking further steps in the proceedings, declare the action inadmissible.

21 The present action is brought under Article 36(2) SCA. The applicant seeks the annulment of the contested decision, by which ESA discontinued its examination of the applicant's complaint without taking further action on the alleged infringement.

22 In his pleadings, the applicant submits that Article 31 SCA obliges ESA to act. However, it is settled case law that ESA alone is competent to decide whether it is appropriate to bring proceedings under the first paragraph of that provision for failure to fulfil obligations. Consequently, a private applicant has no right to challenge a refusal by ESA to initiate infringement proceedings against an EFTA State. That conclusion is not affected by the applicant's argument that ESA allegedly infringed his procedural

rights by failing to state reasons (see *Bentzen Transport* v *ESA*, cited above, paragraphs 40 to 42, and case law cited).

23 Consequently, the contested decision does not constitute a challengeable act. The application must therefore be dismissed as manifestly inadmissible.

V COSTS

24 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 the applicant be ordered to pay the costs and the latter has been unsuccessful, he must be ordered to pay the costs.

On those grounds,

The Court

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The applicant is to bear the costs of the proceedings.**

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

Luxembourg,
24 May 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Order of the Court

24 May 2016

(Legal aid)

In Case E-2/16,

Gerhard Spitzer, represented by Antonius Falkner, Rechtsanwalt,

— applicant,

v

EFTA Surveillance Authority, represented by Carsten Zatschler and Marlene Lie Hakkebo, Members of its Department of Legal & Executive Affairs, acting as Agents,

— defendant,

APPLICATION under Article 72 of the Rules of Procedure for legal aid,

The Court

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

Registrar: Gunnar Selvik,

makes the following

Order

I PROCEDURE

1 By an application registered at the Court on 23 February 2016, the applicant brought an action under Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), seeking in essence the annulment of EFTA Surveillance Authority Decision No 425/15/COL of 25 November 2015 on financial collateral arrangements in Liechtenstein.

2 By letter registered at the Court on 29 April 2016 and pursuant to Article 72 of the Rules of Procedure ("RoP"), the applicant has requested the Court to grant him legal aid in the proceedings before it.

3 Relying on statements concerning his financial situation, the applicant submits that he is unable to meet the costs of the proceedings before the Court. The applicant requests that:

The plaintiff Dr. Gerhard Spitzer is granted legal aid within the meaning of Art. 72 RoP to acquire all the costs of the present process, including the cost of the chosen legal representative and the necessary translations.

II FINDINGS OF THE COURT

4 Article 72(1) RoP provides *that a party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid. Pursuant to the third sentence of Article 72(3) RoP, the Court shall consider whether there is manifestly no cause of action.*

5 In a separate order of today, the Court has dismissed as manifestly ill-founded the action to which the application for legal aid relates.

6 It follows that the application for legal aid must be rejected without it being necessary to hear the opposite party.

On those grounds,

The Court

hereby orders:

The application for legal aid is rejected.

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

Luxembourg,
24 May 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Case

E-24/15

Walter Waller

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Liechtensteinische Invalidenversicherung

(Coordination of social security systems – Article 87(2) of Regulation (EC) No 987/2009 – Binding effect of medical findings)

2016 | Book 2

Rechtssache

E-24/15

Walter Waller

und

Liechtensteinische Invalidenversicherung

(Koordinierung der Systeme der sozialen Sicherheit – Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 – Bindung an ärztliche Feststellungen)

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Inhaltsverzeichnis

Summary of the Judgment

1 Where a recipient of social security benefits is staying or residing within the territory of an EEA State other than that in which the debtor institution is located, the medical examination shall be carried out by the institution of the beneficiary's place of stay or residence. Article 87(2) of Regulation (EC) No 987/2009 precludes the debtor institution from challenging the medical findings of the institution of the place of stay or residence in an administrative procedure. That binding effect also applies in court proceedings following an administrative procedure.

2 The binding effect of medical findings provided for in Article 87(2) of the Regulation applies only as long as the debtor institution has not invoked its right to have the beneficiary examined by a doctor of its choice.

3 The binding effect applies to the debtor institution, not to the recipient or claimant. There is nothing in the wording of Article 87(2) of the Regulation to prevent a recipient or a claimant from challenging the medical findings in the administrative procedure before the debtor institution. The same reasoning must apply in following court proceedings.

Zusammenfassung des Urteils

1 Hält sich ein Sozialleistungsempfänger vorübergehend im Hoheitsgebiet eines anderen EWR-Staates als dem in dem sich der leistungspflichtige Träger befindet auf oder wohnt er dort, so wird die ärztliche Untersuchung durch den Träger des Aufenthalts- oder Wohnorts des Berechtigten vorgenommen. Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 untersagt es dem leistungspflichtigen Träger, die ärztlichen Feststellungen des Trägers des Aufenthalts- oder Wohnorts in einem Verwaltungsverfahren in Frage zu stellen. Diese Bindungswirkung gilt auch in einem an das Verwaltungsverfahren anschliessenden Gerichtsverfahren.

2 Die Bindungswirkung ärztlicher Feststellungen gemäss Artikel 87 Absatz 2 der Verordnung gilt nur insoweit, als der leistungspflichtige Träger nicht von seinem Recht Gebrauch gemacht hat, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.

3 Die Bindungswirkung gilt für den leistungspflichtigen Träger, nicht für den Leistungsempfänger oder Antragssteller. Der Wortlaut von Artikel 87 Absatz 2 der Verordnung hindert einen Leistungsempfänger oder Antragsteller nicht daran, die ärztlichen Feststellungen im Verwaltungsverfahren vor dem leistungspflichtigen Träger in Frage zu stellen. Dieselbe Begründung trägt auch bei einem daran anschliessenden Gerichtsverfahren.

Judgment of the Court

2 June 2016[1]

(Coordination of social security systems – Article 87(2) of Regulation (EC) No 987/2009 – Binding effect of medical findings)

In Case E-24/15,

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 Princely Court of Appeal (Fürstliches Obergericht), in the case between

Walter Waller

and

Liechtensteinische Invalidenversicherung,

concerning the interpretation of Article 87(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems,

1 Language of the request: German

Urteil des Gerichtshofs

2. Juni 2016[1]

(Koordinierung der Systeme der sozialen Sicherheit – Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 – Bindung an ärztliche Feststellungen)

In der Rechtssache E-24/15,

ANTRAG des Fürstlichen Obergerichts an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs in der Rechtssache

Walter Waller

und

Liechtensteinische Invalidenversicherung

betreffend die Auslegung von Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 des Europäischen Parlaments und des Rates vom 16. September 2009 zur Festlegung der Modalitäten für die Durchführung der Verordnung (EG) Nr. 883/2004 über die Koordinierung der Systeme der sozialen Sicherheit, erlässt

1 Sprache des Antrags: Deutsch

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:

– Walter Waller, represented by Mag. Antonius Falkner, Rechtsanwalt;

– the Government of Belgium, represented by Liesbet Van der Broek and Marie Jacobs, Legal Advisers, Ministry of Foreign Affairs, acting as Agents;

– the Government of Liechtenstein, represented by Dr Andrea Entner-Koch and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;

– the Government of Norway, represented by Christian Fredrik Fougner Rydning, Agent, Ministry of Foreign Affairs and Tonje Skjeie, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Maria Moustakali, Officer, and Íris Ísberg, Temporary Officer, Department of Legal Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Denis Martin and Jonathan Tomkin, members of its Legal Service, acting as Agents,

Der Gerichtshof

bestehend aus Carl Baudenbacher, Präsident, Per Christiansen (Berichterstatter) und Páll Hreinsson, Richter,

Kanzler: Gunnar Selvik,

unter Berücksichtigung der schriftlichen Erklärungen

– Walter Wallers, vertreten durch Mag. Antonius Falkner, Rechtsanwalt;

– der Regierung Belgiens, vertreten durch Liesbet Van den Broek und Marie Jacobs, Rechtsberaterinnen, Aussenministerium, als Bevollmächtigte;

– der Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch, Leiterin, und Thomas Bischof, Stv. Leiter, Stabstelle EWR, als Bevollmächtigte;

– der Regierung Norwegens, vertreten durch Christian Fredrik Fougner Rydning, Erster Konsulent, Aussenministerium, und Tonje Skjeie, Advokat, Regierungsadvokat (Zivilsachen), als Bevollmächtigte;

– der EFTA-Überwachungsbehörde, vertreten durch Maria Moustakali, Beamtin, und Íris Ísberg, Beamtin (befristet), Rechtsabteilung, als Bevollmächtigte;

– der Europäischen Kommission (im Folgenden: Kommission), vertreten durch Denis Martin und Jonathan Tomkin, Mitarbeiter des Juristischen Diensts, als Bevollmächtigte,

having regard to the Report for the Hearing,

having heard oral argument of the Government of Belgium, represented by Liesbet Van der Broek; the Government of Liechtenstein, represented by Thomas Bischof; the Government of Norway, represented by Christian Fredrik Fougner Rydning; ESA represented by Íris Ísberg; and the Commission, represented by Jonathan Tomkin, at the hearing on 20 April 2016.

gives the following

Judgment

I LEGAL BACKGROUND

EEA LAW

1 Article 28(1) and (2) EEA reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

THE BASIC REGULATION

2 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 200, p. 1) ("the basic Regulation") has been made

unter Berücksichtigung des Sitzungsberichts,

nach Anhörung der mündlichen Ausführungen der Regierung Belgiens, vertreten durch Liesbet Van der Broek, der Regierung des Fürstentums Liechtenstein, vertreten durch Thomas Bischof, der Regierung Norwegens, vertreten durch Christian Fredrik Fougner Rydning, der EFTA-Überwachungsbehörde, vertreten durch Íris Ísberg, und der Kommission, vertreten durch Jonathan Tomkin, in der Sitzung vom 20. April 2016,

folgendes

Urteil

I RECHTLICHER HINTERGRUND

EWR-RECHT

1 Artikel 28 Absätze 1 und 2 des EWR-Abkommens lauten:

> *1. Zwischen den EG-Mitgliedstaaten und den EFTA-Staaten wird die Freizügigkeit der Arbeitnehmer hergestellt.*
>
> *2. Sie umfasst die Abschaffung jeder auf der Staatsangehörigkeit beruhenden unterschiedlichen Behandlung der Arbeitnehmer der EG-Mitgliedstaaten und der EFTA-Staaten in Bezug auf Beschäftigung, Entlohnung und sonstige Arbeitsbedingungen.*

DIE GRUNDVERORDNUNG

2 Die Verordnung (EG) Nr. 883/2004 des Europäischen Parlaments und des Rates vom 29. April 2004 zur Koordinierung der Systeme der sozialen Sicherheit (ABl. 2004 L 200, S. 1) (im Folgenden:

part of the EEA Agreement by Joint Committee Decision No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33), and is referred to at point 1 of Annex VI to the Agreement.

3 Article 46(3) of the basic Regulation reads:

A decision taken by an institution of a Member State concerning the degree of invalidity of a claimant shall be binding on the institution of any other Member State concerned, provided that the concordance between the legislation of these Member States on conditions relating to the degree of invalidity is acknowledged in Annex VII.

4 Article 82 of the basic Regulation reads:

Medical examinations provided for by the legislation of one Member State may be carried out at the request of the competent institution, in another Member State, by the institution of the place of residence or stay of the claimant or the person entitled to benefits, under the conditions laid down in the Implementing Regulation or agreed between the competent authorities of the Member States concerned.

THE IMPLEMENTING REGULATION

5 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) ("the implementing Regulation") has been made part of the EEA Agreement by Joint Committee Decision No 76/2011, and is referred to at point 2 of Annex VI to the Agreement.

Grundverordnung) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 76/2011 vom 1. Juli 2011 (ABl. 2011 L 262, S. 33) unter Nummer 1 des Anhangs VI in das EWR-Abkommen aufgenommen.

3 Artikel 46 Absatz 3 der Grundverordnung lautet:

Eine vom Träger eines Mitgliedstaats getroffene Entscheidung über den Grad der Invalidität eines Antragstellers ist für den Träger jedes anderen in Betracht kommenden Mitgliedstaats verbindlich, sofern die in den Rechtsvorschriften dieser Mitgliedstaaten festgelegten Definitionen des Grads der Invalidität in Anhang VII als übereinstimmend anerkannt sind.

4 Artikel 82 der Grundverordnung lautet:

Die in den Rechtsvorschriften eines Mitgliedstaats vorgesehenen ärztlichen Gutachten können auf Antrag des zuständigen Trägers in einem anderen Mitgliedstaat vom Träger des Wohn- oder Aufenthaltsorts des Antragstellers oder des Leistungsberechtigten unter den in der Durchführungsverordnung festgelegten Bedingungen oder den von den zuständigen Behörden der beteiligten Mitgliedstaaten vereinbarten Bedingungen angefertigt werden.

DIE DURCHFÜHRUNGSVERORDNUNG

5 Die Verordnung (EG) Nr. 987/2009 des Europäischen Parlaments und des Rates vom 16. September 2009 zur Festlegung der Modalitäten für die Durchführung der Verordnung (EG) Nr. 883/2004 über die Koordinierung der Systeme der sozialen Sicherheit (ABl. 2009 L 284, S. 1) (im Folgenden: Durchführungsverordnung) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 76/2011 unter Nummer 2 des Anhangs VI in das EWR-Abkommen aufgenommen.

6 Article 5(1) of the implementing Regulation reads:

Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.

7 Article 49(2) of the implementing Regulation reads:

Where Article 46(3) of the basic Regulation is not applicable, each institution shall, in accordance with its legislation, have the possibility of having the claimant examined by a medical doctor or other expert of its choice to determine the degree of invalidity. However, the institution of a Member State shall take into consideration documents, medical reports and administrative information collected by the institution of any other Member State as if they had been drawn up in its own Member State.

8 Article 87(1) and (2) of the implementing Regulation reads:

1. Without prejudice to other provisions, where a recipient or a claimant of benefits, or a member of his family, is staying or residing within the territory of a Member State other than that in which the debtor institution is located, the medical examination shall be carried out, at the request of that institution, by the institution of the beneficiary's place of stay or residence in accordance with the procedures laid down by the legislation applied by that institution.

6 Artikel 5 Absatz 1 der Durchführungsverordnung lautet:

Vom Träger eines Mitgliedstaats ausgestellte Dokumente, in denen der Status einer Person für die Zwecke der Anwendung der Grundverordnung und der Durchführungsverordnung bescheinigt wird, sowie Belege, auf deren Grundlage die Dokumente ausgestellt wurden, sind für die Träger der anderen Mitgliedstaaten so lange verbindlich, wie sie nicht von dem Mitgliedstaat, in dem sie ausgestellt wurden, widerrufen oder für ungültig erklärt werden.

7 Artikel 49 Absatz 2 der Durchführungsverordnung lautet:

Für den Fall, dass Artikel 46 Absatz 3 der Grundverordnung für die Feststellung des Grades der Invalidität nicht anwendbar ist, kann jeder Träger entsprechend seinen Rechtsvorschriften den Antragsteller von einem Arzt oder einem anderen Experten seiner Wahl untersuchen lassen. Der Träger eines Mitgliedstaats berücksichtigt jedoch die von den Trägern aller anderen Mitgliedstaaten erhaltenen ärztlichen Unterlagen und Berichte sowie die verwaltungsmäßigen Auskünfte ebenso, als wären sie in seinem eigenen Mitgliedstaat erstellt worden.

8 Artikel 87 Absätze 1 und 2 der Durchführungsverordnung lauten:

1. Unbeschadet sonstiger Vorschriften gilt Folgendes: Hält sich ein Antragsteller oder ein Leistungsempfänger oder ein Familienangehöriger vorübergehend im Hoheitsgebiet eines anderen als des Mitgliedstaats auf, in dem sich der leistungspflichtige Träger befindet, oder wohnt er dort, so wird eine ärztliche Untersuchung auf Ersuchen dieses Trägers durch den Träger des Aufenthalts- oder Wohnorts des Berechtigten entsprechend dem von diesem Träger anzuwendenden gesetzlich vorgeschriebenen Verfahren vorgenommen.

The debtor institution shall inform the institution of the place of stay or residence of any special requirements, if necessary, to be followed and points to be covered by the medical examination.

2. *The institution of the place of stay or residence shall forward a report to the debtor institution that requested the medical examination. This institution shall be bound by the findings of the institution of the place of stay or residence.*

   The debtor institution shall reserve the right to have the beneficiary examined by a doctor of its choice. However, the beneficiary may be asked to return to the Member State of the debtor institution only if he or she is able to make the journey without prejudice to his health and the cost of travel and accommodation is paid for by the debtor institution.

NATIONAL LAW

9 According to Article 53(1) and (5) of the Invalidity Insurance Act (*Gesetz* über *die Invalidenversicherung; LR 831.20*), a person is entitled to an invalidity pension when regarded as having a degree of invalidity of at least 40%. A quarter pension is granted where the degree of invalidity is at least 40%, a half pension is granted where the degree of invalidity is at least 50%, and a full pension is granted where the degree of invalidity is at least 67%. Invalidity is defined as a long-term incapacity to work caused by damage to physical or mental health as a result of congenital defect, illness or accident.

Der leistungspflichtige Träger teilt dem Träger des Aufenthalts- oder Wohnorts mit, welche besonderen Voraussetzungen erforderlichenfalls zu erfüllen und welche Aspekte in dem ärztlichen Gutachten zu berücksichtigen sind.

2. *Der Träger des Aufenthalts- oder Wohnorts erstattet dem leistungspflichtigen Träger, der um das ärztliche Gutachten ersucht hat, Bericht. Der leistungspflichtige Träger ist an die Feststellungen des Trägers des Aufenthalts- oder Wohnorts gebunden.*

   Dem leistungspflichtigen Träger steht es frei, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen. Allerdings kann der Berechtigte nur dann aufgefordert werden, sich in den Mitgliedstaat des leistungspflichtigen Trägers zu begeben, wenn er reisen kann, ohne dass dies seine Gesundheit gefährdet, und wenn die damit verbundenen Reise- und Aufenthaltskosten von dem leistungspflichtigen Träger übernommen werden.

NATIONALES RECHT

9 Gemäss Artikel 53 Absätze 1 und 5 des Gesetzes über die Invalidenversicherung (LR 831.20) haben Personen Anspruch auf Invalidenrente, wenn ein Invaliditätsgrad von mindestens 40 % besteht. Bei einem Invaliditätsgrad von mindestens 40 % besteht Anspruch auf eine Viertelsrente, bei einem Invaliditätsgrad von mindestens 50 % besteht Anspruch auf eine halbe Rente und bei einem Invaliditätsgrad von mindestens 67 % besteht Anspruch auf eine ganze Rente. Als Invalidität gilt die durch einen körperlichen oder geistigen Gesundheitsschaden als Folge von Geburtsgebrechen, Krankheit oder Unfall verursachte, längere Zeit dauernde Erwerbsunfähigkeit.

10 The Insurance Fund takes the decision whether to grant a claim for benefits under the Invalidity Insurance Act. Pursuant to Article 78 of that act, a decision may be challenged by an administrative complaint before the Insurance Fund, which shall review its decision. A reviewed decision may be appealed to the Princely Court of Appeal for judicial review.

11 According to the Princely Court of Appeal, the procedure before the Insurance Fund is regulated by a principle of unfettered evaluation of evidence. This entails that the Insurance Fund will also determine the factual circumstances of the case. The same principle applies to judicial review before the Princely Court of Appeal if an appeal is brought against the Insurance Fund's decision.

II FACTS AND PROCEDURE

12 Mr Waller is a German national, residing in Germany. He was employed in Liechtenstein from 1988 to 2000. From 2011 *the Liechtenstein Invalidity Insurance Fund (Liechtensteinische Invalidenversicherung) ("the Insurance Fund")* granted him a full invalidity pension.

13 According to the referring court, the appellant applied for a reassessment of his continued entitlement to the invalidity pension in 2013. The Insurance Fund requested the German statutory pension scheme to perform a medical examination of Mr Waller. A doctor appointed by the German statutory pension scheme provided information in a medical report under the exchange of data system established by the implementing Regulation (in this case using the E 213 form). Although the appellant's medical condition had improved, his ability to work was still found to be reduced. In the medical report the doctor concluded, *inter alia*, that the appellant had a work

10 Die Invalidenversicherung entscheidet über die Gewährung von Leistungen nach dem Gesetz über die Invalidenversicherung. Artikel 78 dieses Gesetzes zufolge kann eine Entscheidung mittels Verwaltungsbeschwerde vor der Invalidenversicherung angefochten werden, die ihre Entscheidung dann überprüft. Gegen die erneute Entscheidung kann vor dem Fürstlichen Obergericht Berufung erhoben werden.

11 Dem Fürstlichen Obergericht zufolge gilt für das Verfahren vor der Invalidenversicherung der Grundsatz der freien Beweiswürdigung. Das bedeutet, dass die Invalidenversicherung auch den Sachverhalt ermittelt. Dieser Grundsatz gilt ebenfalls für die gerichtliche Überprüfung vor dem Fürstlichen Obergericht, wenn gegen die Entscheidung der Invalidenversicherung Berufung erhoben wird.

II SACHVERHALT UND VERFAHREN

12 Herr Waller ist ein deutscher Staatsangehöriger mit Wohnsitz in Deutschland. Er war von 1988 bis 2000 in Liechtenstein erwerbstätig. Ab dem Jahr 2011 gewährte ihm die Liechtensteinische Invalidenversicherung (im Folgenden: Invalidenversicherung) eine ganze Invalidenrente.

13 Laut dem vorlegenden Gericht beantragte der Berufungswerber im Jahr 2013 die erneute Prüfung seiner Leistungsberechtigung. Die Invalidenversicherung ersuchte die deutsche Rentenversicherung, eine ärztliche Untersuchung von Herrn Waller durchzuführen. Eine von der deutschen Rentenversicherung beauftragte Ärztin erstellte im Rahmen des gemäss Durchführungsverordnung vorgesehenen Datenaustauschs einen ärztlichen Bericht mit Informationen (in diesem Fall unter Verwendung des Formulars E 213). Obwohl sich der Zustand des Berufungswerbers gebessert hatte, bestand noch immer nachvollziehbar eine Einschränkung der Arbeitsfähigkeit. Im

capacity of less than three hours per day and that this condition would continue to apply for another two years.

14 After considering the medical report, but also information from the appellant's general practitioner stating that Mr Waller was no longer capable of working, the internal medical service of the Insurance Fund considered his degree of invalidity to be 59%. Accordingly, the Insurance Fund reduced Mr Waller's invalidity pension from 100% to 50%.

15 The appellant lodged an administrative complaint against that decision. After contacting the medical officer of the German statutory pension scheme, the Insurance Fund was informed that a work capacity of less than three hours per day corresponded to full incapacity under German social security law and that a more precise quantification of the appellant's incapacity to work could not be carried out.

16 The Insurance Fund rejected Mr Waller's complaint. *He challenged that decision before the Princely Court of Appeal. Mr Waller argues, in essence, that the respondent based its reduction of his invalidity pension solely on the Insurance Fund's internal medical service's understanding of the information given in the medical report, namely that he had some capacity to work.*

17 On 17 September 2015, the Princely Court of Appeal decided to stay the proceedings and refer the following questions to the Court:

ärztlichen Bericht bestätigte die Ärztin u. a., dass für weitere zwei Jahre ein unter dreistündiges Leistungsvermögen pro Tag besteht.

14 Unter Berücksichtigung des ärztlichen Berichts, aber auch weiterer Informationen der Hausärztin des Berufungswerbers, welche ausführte, dass bei Herrn Waller keine Arbeitsfähigkeit mehr gegeben sei, stellte der interne ärztliche Dienst der Invalidenversicherung einen Invaliditätsgrad von 59 % fest. Die Invalidenversicherung kürzte die Invalidenrente von Herrn Waller entsprechend von 100 % auf 50 %.

15 Der Berufungswerber brachte eine Verwaltungsbeschwerde gegen diese Verfügung ein. Die Invalidenversicherung setzte sich mit der Vertrauensärztin der deutschen Rentenversicherung in Verbindung, die mitteilte, dass eine unter dreistündige Arbeitsfähigkeit pro Tag nach den Kriterien des deutschen Sozialversicherungsrechts einer vollen Leistungsminderung entspreche, sodass eine genauere Quantifizierung der Restleistungsfähigkeit des Berufungswerbers nicht erfolgen würde.

16 Die Invalidenversicherung lehnte die Beschwerde von Herrn Waller ab. Gegen diese Entscheidung legte Herr Waller beim Fürstlichen Obergericht Berufung ein. Er bringt im Wesentlichen vor, dass sich die Berufungsgegnerin bei der Kürzung seiner Invalidenrente ausschliesslich auf das Verständnis der Angaben im ärztlichen Bericht seitens des internen ärztlichen Dienstes der Invalidenversicherung, nämlich dass er bedingt arbeitsfähig sei, stütze.

17 Am 17. September 2015 entschied das Fürstliche Obergericht, das Verfahren zu unterbrechen und dem Gerichtshof die folgenden Fragen vorzulegen:

(1) Does the fact that under the second sentence of Article 87(2) of Regulation No 987/2009 the debtor institution shall be bound by the findings of the institution of the place of stay or residence preclude the debtor institution from challenging those findings – and thus the information stated in the detailed medical report provided in form E 213 – in its procedure?

(2) If the answer to the first question is in the affirmative: Does that binding effect also apply in court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution.

18 *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

19 The present case concerns legal issues that the Court dealt with to some extent in Case E-13/15 *Bautista*, [2015] EFTA Ct. Rep. 720. That case involved invalidity pension payments from the Liechtenstein Insurance Fund to a beneficiary resident in Spain. That beneficiary was also examined by the national statutory pension scheme upon the request of the Insurance Fund. In *Bautista* the Court had reason to review the binding effect of the findings of the institution of the place of stay or residence. Accordingly, in answering the questions in the present case the Court will refer to relevant reasoning contained in *Bautista*.

(1) Untersagt es die sich aus Art. 87 Absatz 2 2. Satz der VO 987/2009 ergebende Bindung des leistungspflichtigen Trägers an die Feststellungen des Trägers des Aufenthalts- oder Wohnortes des Versicherten, diese Feststellungen in seinem Verfahren und damit die Angaben im ausführlichen ärztlichen Bericht gemäss EU-Formular E 213 in Frage zu stellen?

(2) Für den Fall der Bejahung der ersten Frage: Gilt die erwähnte Bindung auch in einem sich nach nationalen Verfahrensvorschriften an das Verfahren vor einem leistungspflichtigen Träger anschliessenden Gerichtsverfahren?

18 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 ANTWORTEN DES GERICHTSHOFS

19 Die vorliegende Rechtssache beschäftigt sich mit Rechtsfragen, die der Gerichtshof zum Teil bereits in der Rechtssache E-13/15 *Bautista*, Slg. 2015, 720, behandelt hat. Gegenstand dieser Rechtssache war die Zahlung einer Invalidenrente durch die Liechtensteinische Invalidenversicherung an einen in Spanien wohnhaften Leistungsberechtigten. Dieser Leistungsberechtigte wurde ebenfalls auf Wunsch der Invalidenversicherung von der nationalen Rentenversicherung untersucht. Die Rechtssache *Bautista* bot dem Gerichtshof Anlass, die Bindungswirkung der Feststellungen des Trägers des Aufenthalts- oder Wohnorts zu prüfen. Folglich wird der Gerichtshof bei der Beantwortung der Fragen in der vorliegenden Rechtssache auf die entsprechenden Gründe in der Rechtssache *Bautista* Bezug nehmen.

THE FIRST QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

20 The appellant, ESA and the Commission submit that the binding effect of opinions obtained through the institution of the place of stay of the insured person applies only insofar as the debtor institution does not invoke its independent right to obtain an opinion from a doctor of its own choice (*reference is made, inter alia, to Bautista, cited above, paragraph 39).* Since the Insurance Fund has not made use of this right, it is bound by the findings of the institution of the appellant's place of residence and thus cannot challenge the information contained in the medical report.

21 The Liechtenstein Government submits that Article 49(2) of the implementing Regulation constitutes a *lex specialis* in the context of the determination of the degree of invalidity. Pursuant to this provision, a medical report from the institution of the place of stay or residence shall be taken into account. The debtor institution is, however, not bound to follow it.

22 In the alternative, the Liechtenstein Government contends that the principle of equal treatment, found, *inter alia*, in Article 4 of the basic Regulation, appears to preclude an absolute binding effect for the findings of the institution of the place of stay or residence of the beneficiary, since that binding effect would only benefit a recipient or beneficiary examined in the place of stay or residence, and not someone examined in the State where the debtor institution is located.

ZUR ERSTEN FRAGE

DEM GERICHTSHOF VORGELEGTE STELLUNGNAHMEN

20 Der Berufungswerber, die EFTA-Überwachungsbehörde und die Kommission bringen vor, die Bindung an vom Träger des Aufenthaltsorts des Versicherten eingeholte Gutachten gelte nur insoweit, als der leistungspflichtige Träger nicht von seinem eigenständigen Recht Gebrauch macht, ein Gutachten eines Arztes seiner Wahl einzuholen (es wird u. a. auf die Rechtssache *Bautista*, oben erwähnt, Randnr. 39, verwiesen). Da die Invalidenversicherung von diesem Recht keinen Gebrauch gemacht hat, ist sie an die Feststellungen des Trägers des Wohnorts des Berufungswerbers gebunden und kann die Angaben im ärztlichen Bericht nicht in Frage stellen.

21 Die Regierung des Fürstentums Liechtenstein hält fest, dass es sich bei Artikel 49 Absatz 2 der Durchführungsverordnung im Zusammenhang mit der Bemessung des Grades der Invalidität um eine *lex specialis* handelt. Gemäss dieser Bestimmung ist ein ärztlicher Bericht des Trägers des Aufenthalts- oder Wohnorts zu berücksichtigen. Der leistungspflichtige Träger ist jedoch nicht daran gebunden.

22 Alternativ bringt die Regierung des Fürstentums Liechtenstein vor, dass der Grundsatz der Gleichbehandlung, der sich unter anderem in Artikel 4 der Grundverordnung niederschlägt, eine absolute Bindung an die Feststellungen des Trägers des Aufenthalts- oder Wohnorts des Leistungsberechtigten auszuschliessen scheint, da eine solche Bindung nur einem Leistungsempfänger oder Leistungsberechtigten nützen würde, der am Aufenthalts- oder Wohnort untersucht wird, nicht jedoch jemandem, der im Staat des leistungspflichtigen Trägers untersucht wird.

23 The Norwegian Government submits that the binding effect mentioned in Article 87(2) of the implementing Regulation is limited to the medical findings. Therefore, the binding effect does not apply to legal findings in the debtor institution's subsequent assessment. This view is supported by the Belgian Government, which asserts that the debtor institution is exclusively competent to assess under national legislation the incapacity of a claimant. However, the debtor institution must make this evaluation in light of the findings of the medical expert of the institution of the place of stay or residence.

24 *The Norwegian Government adds that, in its view, Article 87 of the implementing Regulation does not entail an obligation to request the institution of the place of stay or residence to conduct the medical examination. First, Article 82 of the basic Regulation merely states that an examination "may" be carried out. Furthermore, the wording "shall be carried out" in Article 87(1) of the implementing Regulation may simply refer to an obligation on the institution of the place of stay or residence to carry out an examination on request or to conduct the examination according to its legislation. It does not entail an obligation to request the institution of the place of stay or residence to perform this examination.*

FINDINGS OF THE COURT

25 By its first question, the national court asks whether a debtor institution is precluded from challenging the findings contained in form E 213 in an administrative procedure, given the binding effect of such findings laid down in Article 87(2) of the implementing Regulation.

23 Der Regierung Norwegens zufolge ist die Bindung gemäss Artikel 87 Absatz 2 der Durchführungsverordnung auf die ärztlichen Feststellungen beschränkt. Daher gilt die Bindung nicht für rechtliche Feststellungen bei der anschliessenden Beurteilung durch den leistungspflichtigen Träger. Dieser Auffassung schliesst sich die Regierung Belgiens an, die betont, dass allein der leistungspflichtige Träger für die Bewertung der Arbeitsunfähigkeit eines Antragstellers nach den nationalen Rechtsvorschriften zuständig ist. Der leistungspflichtige Träger hat diese Bewertung jedoch im Licht der Feststellungen des medizinischen Fachpersonals des Trägers des Aufenthalts- oder Wohnorts vorzunehmen.

24 Die Regierung Norwegens ergänzt, dass Artikel 87 der Durchführungsverordnung ihrer Auffassung nach keine Verpflichtung vorsieht, den Träger des Aufenthalts- oder Wohnorts um ein ärztliches Gutachten zu ersuchen. Erstens heisst es in Artikel 82 der Grundverordnung nur, dass Gutachten angefertigt werden „können". Überdies kann sich der Wortlaut gemäss Artikel 87 Absatz 1 der Durchführungsverordnung, dass die ärztliche Untersuchung „vorgenommen" („shall be carried out" in der englischen Sprachfassung) wird, einfach auf eine Verpflichtung des Trägers des Aufenthalts- oder Wohnorts beziehen, auf Ersuchen eine Untersuchung vorzunehmen oder die Untersuchung gemäss seinen Rechtsvorschriften durchzuführen. Diese Bestimmung sieht keine Verpflichtung vor, den Träger des Aufenthalts- oder Wohnorts um die Durchführung der Untersuchung zu ersuchen.

ENTSCHEIDUNG DES GERICHTSHOFS

25 Mit seiner ersten Frage ersucht das nationale Gericht um Klärung, ob es einem leistungspflichtigen Träger untersagt ist, die im Formular E 213 enthaltenen Feststellungen angesichts der sich aus Artikel 87 Absatz 2 der Durchführungsverordnung ergebenden Bindung solcher Feststellungen in einem Verwaltungsverfahren in Frage zu stellen.

26 The Government of Liechtenstein submits that Article 49(2) of the implementing Regulation is the relevant provision in the present case. However, the Court rejects this submission. The relevant provision is Article 87(2) of the implementing Regulation because this provision is a particular rule concerning medical examinations (see *Bautista*, cited above, paragraph 36).

27 In relation to the binding effect of medical findings provided for in Article 87(2) of the implementing Regulation, the Court held in *Bautista*:

36 … When a recipient or claimant of benefits is staying or residing in an EEA State other than that of the debtor institution, the debtor institution must request the institution in that other EEA State to perform the medical examination. It follows from the second sentence of Article 87(2) that the debtor institution requesting the medical examination is bound by such findings.

37 The purpose of a binding effect on the debtor institution within the meaning of Article 87(2) is to enable recipients or claimants of social security rights in another EEA State to exercise their right to free movement. That freedom would be counteracted if the debtor institution could question the findings of the institution of the claimant's place of stay or residence.

28 At paragraph 40 of that judgment, the Court held further

40 … the binding effect mentioned in Article 87(2) applies to medical findings, not to the legal assessment of whether the claimant is entitled to benefits. The debtor institution is competent to assess under national

26 Die Regierung des Fürstentums Liechtenstein bringt vor, dass Artikel 49 Absatz 2 der Durchführungsverordnung die in der gegenständlichen Rechtssache massgebliche Bestimmung darstellt. Der Gerichtshof weist dieses Vorbringen jedoch zurück. Die massgebliche Bestimmung ist Artikel 87 Absatz 2 der Durchführungsverordnung, bei der es sich um eine spezielle Regelung zu ärztlichen Gutachten handelt (vgl. *Bautista*, oben erwähnt, Randnr. 36).

27 Bezugnehmend auf die in Artikel 87 Absatz 2 der Durchführungsverordnung vorgesehene Bindungswirkung ärztlicher Feststellungen stellte der Gerichtshof in der Rechtssache *Bautista* fest:

36 […] Hält sich ein Antragsteller oder Leistungsempfänger vorübergehend in einem anderen EWR-Staat auf als dem, in dem sich der leistungspflichtige Träger befindet, oder wohnt er dort, muss der leistungspflichtige Träger den Träger des anderen EWR-Staats ersuchen, die ärztliche Untersuchung vorzunehmen. Laut Artikel 87 Absatz 2 Satz 2 ist der leistungspflichtige Träger, der um das ärztliche Gutachten ersucht hat, an diese Feststellungen gebunden.

37 Der Zweck der Bindung des leistungspflichtigen Trägers im Sinne von Artikel 87 Absatz 2 besteht darin, Leistungsempfänger oder Antragsteller in Bezug auf Sozialversicherungsansprüche in einem anderen EWR-Staat in die Lage zu versetzen, ihr Recht auf Freizügigkeit auszuüben. Diese Freizügigkeit würde eingeschränkt, wenn der leistungspflichtige Träger die Feststellungen des Trägers des Aufenthalts- oder Wohnorts des Antragstellers in Frage stellen könnte.

28 In Randnr. 40 dieses Urteils stellt der Gerichtshof weiter fest,

40 […] dass die Bindung gemäss Artikel 87 Absatz 2 für ärztliche Feststellungen gilt, nicht für die rechtliche Beurteilung des Anspruchs des Antragstellers auf Leistungen. Der leistungspflichtige Träger ist für

law any entitlement to invalidity benefits, inter alia, based on the medical findings.

29 The Insurance Fund is therefore bound by the medical findings made by the doctor appointed by the German statutory pension scheme who examined Mr Waller. If the Insurance Fund has deviated from the medical findings, this would be tantamount to challenging those findings. That would not be compatible with the binding effect required by Article 87(2) of the implementing Regulation. However, whether there has been a deviation from those findings constitutes a matter of fact and is thus for the referring court to assess.

30 The Court adds that the binding effect of medical findings provided for in Article 87(2) applies only as long as the debtor institution has not invoked its right to have the beneficiary examined by a doctor of its choice (see *Bautista*, cited above, paragraph 39). In the present case, the Insurance Fund has not invoked this right.

31 The Government of Norway has argued that under Article 87 of the implementing Regulation it is optional whether to request an examination by the institution of the place of stay or residence. However, the Court notes that it is implicit in the coordination scheme that requests for medical examinations are to be exchanged between competent authorities in the EEA States as a matter of mutual trust. If a debtor institution could proceed directly to an examination by a doctor of its choice that scheme would be undermined.

die Bewertung des Anspruchs auf Leistungen bei Invalidität, u. a. auf der Grundlage der ärztlichen Feststellungen, zuständig.

29 Die Invalidenversicherung ist daher an die ärztlichen Feststellungen der von der deutschen Rentenversicherung beauftragten Ärztin, die Herrn Waller untersucht hat, gebunden. Eine Abweichung der Invalidenversicherung von diesen ärztlichen Feststellungen wäre gleichbedeutend mit deren Infragestellung. Dies wäre mit der Bindungswirkung nach Artikel 87 Absatz 2 der Durchführungsverordnung nicht vereinbar. Ob eine Abweichung von diesen Feststellungen gegeben war, ist eine Frage der Sachverhaltsermittlung und daher durch das vorlegende Gericht zu beurteilen.

30 Der Gerichtshof fügt hinzu, dass die Bindungswirkung ärztlicher Feststellungen gemäss Artikel 87 Absatz 2 nur insoweit gilt, als der leistungspflichtige Träger nicht von seinem Recht Gebrauch gemacht hat, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen (vgl. *Bautista*, oben erwähnt, Randnr. 39). Im gegenständlichen Fall hat die Invalidenversicherung nicht von diesem Recht Gebrauch gemacht.

31 Die Regierung Norwegens hat geltend gemacht, dass das Ersuchen um eine Untersuchung nach Artikel 87 der Durchführungsverordnung durch den Träger des Aufenthalts- oder Wohnorts optional sei. Der Gerichtshof stellt jedoch fest, es folge implizit aus dem Koordinierungssystem, dass Ersuchen um ärztliche Untersuchungen zwischen den zuständigen Behörden in den EWR-Staaten als Ausdruck des gegenseitigen Vertrauens auszutauschen sind. Könnte ein leistungspflichtiger Träger sofort ein ärztliches Gutachten durch einen Arzt seiner Wahl erstellen lassen, würde dieses System untergraben.

32 The answer to the first question referred is that Article 87(2) of the implementing Regulation precludes the debtor institution from challenging the medical findings of the institution of the place of stay or residence in the administrative procedure.

THE SECOND QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

33 The appellant submits that the binding effect applies in court proceedings following an administrative procedure before the debtor institution. That view is essentially supported by the Liechtenstein Government in its alternative line of argument (reference is made to the judgment in *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 33).

34 The Commission concurs and adds that the effectiveness of t would be undermined if the binding effect of medical findings did not apply in court proceedings triggered by the very fact that the competent institution did not comply with such findings.

35 ESA argues that the binding effect mentioned in Article 87(2) of the implementing Regulation does not apply in court proceedings when a recipient or claimant wants to challenge the medical findings. ESA refers to paragraphs 41 to 44 of *Bautista*, cited above, and the principle of equal treatment. It submits that a recipient or claimant must be entitled to challenge the decisions of the debtor institution in national court proceedings.

32 Die Antwort auf die erste vorgelegte Frage lautet, dass es Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 dem leistungspflichtigen Träger untersagt, die ärztlichen Feststellungen des Trägers des Aufenthalts- oder Wohnorts im Verwaltungsverfahren in Frage zu stellen.

ZUR ZWEITEN FRAGE

DEM GERICHTSHOF VORGELEGTE STELLUNGNAHMEN

33 Der Berufungswerber bringt vor, dass die Bindung auch in einem sich an das Verwaltungsverfahren vor dem leistungspflichtigen Träger anschliessenden Gerichtsverfahren gilt. Die Regierung des Fürstentums Liechtenstein stützt diese Auffassung in ihrer unterschiedlichen Argumentation im Wesentlichen (es wird auf das Urteil in *Herbosch Kiere*, C-2/05, EU:C:2006:69, Randnr. 33, verwiesen).

34 Die Kommission schliesst sich dieser Argumentation an und fügt hinzu, die Wirksamkeit der Regelung würde untergraben, wenn ärztliche Feststellungen in Gerichtsverfahren, die deshalb eingeleitet wurden, weil der zuständige Träger diesen Feststellungen nicht entsprochen hat, keine Bindungswirkung hätten.

35 Der EFTA-Überwachungsbehörde zufolge gilt die in Artikel 87 Absatz 2 der Durchführungsverordnung vorgesehene Bindung nicht in Gerichtsverfahren, wenn ein Leistungsempfänger oder Antragsteller die ärztlichen Feststellungen in Frage stellen will. Die EFTA-Überwachungsbehörde beruft sich auf die Randnrn. 41 bis 44 im Urteil in der Rechtssache *Bautista*, oben erwähnt, und den Grundsatz der Gleichbehandlung. Sie vertritt die Auffassung, dass ein Leistungsempfänger oder Antragsteller das Recht haben muss, Entscheidungen des leistungspflichtigen Trägers in Verfahren vor nationalen Gerichten in Frage zu stellen.

36 The Belgian Government states that the second question is identical to the question referred in *Bautista*. In that case the Belgian Government argued that to deprive an individual of the right to present evidence to the contrary in national court proceedings would run counter to the fundamental right to have one's case examined by an independent and impartial tribunal allowing for evidence to be challenged.

37 The Norwegian Government submits that the binding effect does not apply in court proceedings, since Article 87(2) of the implementing Regulation limits this effect to the debtor institution. Reference is also made to the principle of national procedural autonomy.

FINDINGS OF THE COURT

38 By its second question the referring court asks whether the binding effect of medical findings also applies in court proceedings which follow on from the administrative proceedings before the debtor institution.

39 The binding effect applies to the debtor institution, not to the recipient or claimant. The Court held in *Bautista* that the purpose of that binding effect is to enable recipients or claimants of social security rights to exercise their right to free movement according to EEA law. Also, there is nothing in the wording of Article 87(2) of the implementing Regulation to prevent a recipient or a claimant from challenging the medical findings in the administrative procedure before the debtor institution (see *Bautista*, cited above, paragraphs 37 and 41). The same reasoning must apply in court proceedings that

36 Laut der Regierung Belgiens ist die zweite Frage identisch mit der in der Rechtssache *Bautista* vorgelegten Frage. In dieser Rechtssache argumentierte die Regierung Belgiens, dass es gegen das Grundrecht auf die Prüfung eines Falles durch ein unabhängiges und unparteiisches Gericht, vor dem Beweise angefochten werden können, verstiesse, einer Person das Recht auf die Vorlage von Gegenbeweisen in nationalen Gerichtsverfahren vorzuenthalten.

37 Der Regierung Norwegens zufolge gilt die Bindungswirkung nicht in Gerichtsverfahren, da Artikel 87 Absatz 2 der Durchführungsverordnung die Wirkung auf den leistungspflichtigen Träger beschränkt. Auch auf den Grundsatz der nationalen Verfahrensautonomie wird verwiesen.

ENTSCHEIDUNG DES GERICHTSHOFS

38 Mit seiner zweiten Frage ersucht das vorlegende Gericht um Klärung, ob die Bindungswirkung ärztlicher Feststellungen auch in einem sich an das Verwaltungsverfahren vor dem leistungspflichtigen Träger anschliessenden Gerichtsverfahren gilt.

39 Die Bindungswirkung gilt für den leistungspflichtigen Träger, nicht für den Leistungsempfänger oder Antragsteller. Der Gerichtshof hat in der Rechtssache *Bautista* festgestellt, dass der Zweck der Bindung darin besteht, Leistungsempfänger oder Antragsteller in Bezug auf Sozialversicherungsansprüche in die Lage zu versetzen, ihr im EWR-Recht verankertes Recht auf Freizügigkeit auszuüben. Überdies hindert nichts am Wortlaut von Artikel 87 Absatz 2 der Durchführungsverordnung einen Leistungsempfänger oder Antragsteller daran, die ärztlichen Feststellungen im Verwaltungsverfahren vor dem leistungspflichtigen Träger in Frage zu stellen (vgl. *Bautista*, oben erwähnt, Randnrn. 37 und 41). Dieselbe Begründung trägt auch bei dem sich an das Verwaltungsverfahren vor dem leistungspflichtigen Träger

follow an administrative procedure before the debtor institution, as the same considerations are valid in both instances.

40 However, it appears that Mr Waller does not wish to challenge the medical findings in question. On the contrary, he argues that those findings must be considered binding in a judicial review following the administrative procedure. This may suggest that his argument before the national court is that the Insurance Fund erred in not properly relying on the medical findings made by the institution of the place of stay or residence, in other words that the Fund did not respect the binding effect provided for in Article 87(2) of the implementing Regulation.

41 As indicated above, Article 87(2) of the implementing Regulation is an expression of the mutual trust needed for the coordination scheme, which reflects the principle of loyalty laid down in Article 3 EEA. Taking account of the purpose of Article 87, it follows that the authorities, including the courts, of the EEA State in which the debtor institution is situated, are not entitled to scrutinise medical findings when the debtor institution is itself bound by these (compare, by analogy, *Herbosch Kiere*, cited above, paragraphs 30 to 33). To permit such scrutiny would undermine the effectiveness of EEA law and impair legal certainty for the recipient or claimant of a social security benefit.

42 The answer to the second question is therefore that the binding effect mentioned in Article 87(2) of the implementing Regulation applies in court proceedings following an administrative proceeding before the debtor institution, such as in the present case.

anschliessenden Gerichtsverfahren, da in beiden Fällen dieselben Erwägungen gelten.

40 Es hat jedoch nicht den Anschein, als wolle Herr Waller die gegenständlichen ärztlichen Feststellungen in Frage stellen. Er bringt vielmehr vor, diese Feststellungen müssten in einer sich an das Verwaltungsverfahren anschliessenden gerichtlichen Überprüfung als bindend betrachtet werden. Dies könnte darauf hindeuten, dass er vor dem nationalen Gericht argumentiert, die Invalidenversicherung habe einen Fehler gemacht, indem sie die ärztlichen Feststellungen des Trägers des Aufenthalts- oder Wohnorts nicht ordnungsgemäss berücksichtigt habe, mit anderen Worten, dass die Invalidenversicherung die in Artikel 87 Absatz 2 der Durchführungsverordnung vorgesehene Bindungswirkung nicht beachtet habe.

41 Wie oben ausgeführt, bildet Artikel 87 Absatz 2 der Durchführungsverordnung einen Ausdruck des für das Koordinierungssystem erforderlichen gegenseitigen Vertrauens, was den in Artikel 3 des EWR-Abkommens verankerten Grundsatz der Loyalität widerspiegelt. Behörden, einschliesslich der Gerichte, des EWR-Staats, in dem der leistungspflichtige Träger angesiedelt ist, haben bei Berücksichtigung des Zwecks von Artikel 87 nicht das Recht, ärztliche Feststellungen zu überprüfen, wenn der leistungspflichtige Träger selbst daran gebunden ist (vgl. sinngemäss *Herbosch Kiere*, oben erwähnt, Randnrn. 30 bis 33). Die Zulassung einer solchen Prüfung würde die Wirksamkeit des EWR-Rechts untergraben und die Rechtssicherheit für den Leistungsempfänger oder Antragsteller einer Sozialversicherungsleistung beeinträchtigen.

42 Die Antwort auf die zweite Frage lautet daher, dass die Bindung nach Artikel 87 Absatz 2 der Durchführungsverordnung in einem sich an das Verwaltungsverfahren vor dem leistungspflichtigen Träger anschliessenden Gerichtsverfahren, wie in der gegenständlichen Rechtssache, gilt.

IV COSTS

43 The costs incurred by the Governments of Belgium, Liechtenstein and Norway, 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.

IV KOSTEN

43 Die Auslagen der Regierungen Belgiens, des Fürstentums Liechtenstein und Norwegens, der EFTA-Überwachungsbehörde und der Europäischen Kommission, die vor dem Gerichtshof Erklärungen abgegeben haben, sind nicht erstattungsfähig. Da es sich bei diesem Verfahren um einen Zwischenstreit in einem beim nationalen Gericht anhängigen Rechtsstreit handelt, ist die Kostenentscheidung betreffend die Parteien dieses Verfahrens Sache dieses Gerichts.

On those grounds,

The Court

in answer to the questions referred to it by the Princely Court of Appeal hereby gives the following Advisory Opinion:

(1) Article 87(2) of Regulation (EC) No 987/2009 precludes the debtor institution from challenging the medical findings of the institution of the place of stay or residence in the administrative procedure.

(2) The binding effect mentioned in Article 87(2) of Regulation (EC) No 987/2009 applies in court proceedings following on from an administrative proceeding before the debtor institution in a situation such as that of the present case.

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

Delivered in open court in Luxembourg on
***2 June 2016**.*

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Aus diesen Gründen erstellt

Der Gerichtshof

in Beantwortung der ihm vom Fürstlichen Obergericht vorgelegten Fragen folgendes Gutachten:

(1) Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 untersagt es dem leistungspflichtigen Träger, die ärztlichen Feststellungen des Trägers des Aufenthalts- oder Wohnorts im Verwaltungsverfahren in Frage zu stellen.

(2) Die Bindung nach Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 gilt in einem sich an das Verwaltungsverfahren vor dem leistungspflichtigen Träger anschliessenden Gerichtsverfahren unter Umständen wie jenen in der gegenständlichen Rechtssache.

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

Verkündet in öffentlicher Sitzung in Luxemburg am
***2. Juni 2016**.*

Gunnar Selvik
Kanzler

Carl Baudenbacher
Präsident

Report for the Hearing

in Case E-24/15

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 Princely Court of Appeal (*Fürstliches Obergericht*), in a case pending before it between

Walter Waller

and

Liechtensteinische Invalidenversicherung

concerning the interpretation of Article 87(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

I INTRODUCTION

1 Mr Walter Waller ("the appellant") is in receipt of a Liechtenstein invalidity pension. As a consequence of a reassessment of his entitlement to this benefit, the Liechtenstein Invalidity Insurance Fund (*Liechtensteinische Invalidenversicherung*) ("the respondent" or "the Insurance Fund") found that the appellant's degree of invalidity was 59 % and consequently reduced the invalidity pension from 100% to 50%.

2 The appellant lodged objections against the reduction. However, the Insurance Fund upheld its decision. The appellant then brought the case before the Princely Court of Appeal. In the context of those proceedings, the Princely Court of Appeal has made a request for an

Sitzungsbericht

in der Rechtssache E-24/15

ANTRAG des Fürstlichen Obergerichts an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs in der vor ihm anhängigen Rechtssache

Walter Waller

und

Liechtensteinische Invalidenversicherung

betreffend die Auslegung von Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 des Europäischen Parlaments und des Rates vom 16. September 2009 zur Festlegung der Modalitäten für die Durchführung der Verordnung (EG) Nr. 883/2004 über die Koordinierung der Systeme der sozialen Sicherheit.

I EINLEITUNG

1 Herr Walter Waller (im Folgenden: Berufungswerber) ist Bezieher einer liechtensteinischen Invalidenrente. Infolge einer erneuten Prüfung des Rentenanspruchs des Berufungswerbers setzte die Liechtensteinische Invalidenversicherung (im Folgenden: Berufungsgegnerin oder Invalidenversicherung) den Grad der Invalidität auf 59% fest und kürzte die Invalidenrente entsprechend von einer ganzen auf eine halbe.

2 Der Berufungswerber brachte Einwände gegen die Kürzung vor. Die Invalidenversicherung bestätigte jedoch ihre Entscheidung. Daraufhin legte der Berufungswerber Berufung beim Fürstlichen Obergericht ein. Im Rahmen dieses Verfahrens hat das Fürstliche

Advisory Opinion to establish the nature and scope of the binding effect provided for in Article 87(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) ("the implementing Regulation").

II LEGAL BACKGROUND

EEA LAW

3 Article 28(1) and (2) EEA reads:

> 1. *Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> 2. *Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

4 Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2004 L 200, p. 1) ("the basic Regulation") is referred to at point 1 of Annex VI to the EEA Agreement. The preamble to the basic Regulation includes the following recitals:

> *(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.*
>
> ...

Obergericht einen Antrag auf Vorabentscheidung zur Klärung des Wesens und des Umfangs der in Artikel 87 Absatz 2 der Verordnung (EG) Nr. 987/2009 des Europäischen Parlaments und des Rates vom 16. September 2009 zur Festlegung der Modalitäten für die Durchführung der Verordnung (EG) Nr. 883/2004 über die Koordinierung der Systeme der sozialen Sicherheit (ABl. 2009 L 284, S. 1) (im Folgenden: Durchführungsverordnung) vorgesehenen Bindung gestellt.

II RECHTLICHER HINTERGRUND

EWR-RECHT

3 Artikel 28 Absätze 1 und 2 des EWR-Abkommens lauten:

> 1. *Zwischen den EG-Mitgliedstaaten und den EFTA-Staaten wird die Freizügigkeit der Arbeitnehmer hergestellt.*
>
> 2. *Sie umfasst die Abschaffung jeder auf der Staatsangehörigkeit beruhenden unterschiedlichen Behandlung der Arbeitnehmer der EG-Mitgliedstaaten und der EFTA-Staaten in Bezug auf Beschäftigung, Entlohnung und sonstige Arbeitsbedingungen.*

4 Auf die Verordnung (EG) Nr. 883/2004 zur Koordinierung der Systeme der sozialen Sicherheit (ABl. 2004 L 200, S. 1) (im Folgenden: Grundverordnung) wird in Nummer 1 des Anhangs VI des EWR-Abkommens verwiesen. Die Präambel der Grundverordnung enthält die folgenden Erwägungsgründe:

> *(1) Die Vorschriften zur Koordinierung der nationalen Systeme der sozialen Sicherheit sind Teil des freien Personenverkehrs und sollten zur Verbesserung des Lebensstandards und der Arbeitsbedingungen beitragen.*
>
> …

(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

(5) It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons concerned.

...

(9) The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.

...

(26) For invalidity benefits, a system of coordination should be drawn up which respects the specific characteristics of national legislation, in particular as regards recognition of invalidity and aggravation thereof.

...

(29) To protect migrant workers and their survivors against excessively stringent application of the national rules concerning reduction, suspension or withdrawal, it is necessary to include provisions strictly governing the application of such rules.

5 Article 4 of the basic Regulation reads:

Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

(4) Es ist notwendig, die Eigenheiten der nationalen Rechtsvorschriften über soziale Sicherheit zu berücksichtigen und nur eine Koordinierungsregelung vorzusehen.

(5) Es ist erforderlich, bei dieser Koordinierung innerhalb der Gemeinschaft sicherzustellen, dass die betreffenden Personen nach den verschiedenen nationalen Rechtsvorschriften gleich behandelt werden.

...

(9) Der Gerichtshof hat mehrfach zur Möglichkeit der Gleichstellung von Leistungen, Einkünften und Sachverhalten Stellung genommen; dieser Grundsatz sollte explizit aufgenommen und ausgeformt werden, wobei Inhalt und Geist der Gerichtsentscheidungen zu beachten sind.

...

(26) Für Leistungen bei Invalidität sollten Koordinierungsregeln vorgesehen werden, die die Eigenheiten der nationalen Rechtsvorschriften, insbesondere im Hinblick auf die Anerkennung des Invaliditätszustands und seiner Verschlimmerung, berücksichtigen.

...

(29) Um Wanderarbeitnehmer und ihre Hinterbliebenen gegen eine übermäßig strenge Anwendung der nationalen Kürzungs-, Ruhens- und Entziehungsvorschriften zu schützen, ist es erforderlich, Bestimmungen aufzunehmen, die für die Anwendung dieser Vorschriften strenge Regeln festlegen.

5 Artikel 4 der Grundverordnung lautet:

Sofern in dieser Verordnung nichts anderes bestimmt ist, haben Personen, für die diese Verordnung gilt, die gleichen Rechte und Pflichten aufgrund der Rechtsvorschriften eines Mitgliedstaats wie die Staatsangehörigen dieses Staats.

6 Article 46(3) of the basic Regulation reads:

A decision taken by an institution of a Member State concerning the degree of invalidity of a claimant shall be binding on the institution of any other Member State concerned, provided that the concordance between the legislation of these Member States on conditions relating to the degree of invalidity is acknowledged in Annex VII.

7 Article 82 of the basic Regulation reads:

Medical examinations provided for by the legislation of one Member State may be carried out at the request of the competent institution, in another Member State, by the institution of the place of residence or stay of the claimant or the person entitled to benefits, under the conditions laid down in the Implementing Regulation or agreed between the competent authorities of the Member States concerned.

8 The implementing Regulation is referred to at point 2 of Annex VI to the EEA Agreement. Article 49(2) of the implementing Regulation reads:

Where Article 46(3) of the basic Regulation is not applicable, each institution shall, in accordance with its legislation, have the possibility of having the claimant examined by a medical doctor or other expert of its choice to determine the degree of invalidity. However, the institution of a Member State shall take into consideration documents, medical reports and administrative information collected by the institution of any other Member State as if they had been drawn up in its own Member State.

9 Article 87(1) and (2) of the implementing Regulation reads:

1. *Without prejudice to other provisions, where a recipient or a claimant of benefits, or a member of his family, is staying or residing within the territory of a Member State other than that in which the*

6 Artikel 46 Absatz 3 der Grundverordnung lautet:

Eine vom Träger eines Mitgliedstaats getroffene Entscheidung über den Grad der Invalidität eines Antragstellers ist für den Träger jedes anderen in Betracht kommenden Mitgliedstaats verbindlich, sofern die in den Rechtsvorschriften dieser Mitgliedstaaten festgelegten Definitionen des Grads der Invalidität in Anhang VII als übereinstimmend anerkannt sind.

7 Artikel 82 der Grundverordnung lautet:

Die in den Rechtsvorschriften eines Mitgliedstaats vorgesehenen ärztlichen Gutachten können auf Antrag des zuständigen Trägers in einem anderen Mitgliedstaat vom Träger des Wohn- oder Aufenthaltsorts des Antragstellers oder des Leistungsberechtigten unter den in der Durchführungsverordnung festgelegten Bedingungen oder den von den zuständigen Behörden der beteiligten Mitgliedstaaten vereinbarten Bedingungen angefertigt werden.

8 Auf die Durchführungsverordnung wird in Nummer 2 des Anhangs VI des EWR-Abkommens verwiesen. Artikel 49 Absatz 2 der Durchführungsverordnung lautet:

Für den Fall, dass Artikel 46 Absatz 3 der Grundverordnung für die Feststellung des Grades der Invalidität nicht anwendbar ist, kann jeder Träger entsprechend seinen Rechtsvorschriften den Antragsteller von einem Arzt oder einem anderen Experten seiner Wahl untersuchen lassen. Der Träger eines Mitgliedstaats berücksichtigt jedoch die von den Trägern aller anderen Mitgliedstaaten erhaltenen ärztlichen Unterlagen und Berichte sowie die verwaltungsmäßigen Auskünfte ebenso, als wären sie in seinem eigenen Mitgliedstaat erstellt worden.

9 Artikel 87 Absätze 1 und 2 der Durchführungsverordnung lauten:

1. *Unbeschadet sonstiger Vorschriften gilt Folgendes: Hält sich ein Antragsteller oder ein Leistungsempfänger oder ein Familienangehöriger vorübergehend im Hoheitsgebiet eines anderen*

debtor institution is located, the medical examination shall be carried out, at the request of that institution, by the institution of the beneficiary's place of stay or residence in accordance with the procedures laid down by the legislation applied by that institution.

The debtor institution shall inform the institution of the place of stay or residence of any special requirements, if necessary, to be followed and points to be covered by the medical examination.

2. *The institution of the place of stay or residence shall forward a report to the debtor institution that requested the medical examination. This institution shall be bound by the findings of the institution of the place of stay or residence.*

   The debtor institution shall reserve the right to have the beneficiary examined by a doctor of its choice. However, the beneficiary may be asked to return to the Member State of the debtor institution only if he or she is able to make the journey without prejudice to his health and the cost of travel and accommodation is paid for by the debtor institution.

NATIONAL LAW

10 According to Article 53(1) and (5) of the Invalidity Insurance Act (*Gesetz* über *die Invalidenversicherung; LR 831.20*), a person is entitled to an invalidity pension when regarded as having a degree of invalidity of at least 40%. A quarter pension is granted where the degree of invalidity is at least 40%, a half pension is granted where the degree of invalidity is at least 50%, and a full pension is granted where the degree of invalidity is at least 67%. Invalidity is defined in

als des Mitgliedstaats auf, in dem sich der leistungspflichtige Träger befindet, oder wohnt er dort, so wird eine ärztliche Untersuchung auf Ersuchen dieses Trägers durch den Träger des Aufenthalts- oder Wohnorts des Berechtigten entsprechend dem von diesem Träger anzuwendenden gesetzlich vorgeschriebenen Verfahren vorgenommen.

Der leistungspflichtige Träger teilt dem Träger des Aufenthalts- oder Wohnorts mit, welche besonderen Voraussetzungen erforderlichenfalls zu erfüllen und welche Aspekte in dem ärztlichen Gutachten zu berücksichtigen sind.

2. *Der Träger des Aufenthalts- oder Wohnorts erstattet dem leistungspflichtigen Träger, der um das ärztliche Gutachten ersucht hat, Bericht. Der leistungspflichtige Träger ist an die Feststellungen des Trägers des Aufenthalts- oder Wohnorts gebunden.*

Dem leistungspflichtigen Träger steht es frei, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen. Allerdings kann der Berechtigte nur dann aufgefordert werden, sich in den Mitgliedstaat des leistungspflichtigen Trägers zu begeben, wenn er reisen kann, ohne dass dies seine Gesundheit gefährdet, und wenn die damit verbundenen Reise- und Aufenthaltskosten von dem leistungspflichtigen Träger übernommen werden.

NATIONALES RECHT

10 Gemäss Artikel 53 Absätze 1 und 5 des Gesetzes über die Invalidenversicherung (LR 831.20) haben Personen Anspruch auf Invalidenrente, wenn ein Invaliditätsgrad von mindestens 40 % besteht. Bei einem Invaliditätsgrad von mindestens 40 % besteht Anspruch auf eine Viertelsrente, bei einem Invaliditätsgrad von mindestens 50 % besteht Anspruch auf eine halbe Rente und bei einem Invaliditätsgrad von mindestens 67 % besteht Anspruch auf

Article 29(1) and (2) of the same Act as a long-term incapacity to work caused by damage to physical or mental health as a result of congenital defect, illness or accident.

11 The decision whether to grant a claim for benefits under the Invalidity Insurance Act is taken by the Insurance Fund. Pursuant to Article 78 of the Invalidity Insurance Act, that decision may be challenged by an administrative complaint before the Insurance Fund, which in that case shall review its decision. The renewed decision may then be appealed to the Princely Court of Appeal for review.

12 Pursuant to Article 90(1) and (2) of the Regulation on the Invalidity Insurance Act (*Verordnung zum Gesetz* über *die Invalidenversicherung; LR 831.201*), the Insurance Fund may review of its own motion a person's continued entitlement to benefits, in particular whether there are circumstances indicating a possible significant change in the degree of invalidity.

13 The administrative procedure for complaints against the Insurance Fund's decisions is governed by the General State Administration Act (*Gesetz* über *die allgemeine Landesverwaltungspflege; LR 172.020*) ("the Administration Act"). Article 64(3) of that Act provides, *inter alia*, that each party must be given the opportunity to comment on all facts and circumstances relevant to the determination of the case at hand in order to safeguard their rights and interests.

eine ganze Rente. Laut Artikel 29 Absätze 1 und 2 dieses Gesetzes gilt als Invalidität die durch einen körperlichen oder geistigen Gesundheitsschaden als Folge von Geburtsgebrechen, Krankheit oder Unfall verursachte, längere Zeit dauernde Erwerbsunfähigkeit.

11 Über die Gewährung von Leistungen nach dem Gesetz über die Invalidenversicherung entscheidet die Invalidenversicherung. Artikel 78 des Gesetzes über die Invalidenversicherung zufolge kann diese Entscheidung mittels Verwaltungsbeschwerde vor der Invalidenversicherung angefochten werden, die ihre Entscheidung in diesem Fall überprüft. Gegen die erneute Entscheidung kann anschliessend vor dem Fürstlichen Obergericht Berufung erhoben werden.

12 Gemäss Artikel 90 Absätze 1 und 2 der Verordnung zum Gesetz über die Invalidenversicherung (LR 831.201) kann die Invalidenversicherung die Leistungsberechtigung von Amts wegen prüfen, insbesondere, wenn Tatsachen bekannt werden, die eine für den Anspruch erhebliche Änderung des Grades der Invalidität als möglich erscheinen lassen.

13 Das Verwaltungsverfahren für Beschwerden gegen die Entscheidungen der Invalidenversicherung wird durch das Gesetz über die allgemeine Landesverwaltungspflege (LR 172.020) geregelt. Artikel 64 Absatz 3 dieses Gesetzes sieht unter anderem vor, dass jeder Partei die Gelegenheit geboten werden muss, sich über alle für die Erledigung des Verhandlungsgegenstandes massgebenden Tatsachen und Verhältnisse zu äussern und überhaupt ihre Rechte und Interessen zu wahren.

14 Article 60(3) of the Administration Act provides that each party may request the summoning of parties, witnesses, and experts who have not previously been summoned and to request measures of inquiry as appropriate. Pursuant to Article 66(2) of the same Act, each party may address questions to parties, witnesses and experts.

15 According to the referring court, Article 79(1) of the Administration Act provides that the Insurance Fund shall adjudicate on a complaint in accordance with its own conviction reached on the basis of the entire contents of the hearing and the evidence taken ("unfettered evaluation of evidence").

16 The Code of Civil Procedure (*Zivilprozessordnung; LR 271.0*) governs the judicial review procedure. Pursuant to Article 272(1) of the Code of Civil Procedure, civil proceedings in Liechtenstein must also have regard to the principle of unfettered evaluation of evidence. This means that the court must determine, in accordance with its own conviction and giving careful consideration to the results of the entire hearing and the evidence presented, which facts may be relied upon for the proceedings. Consequently, the court may review the evaluation of evidence made at first instance (in this case the Insurance Fund's decision) and amend that evaluation of evidence, thus making findings of fact that depart from those made at first instance.

17 As an exception to this rule, Article 292(1) of the Code of Civil Procedure provides that authentic instruments establish full proof of that which is officially ordered or declared in those instruments by an authority or is attested by the authority or the authenticating officer. Nonetheless, Article 292(2) permits evidence to be adduced challenging the veracity of the attested record or fact. Furthermore, Article 190(1) of the Code of Civil Procedure recognises that final

14 Nach Artikel 60 Absatz 3 des Gesetzes über die allgemeine Landesverwaltungspflege können die Parteien die Vorladung noch nicht vorgeladener Parteien, Zeugen und Sachverständiger beantragen und rechtliche Ausführungen aufnehmen. Gemäss Artikel 66 Absatz 2 dieses Gesetzes kann jede Partei Fragen an Parteien, Zeugen und Sachverständige richten.

15 Dem vorlegenden Gericht zufolge entscheidet laut Artikel 79 Absatz 1 des Gesetzes über die allgemeine Landesverwaltungspflege die Invalidenversicherung nach ihrer freien, aus dem ganzen Inhalte der Verhandlung und dem Gegenstande der Beweisaufnahme geschöpften Überzeugung (sogenannte freie Beweiswürdigung).

16 Die Zivilprozessordnung (LR 271.0) findet auf das gerichtliche Überprüfungsverfahren Anwendung und gemäss § 272 Absatz 1 der Zivilprozessordnung der Grundsatz der freien Beweiswürdigung. Das Gericht muss also nach freier Überzeugung und unter sorgfältiger Berücksichtigung der Ergebnisse der gesamten Verhandlung und Beweisführung beurteilen, ob eine tatsächliche Angabe für wahr zu halten sei oder nicht. Damit kann das Gericht die Beweiswürdigung der Vorinstanz (hier: der Invalidenversicherung) überprüfen und die Beweiswürdigung ändern und somit zu anderen, von der Vorinstanz abweichenden Tatsachenfeststellungen gelangen.

17 Eine Ausnahme von dieser Regel bildet § 292 Absatz 1 der Zivilprozessordnung, der vorsieht, dass öffentliche Urkunden vollen Beweis dessen begründen, was darin von der Behörde amtlich verfügt oder erklärt oder von der Behörde oder der Urkundsperson bezeugt wird. Allerdings ist nach § 292 Absatz 2 der Zivilprozessordnung der Beweis der Unrichtigkeit des bezeugten Vorganges oder der bezeugten Tatsache oder der unrichtigen Beurkundung zulässig. Zudem kennt § 190 Absatz 1 der Zivilprozessordnung auch die Bindung an rechtskräftige

decisions by courts or administrative authorities are binding. Consequently, a court dealing with a case on a final decision must presume in certain circumstances the legal effectiveness of this decision without re-examining the facts or law involved and take the outcome of that decision to be a legal fact binding on the later proceedings.

III FACTS AND PROCEDURE

18 The appellant is a German national, residing in Germany, who worked in Liechtenstein from 1988 to 2000. In 2011 the respondent granted a full invalidity pension to the appellant. In 2013 the appellant applied for a reassessment of his continued entitlement to the invalidity pension. The Insurance Fund thus requested the German statutory pension scheme to provide it with an E 213 form. A doctor appointed by German statutory pension scheme examined the appellant, and concluded that he had a work capacity of less than three hours per day, corresponding to full incapacity under German law. This condition would continue to apply for another two years. Although the appellant's condition had improved in comparison to his prior examination, his ability to work was still reduced.

19 After considering both the E 213 form and further reports from the appellant's general practitioner stating that the appellant was no longer capable of working, the internal medical service of the Insurance Fund decided in July 2014 that he had a degree of invalidity of 59% and granted him a 50% invalidity pension.

Vorentscheidungen von Gerichten und Verwaltungsbehörden. Danach muss ein Gericht in einer Rechtssache, die auf einer Vorentscheidung beruht, in bestimmten Fällen von der Rechtswirksamkeit dieser Entscheidung ohne neuerliche Prüfung der Sach- oder Rechtslage ausgehen und das Ergebnis dieser Entscheidung als für das spätere Verfahren bindende Rechtstatsache zugrunde legen.

III SACHVERHALT UND VERFAHREN

18 Der Berufungswerber ist ein deutscher Staatsangehöriger mit Wohnsitz in Deutschland, der von 1988 bis 2000 in Liechtenstein erwerbstätig war. Im Jahr 2011 gewährte die Berufungsgegnerin dem Berufungswerber eine ganze Invalidenrente. 2013 beantragte der Berufungswerber die erneute Prüfung seiner Leistungsberechtigung. Daher ersuchte die Invalidenversicherung die deutsche Rentenversicherung, ihr ein Formular E 213 zukommen zu lassen. Eine von der deutschen Rentenversicherung beauftragte Ärztin untersuchte den Berufungswerber und bestätigte, dass für weitere zwei Jahre ein unter dreistündiges Leistungsvermögen pro Tag besteht, was nach deutschem Recht einer völligen Arbeitsunfähigkeit entspricht. Obwohl sich der Zustand des Berufungswerbers im Vergleich zur Voruntersuchung gebessert habe, bestehe nachvollziehbar eine Einschränkung der Arbeitsfähigkeit.

19 Unter Berücksichtigung des Formulars E 213 und weiterer Berichte der Hausärztin des Berufungswerbers, welche ausführte, dass keine Arbeitsfähigkeit mehr gegeben sei, stellte der interne ärztliche Dienst der Invalidenversicherung im Juli 2014 einen Invaliditätsgrad von 59 % fest und gewährte dem Berufungswerber eine Invalidenrente im Ausmass von 50 %.

20 In August 2014 the appellant launched an administrative appeal against the decision. After contacting the medical officer of the German statutory pension scheme, the Insurance Fund was told that a daily work capacity of less than three hours corresponded to full incapacity under German pension law, and that a more precise quantification of the appellant's incapacity to work thus could not be carried out.

21 The Insurance Fund received further reports from the appellant's general practitioner, stating that his medical condition made him incapable of working. In December 2014 the appeal was dismissed.

22 The appellant brought that decision before the referring court. He argues, in essence, that the respondent has based the reduction of the invalidity pension solely on the internal medical service's interpretation of the information in the E 213 form, concluding that he had a capacity to work. The respondent contends that it was correct to rely on the report from the internal medical service. It maintains that external opinions should only be obtained where a divergence exists between the internal service's report and the general conclusions of the medical file that is not evidently based on different medical actuarial premises.

23 On 17 September 2015, the referring court decided to stay the proceedings and to refer the following questions to the Court:

(1) Does the fact that under the second sentence of Article 87(2) of Regulation No 987/2009 the debtor institution shall be bound by the findings of the institution of the place of stay or residence preclude the debtor institution from

20 Im August 2014 brachte der Berufungswerber Verwaltungsbeschwerde gegen diese Verfügung ein. Die Invalidenversicherung setzte sich mit der Vertrauensärztin der deutschen Rentenversicherung in Verbindung, die mitteilte, dass eine unter dreistündige Arbeitsfähigkeit pro Tag nach den Kriterien des deutschen Rentenrechts einer vollen Leistungsminderung entspreche, sodass eine genauere Quantifizierung der Restleistungsfähigkeit nicht erfolgen würde.

21 Die Invalidenversicherung holte eine weitere Stellungnahme der Hausärztin des Berufungswerbers ein, welche festhielt, dass eine Arbeitsfähigkeit nicht möglich sei. Im Dezember 2014 wurde die Beschwerde abgewiesen.

22 Gegen diese Entscheidung legte der Berufungswerber beim vorlegenden Gericht Berufung ein. Er bringt im Wesentlichen vor, dass die Berufungsgegnerin die Kürzung der Invalidenrente ausschliesslich auf die Auslegung der Angaben im Formular E 213 durch den internen ärztlichen Dienst stütze und so zu dem Ergebnis gelange, dass er arbeitsfähig sei. Die Berufungsgegnerin ist der Ansicht, sie habe zu Recht auf den Bericht des internen ärztlichen Diensts abgestellt. Es seien nur dann externe Gutachten einzuholen, wenn zwischen dem Bericht des internen ärztlichen Diensts und dem allgemeinen Tenor im medizinischen Dossier eine Differenz bestehe, welche nicht offensichtlich auf unterschiedlichen versicherungsmedizinischen Prämissen beruhe.

23 Am 17. September 2015 entschied das vorlegende Gericht, das Verfahren zu unterbrechen und dem Gerichtshof die folgenden Fragen vorzulegen:

(1) Untersagt es die sich aus Art. 87 Absatz 2 2. Satz der VO 987/2009 ergebende Bindung des leistungspflichtigen Trägers an die Feststellungen des Trägers des Aufenthalts- oder Wohnortes des Versicherten, diese Feststellungen in

challenging those findings – and thus the information stated in the detailed medical report provided in form E 213 – in its procedure?

(2) If the answer to the first question is in the affirmative: Does that binding effect also apply in court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution?

24 The request was registered at the Court on 1 October 2015.

IV WRITTEN OBSERVATIONS

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

- the appellant, represented by Mag. iur. Antonius Falkner, Rechtsanwalt;
- the Government of Belgium, represented by Liesbet Van der Broek and Marie Jacobs, Legal Advisers, Ministry of Foreign Affairs, acting as Agents;
- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the Government of Norway, represented by Christian Fredrik Fougner Rydning, Higher Executive Officer, Ministry of Foreign Affairs and Tonje Skjeie, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;

seinem Verfahren und damit die Angaben im ausführlichen ärztlichen Bericht gemäss EU-Formular E 213 in Frage zu stellen?

(2) Für den Fall der Bejahung der ersten Frage: Gilt die erwähnte Bindung auch in einem sich nach nationalen Verfahrensvorschriften an das Verfahren vor einem leistungspflichtigen Träger anschliessenden Gerichtsverfahren?

24 Der Antrag ging beim Gerichtshof am 1. Oktober 2015 ein.

IV SCHRIFTLICHE ERKLÄRUNGEN

25 Gemäss Artikel 20 der Satzung des Gerichtshofs und Artikel 97 der Verfahrensordnung haben schriftliche Erklärungen abgegeben:

- der Berufungswerber, vertreten durch Mag. iur. Antonius Falkner, Rechtsanwalt;
- die Regierung Belgiens, vertreten durch Liesbet Van den Broek und Marie Jacobs, Rechtsberaterinnen, Aussenministerium, als Bevollmächtigte;
- die Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch, Leiterin, und Thomas Bischof, Stv. Leiter, Stabstelle EWR, als Bevollmächtigte;
- die Regierung Norwegens, vertreten durch Christian Fredrik Fougner Rydning, Erster Konsulent, Aussenministerium, und Tonje Skjeie, Advokat, Regierungsadvokat (Zivilsachen), als Bevollmächtigte;

– the EFTA Surveillance Authority ("ESA"), represented by Maria Moustakali, Officer, and Íris Ísberg, Temporary Officer, Department of Legal Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Denis Martin and Jonathan Tomkin, members of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS SUBMITTED AND ANSWERS PROPOSED

THE APPELLANT

26 The appellant submits that the binding effect of opinions obtained through the institution in the place of stay of the insured person applies only insofar as the debtor institution does not invoke its independent right to obtain an opinion from a doctor of its own choice.[1] Since the Insurance Fund did not make use of this right, it is consequently bound by the findings by the institution of the appellant's place of residence.

27 The answer to the first question must therefore be that the Insurance Fund is precluded from challenging the information stated in the detailed medical report in form E 213.

28 In relation to the second question, the appellant submits that the binding effect also applies in follow-on proceedings before the Princely Court of Appeal.

1 Reference is made to Case E-13/15 *Bautista*, not yet reported, paragraph 39, and the judgment in *Paletta I*, C-45/90, EU:C:1992:236.

– die EFTA-Überwachungsbehörde, vertreten durch Maria Moustakali, Beamtin, und Íris Ísberg, Beamtin (befristet), Rechtsabteilung, als Bevollmächtigte;

– die Europäische Kommission (im Folgenden: Kommission), vertreten durch Denis Martin und Jonathan Tomkin, Mitarbeiter des Juristischen Diensts, als Bevollmächtigte.

V ZUSAMMENFASSUNG DER VORGELEGTEN AUSFÜHRUNGEN UND VORGESCHLAGENEN ANTWORTEN

DER BERUFUNGSWERBER

26 Der Berufungswerber bringt vor, die Bindung an vom Träger des Aufenthaltsorts des Versicherten eingeholte Gutachten gelte nur insoweit, als der leistungspflichtige Träger nicht von seinem eigenständigen Recht Gebrauch macht, ein Gutachten eines Arztes seiner Wahl einzuholen.[1] Da die Invalidenversicherung von diesem Recht keinen Gebrauch gemacht hat, ist sie folglich an die Feststellungen des Trägers des Wohnorts des Berufungswerbers gebunden.

27 Die Antwort auf die erste Frage muss daher lauten, dass es der Invalidenversicherung untersagt ist, die Angaben im ausführlichen ärztlichen Bericht gemäss Formular E 213 in Frage zu stellen.

28 Hinsichtlich der zweiten Frage hält der Berufungswerber fest, dass die Bindungswirkung auch im anschliessenden Verfahren vor dem Fürstlichen Obergericht gilt.

1 Es wird auf das Urteil in *Bautista*, E-13/15, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 39, und das Urteil in *Paletta I*, C-45/90, EU:C:1992:236, verwiesen.

THE GOVERNMENT OF BELGIUM

29 The Belgian Government observes that the second sentence of Article 87(2) of the implementing Regulation was not found in the predecessor provision of Council Regulation (EEC) No 574/72 (OJ, English Special Edition 1972 (I), p. 160), but is inspired by the case law of the Court of Justice of the European Union ("the ECJ") clarifying the content of Article 18 of that latter regulation. That provision concerned the procedure for declaration of incapacity for work, and the subsequent administrative checks and medical examinations related to sickness benefits for claimants residing in a Member State other than the competent Member State.

30 The Belgian Government maintains that, in interpreting Article 18 of Regulation No 574/72, the ECJ concluded that the system put in place by that Article had a binding effect on the debtor institution, both in fact and in law, as regards the commencement and the duration of the work incapacity as established by the institution of the place of residence or stay, provided that the debtor institution did not make use of its possibility to have the beneficiary examined by a doctor of its own choice.[2]

31 The Belgian Government observes that the case law at issue concerned the recognition of medical examinations related to short-term incapacity for work, whereas the present case concerns invalidity or long-term incapacity for work, and the corresponding

2 Reference is made to the judgments in *Rindone*, 22/86, EU:C:1987:130, paragraph 15, and *Paletta I*, cited above, paragraph 28.

DIE REGIERUNG BELGIENS

29 Die Regierung Belgiens erläutert, dass Artikel 87 Absatz 2 Satz 2 der Durchführungsverordnung nicht in der Vorgängerbestimmung der Verordnung (EWG) Nr. 574/72 des Rates (ABl. 1972 L 74, S. 1) enthalten war, sondern auf die Rechtsprechung des Gerichtshofs der Europäischen Union (im Folgenden: EuGH) zur Klärung des Inhalts von Artikel 18 der letztgenannten Verordnung zurückgeht. Diese Bestimmung betraf das Verfahren zur Erklärung der Arbeitsunfähigkeit und die anschliessenden verwaltungsmässigen und ärztlichen Kontrollen in Bezug auf Krankengeld für Leistungsempfänger, die in einem anderen Mitgliedstaat als dem zuständigen Mitgliedstaat ansässig sind.

30 Die Regierung Belgiens vertritt die Ansicht, der EuGH sei bei der Auslegung des Artikels 18 der Verordnung Nr. 574/72 zu dem Schluss gelangt, dass das durch diesen Artikel geschaffene System für den leistungspflichtigen Träger in tatsächlicher und in rechtlicher Hinsicht bindende Wirkung hatte, was den vom Träger des Aufenthalts- oder Wohnorts festgestellten Eintritt und die Dauer der Arbeitsunfähigkeit anbelangt, sofern der leistungspflichtige Träger nicht von der Möglichkeit Gebrauch gemacht hat, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.[2]

31 Die Regierung Belgiens stellt fest, dass die gegenständliche Rechtsprechung die Anerkennung ärztlicher Gutachten im Zusammenhang mit einer kurzfristigen Arbeitsunfähigkeit betrifft, während es sich im vorliegenden Fall um eine Invalidität bzw.

2 Es wird auf die Urteile in *Rindone*, 22/86, EU:C:1987:130, Randnr. 15, und *Paletta I*, oben erwähnt, Randnr. 28, verwiesen.

right to an invalidity pension.[3] In its view, the assessment in the latter situation has a far broader scope than in the first situation and involves an evaluation aimed at establishing the degree of incapacity, and thus an assessment of whether the beneficiary may still perform professional activities in the labour market. The approach to this assessment differs widely among the EEA States. This fact is reflected in Article 46(3) of the basic Regulation, known as the rule of concordance. However, this rule does not apply between Germany and Liechtenstein.

32 The Belgian Government argues that Article 87(2) of the implementing Regulation, read in the light of case law, does not change the fact that it is the debtor institution that is exclusively competent to assess whether a recipient can be considered as having an incapacity under national legislation.

33 The Belgian Government submits that the debtor institution is bound to make this evaluation in light of the medical and functional findings of the medical expert of the institution of the place of residence or stay, but that it is not bound to reach the same conclusion in the assessment of whether or not an individual is entitled to a benefit.

34 The Belgian Government argues that Article 87(2) of the implementing regulation cannot be interpreted to mean that the finding of long-term total incapacity for work under German legislation obliges the Liechtenstein institution to grant an

3 Reference is made to the Opinion of Advocate General Mischo in *Rindone*, 22/86, EU:C:1987:32, pp. 1354-1355.

langfristige Arbeitsunfähigkeit und das damit einhergehende Recht auf eine Invalidenrente handelt.[3] Nach Einschätzung der Regierung Belgiens muss im letzteren Fall eine wesentlich umfassendere Evaluierung erfolgen als im ersten. Diese hat eine Bewertung mit dem Ziel der Festlegung des Invaliditätsgrads und damit eine Beurteilung, ob der Leistungsberechtigte noch einer beruflichen Tätigkeit auf dem Arbeitsmarkt nachgehen kann, zu beinhalten. Die Ansätze der EWR-Staaten hinsichtlich dieser Bewertung sind sehr unterschiedlich. Diese Tatsache spiegelt sich in Artikel 46 Absatz 3 der Grundverordnung wider, der auch als Übereinstimmungsregel bezeichnet wird. Diese Regelung findet im Verhältnis Deutschland – Liechtenstein jedoch keine Anwendung.

32 Die Regierung Belgiens macht geltend, dass Artikel 87 Absatz 2 der Durchführungsverordnung – vor dem Hintergrund der Rechtsprechung betrachtet – nichts an dem Umstand ändert, dass allein der leistungspflichtige Träger für die Bewertung der Arbeitsunfähigkeit eines Leistungsempfängers nach den nationalen Rechtsvorschriften zuständig ist.

33 Laut der Regierung Belgiens hat der leistungspflichtige Träger diese Bewertung im Licht der ärztlichen und funktionalen Befunde des medizinischen Fachpersonals des Trägers des Aufenthalts- oder Wohnorts vorzunehmen. Er muss bei seiner Bewertung, ob eine Person Anspruch auf eine Leistung hat, jedoch nicht notwendigerweise zur selben Schlussfolgerung gelangen.

34 Die Regierung Belgiens führt aus, dass Artikel 87 Absatz 2 der Durchführungsverordnung nicht so ausgelegt werden kann, dass die Feststellung einer langfristigen völligen Arbeitsunfähigkeit nach deutschem Recht den liechtensteinischen Träger verpflichtet,

3 Es wird auf die Schlussanträge des Generalanwalts Mischo in *Rindone*, 22/86, EU:C:1987:32, S. 1354 bis 1355, verwiesen.

equivalent invalidity pension for total incapacity for work, irrelevant of the assessment of invalidity status under Liechtenstein law.

35 Any interpretation to the contrary would go beyond the goal of coordination of social security systems and thus breach the principle that Member States may define the fundamental principles of their social security systems. It would also go beyond the reasons underlying the system of mutual administrative cooperation between Member States with regard to medical examinations, which are to prevent the beneficiary from having to travel to the competent state and to allow for the medical examination to be carried out in the language of the country of residence.[4]

36 According to the Belgian Government, whether the competent institution may take into account other medical evidence provided by the beneficiary is a matter for national procedural law, which must ensure at the same time that the principle of equal treatment is respected.

37 As regards the second question, the Government of Belgium notes that this is identical to the question referred in Case E-13/15 *Bautista*, and simply refers to that judgment.

38 The Government of Belgium proposes that the Court should provide the following answer to the questions referred.

1. *Article 87(2) of Regulation No 987/2009 must be interpreted in the sense that the debtor institution of an invalidity benefit must accept the validity of the medical and functional findings made by the*

4 Reference is made to the judgments in *Voeten and Beckers*, C-279/97, EU:C:1998:599, paragraphs 34-35, and *Martínez Vidal*, C-344/89, EU:C:1991:277.

unabhängig von der Bewertung des Invaliditätsstatus nach liechtensteinischem Recht eine entsprechende Invalidenrente für völlige Arbeitsunfähigkeit zu gewähren.

35 Jede anderweitige Auslegung würde über die Zielsetzung der Koordinierung der Sozialversicherungssysteme hinausgehen und damit gegen den Grundsatz verstossen, dass Mitgliedstaaten die Grundzüge ihrer Sozialversicherungssysteme selbst gestalten können. Sie würde zudem den Rahmen des Systems der gegenseitigen Verwaltungszusammenarbeit zwischen den Mitgliedstaaten im Zusammenhang mit ärztlichen Gutachten sprengen, das verhindern soll, dass der Leistungsempfänger in den zuständigen Staat reisen muss, und gleichzeitig ermöglichen soll, dass die ärztliche Untersuchung in der Sprache des Landes seines Wohnorts erfolgt.[4]

36 Ob der zuständige Träger, so die Regierung Belgiens, andere vom Leistungsempfänger vorgelegte ärztliche Nachweise berücksichtigen kann, ist Sache der nationalen Verfahrensvorschriften, die gleichzeitig gewährleisten müssen, dass der Grundsatz der Gleichbehandlung eingehalten wird.

37 Zur zweiten Frage hält die Regierung Belgiens fest, dass sie mit der in der Rechtssache E-13/15 *Bautista* vorgelegten zweiten Frage identisch ist, und verweist auf das entsprechende Urteil.

38 Die Regierung Belgiens schlägt vor, dass der Gerichtshof die vorgelegten Fragen folgendermassen beantwortet:

1. Artikel 87 Absatz 2 der Verordnung Nr. 987/2009 ist so auszulegen, dass der für Leistungen bei Invalidität leistungspflichtige Träger die Gültigkeit der ärztlichen und funktionalen Befunde des

4 Es wird auf die Urteile in *Voeten und Beckers*, C-279/97, EU:C:1998:599, Randnrn. 34 bis 35, und *Martínez Vidal*, C-344/89, EU:C:1991:277, verwiesen.

medical expert of the state of residence or stay, but cannot be interpreted as the debtor institution must align itself to the loss of incapacity for work found under the legislation of that state.

THE GOVERNMENT OF LIECHTENSTEIN

39 On the first question, the Liechtenstein Government submits that Article 49(2) of the implementing Regulation is the relevant provision in the present case. Article 87(2) of that Regulation is of secondary importance. This rests on the argument that Article 49(2) is the *lex specialis* in the context of the determination of the degree of invalidity and the subsequent determination of the entitlement to an invalidity pension.

40 In the view of the Liechtenstein Government, the wording of Article 49(2) of the implementing Regulation is clear with regard to the treatment of information collected by an institution of another EEA State. It must be taken into consideration as if the documents had been drawn up in the State of the debtor institution. Consequently, a medical report from a foreign institution cannot be ignored. On the other hand, the debtor institution is not bound to follow it.

41 However, even if the Court finds Article 87(2) of the implementing Regulation applicable, the Government of Liechtenstein submits that this leads to the same result.

medizinischen Fachpersonals des Staats des Wohn- oder Aufenthaltsorts anerkennen muss, nicht jedoch so, dass der leistungspflichtige Träger der Feststellung des Verlusts der Arbeitsunfähigkeit nach den Rechtsvorschriften dieses Staats folgen muss.

DIE REGIERUNG DES FÜRSTENTUMS LIECHTENSTEIN

39 Zur ersten Frage äussert die Regierung des Fürstentums Liechtenstein, dass Artikel 49 Absatz 2 der Durchführungsverordnung die in der gegenständlichen Rechtssache massgebliche Bestimmung darstellt. Artikel 87 Absatz 2 dieser Verordnung ist von untergeordneter Bedeutung. Dies wird damit begründet, dass es sich bei Artikel 49 Absatz 2 im Zusammenhang mit der Bestimmung des Grads der Invalidität und der daran anschliessenden Bestimmung des Anspruchs auf eine Invalidenrente um die *lex specialis* handelt.

40 Die Regierung des Fürstentums Liechtenstein vertritt den Standpunkt, dass der Wortlaut von Artikel 49 Absatz 2 der Durchführungsverordnung hinsichtlich des Umgangs mit von einem Träger eines anderen EWR-Staats gesammelten Informationen eindeutig ist. Sie sind so zu berücksichtigen, als wären die Dokumente im Staat des leistungspflichtigen Trägers erstellt worden. Somit kann ein ärztlicher Bericht eines ausländischen Trägers nicht unbeachtet bleiben. Andererseits ist der leistungspflichtige Träger nicht daran gebunden.

41 Selbst wenn der Gerichtshof zu der Schlussfolgerung gelangen sollte, dass Artikel 87 Absatz 2 der Durchführungsverordnung anwendbar ist, würde das der Regierung des Fürstentums Liechtenstein zufolge zum selben Ergebnis führen.

42 The Liechtenstein Government contends that the principle of equal treatment, which finds expression *inter alia* in Article 4 of the basic Regulation, appears to preclude an absolute binding effect of the findings of the institution of the place of stay or residence of the beneficiary. A binding effect of that kind would apply only in relation to a beneficiary examined in the country of stay or residence, whereas it does not apply in relation to a beneficiary examined in the country of the debtor institution. An objective justification for that difference in treatment is not evident.

43 The Liechtenstein Government submits that a binding effect breaches the principle of equal treatment whether the debtor institution requests the institution of the beneficiary's place of stay or residence to carry out the medical examination pursuant to Article 87(1) of the implementing Regulation, or whether it exercises its right to have the beneficiary examined by a doctor of its choice pursuant to the second subparagraph of Article 87(2).

44 The Liechtenstein Government refers to case law, according to which an EEA State applying its own legislation in order to determine an individual's social security rights must have the possibility to review the information received from the competent authority of another EEA State.[5] An absolute binding effect of such information is thus excluded.

5 Reference is made to the judgment in *Bouman*, C-114/13, EU:C:2015:81, paragraphs 24, 26 and 27.

42 Die Regierung des Fürstentums Liechtenstein bringt vor, dass der Grundsatz der Gleichbehandlung, der sich unter anderem in Artikel 4 der Grundverordnung niederschlägt, eine absolute Bindung an die Feststellungen des Trägers des Aufenthalts- oder Wohnorts des Leistungsberechtigten auszuschliessen scheint. Eine Bindung dieser Art würde nur für einen Leistungsberechtigten gelten, der im Land seines Aufenthalts- oder Wohnorts untersucht wird, nicht jedoch für einen Leistungsberechtigten, der im Land des leistungspflichtigen Trägers untersucht wird. Eine objektive Rechtfertigung für diese Ungleichbehandlung ist nicht ersichtlich.

43 Laut der Regierung des Fürstentums Liechtenstein würde eine Bindung gegen den Grundsatz der Gleichbehandlung verstossen, unabhängig davon, ob der leistungspflichtige Träger den Träger des Aufenthalts- oder Wohnorts des Leistungsberechtigten um Durchführung der ärztlichen Untersuchung gemäss Artikel 87 Absatz 1 der Durchführungsverordnung ersucht oder ob er sein Recht nach Artikel 87 Absatz 2 Unterabsatz 2 ausübt, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.

44 Die Regierung des Fürstentums Liechtenstein verweist auf die Rechtsprechung, nach der ein EWR-Staat, der zur Bestimmung der Sozialversicherungsansprüche einer Person seine eigenen Rechtsvorschriften anwendet, die Möglichkeit haben muss, die von der zuständigen Behörde eines anderen EWR-Staats erhaltenen Informationen zu überprüfen.[5] Somit ist eine absolute Bindungswirkung derartiger Informationen ausgeschlossen.

5 Es wird auf das Urteil in *Bouman*, C-114/13, EU:C:2015:81, Randnrn. 24, 26 und 27, verwiesen.

45 If the first question is answered in the affirmative, the Liechtenstein Government submits that the binding effect must also apply in court proceedings.[6]

46 The Government of Liechtenstein proposes that the Court should answer the questions referred as follows:

1. *The debtor institution is not precluded from challenging the findings of the institution of the place of stay or residence – and thus the information stated in the detailed medical report provided in an E 213 form – as it is not bound by those findings. The wording of the second sentence of Article 87(2) of Regulation No 987/2009, if applicable at all in the case at hand, has no bearing on that conclusion.*

2. *In the light of the proposed answer to the first of the referred questions, it is no longer necessary to consider the second question.*

3. *In eventu, the binding effect does also apply in court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution.*

THE GOVERNMENT OF NORWAY

47 The Norwegian Government notes that Article 87 of the implementing Regulation is a general provision, placed under the heading "Miscellaneous, transitional and final provisions".

6 Reference is made to the judgments in *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 33, and *Bouman*, cited above, paragraph 26.

45 Für den Fall, dass die erste Frage bejaht wird, muss, so die Regierung des Fürstentums Liechtenstein, die Bindung auch für Gerichtsverfahren gelten.[6]

46 Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die vorgelegten Fragen folgendermassen beantwortet:

1. *Dem leistungspflichtigen Träger ist es nicht untersagt, die Feststellungen des Trägers des Aufenthalts- oder Wohnorts – und damit die Angaben im ausführlichen ärztlichen Bericht gemäss Formular E 213 – in Frage zu stellen, da er nicht an diese Feststellungen gebunden ist. Der Wortlaut von Artikel 87 Absatz 2 Satz 2 der Verordnung Nr. 987/2009 wirkt sich auf diese Schlussfolgerung – sofern im gegenständlichen Fall überhaupt anwendbar – nicht aus.*

2. *In Anbetracht der für die erste der vorgelegten Fragen vorgeschlagenen Antwort ist es nicht mehr erforderlich auf die zweite Frage einzugehen.*

3. *In eventu gilt die Bindung auch in einem sich nach nationalen Verfahrensvorschriften an das Verfahren vor einem leistungspflichtigen Träger anschliessenden Gerichtsverfahren.*

DIE REGIERUNG NORWEGENS

47 Die Regierung Norwegens bringt vor, bei Artikel 87 der Durchführungsverordnung handle es sich um eine allgemeine Bestimmung unter der Überschrift „Sonstige Vorschriften, Übergangs- und Schlussbestimmungen“.

6 Es wird auf die Urteile in *Herbosch Kiere*, C-2/05, EU:C:2006:69, Randnr. 33, und *Bouman*, oben erwähnt, Randnr. 26, verwiesen.

48 The Norwegian Government submits that the binding effect specified in Article 87(2) of the implementing Regulation is limited, first, to the debtor institution, and second, to the medical findings of the institution of the place of stay or residence. This suggests that the binding effect applies only to certain factual circumstances or observations made by the institution of the place of stay or residence, and not to legal findings in the subsequent assessment by the debtor institution.[7]

49 The Norwegian Government notes that in *Bautista* the Court addressed the question of to what extent the debtor institution is bound, and thus that judgment is relevant to the present case, although the remarks in *Bautista* were made *obiter dicta*, as they were not necessary for the result in that case.

50 As the basic Regulation and the implementing Regulation merely coordinate the different social security systems of the EEA States, the Norwegian Government submits that it is for each EEA State to establish the terms and conditions for benefit eligibility. This view is supported by Article 49(2) of the implementing Regulation, which provides that it is for the debtor institution to determine whether a claimant is entitled to a benefit.

51 Many of the assessments required in the E 213 form may be based on factors that are specific to the country of residence/stay – both in legal and factual terms. Given that the conditions a claimant has to fulfil to be entitled to a particular benefit are not harmonised, in the view of the Norwegian Government, the term "medical findings"

7 Reference is made to the judgment in *Bautista*, cited above, paragraph 40.

48 Der Regierung Norwegens zufolge ist die Bindung gemäss Artikel 87 Absatz 2 der Durchführungsverordnung erstens auf den leistungspflichtigen Träger und zweitens auf die ärztlichen Feststellungen des Trägers des Aufenthalts- oder Wohnorts beschränkt. Dies legt nahe, dass die Bindung nur für bestimmte Sachverhalte oder Beobachtungen des Trägers des Aufenthalts- oder Wohnorts und nicht für juristische Feststellungen bei der anschliessenden Beurteilung durch den leistungspflichtigen Träger gilt.[7]

49 Die Regierung Norwegens hält fest, dass sich der Gerichtshof in der Rechtssache *Bautista* mit der Frage beschäftigt hat, inwiefern der leistungspflichtige Träger an die Feststellungen gebunden ist. Dementsprechend ist dieses Urteil im vorliegenden Fall massgeblich, obwohl die Anmerkungen in der Rechtssache *Bautista* in *obiter dicta* erfolgten, da sie in der Rechtssache nicht entscheidungsrelevant waren.

50 Da die Grund- und die Durchführungsverordnung nur zur Koordinierung der verschiedenen Sozialversicherungssysteme der EWR-Staaten dienen, geht die Regierung Norwegens davon aus, dass es Aufgabe der einzelnen EWR-Staaten ist, die Voraussetzungen für einen Leistungsanspruch festzulegen. Artikel 49 Absatz 2 der Durchführungsverordnung, der vorsieht, dass der leistungspflichtige Träger bestimmt, ob ein Antragsteller Anspruch auf eine Leistung hat, stützt diese Auffassung.

51 Zahlreiche der im Formular E 213 geforderten Beurteilungen können auf Faktoren beruhen, die – sowohl in rechtlicher als auch in tatsächlicher Hinsicht – für das Land des Aufenthalts- oder Wohnorts einschlägig sind. Da die Voraussetzungen, die ein Antragsteller für den Anspruch auf eine bestimmte Leistung erfüllen

7 Es wird auf das Urteil in *Bautista*, oben erwähnt, Randnr. 40, verwiesen.

should be construed in a manner not including such assessments. This would also appear consistent with a normal usage of the term medical "findings", suggesting that the binding effect applies only to observations and factual circumstances and not assessments.

52 In addition, the Norwegian Government emphasises the principle of national procedural autonomy.[8] Further, as Article 87 of the implementing Regulation limits the binding effect to the debtor institution, it does not govern proceedings before the courts.

53 The Norwegian Government adds that form E 213 is merely concerned with a medical evaluation. The medical evaluation is simply one of many factors to be considered in the assessment whether an applicant is eligible for disability benefit. The doctor is neither asked nor even competent to assess whether the claimant should be considered unable to work according to the national legislation of the country of the debtor institution. This determination must be made by the debtor institution alone.

54 The Norwegian Government adds for the sake of completeness that, in its view, Article 87 of the implementing Regulation does not entail an obligation to request the institution of the place of stay or residence to conduct the medical examination. The Norwegian Government observes that Article 82 of the basic Regulation provides that an examination "may" be carried out. The stipulation in Article 87(1) of the implementing Regulation that the medical examination

8 Reference is made to the judgment in *van der Weerd and Others*, C222/05 to C-225/05, EU:C:2007:318, paragraph 28.

muss, nicht harmonisiert sind, sollte der Begriff „ärztliche Feststellungen“ nach Auffassung der Regierung Norwegens so ausgelegt werden, dass solche Beurteilungen davon ausgenommen sind. Dies würde auch mit der Verwendung des Begriffs ärztliche „Feststellungen“ im üblichen Sprachgebrauch übereinstimmen, der nahelegt, dass sich die Bindungswirkung nur auf Beobachtungen und Sachverhalte, nicht jedoch auf Beurteilungen erstreckt.

52 Zudem verweist die Regierung Norwegens auf den Grundsatz der nationalen Verfahrensautonomie.[8] Weil Artikel 87 der Durchführungsverordnung die Bindung auf den leistungspflichtigen Träger beschränkt, umfasst sein Regelungscharakter nicht Verfahren vor den Gerichten.

53 Die Regierung Norwegens fügt hinzu, dass das Formular E 213 nur ein ärztliches Gutachten darstelle. Ein ärztliches Gutachten ist nur einer von vielen Faktoren, die bei der Beurteilung zu berücksichtigen sind, ob ein Antragsteller Anspruch auf eine Invalidenrente hat,. Zur Beurteilung, ob der Antragsteller gemäss der nationalen Gesetzgebung des Landes des leistungspflichtigen Trägers als arbeitsunfähig gelten sollte, ist der Arzt weder angehalten noch in der Lage. Diese Feststellung hat allein der leistungspflichtige Träger zu treffen.

54 Der Vollständigkeit halber ergänzt die Regierung Norwegens, dass Artikel 87 der Durchführungsverordnung ihrer Auffassung nach keine Verpflichtung vorsieht, den Träger des Aufenthalts- oder Wohnorts um ein ärztliches Gutachten zu ersuchen. Die Regierung Norwegens merkt an, dass gemäss Artikel 82 der Grundverordnung Gutachten angefertigt werden „können“. Die Bestimmung in Artikel 87 Absatz 1 der Durchführungsverordnung, dass die ärztliche

8 Es wird auf das Urteil in *van der Weerd u. a.*, C-222/05 bis C-225/05, EU:C:2007:318, Randnr. 28, verwiesen.

"shall be carried out" may simply refer to an obligation for the institution of residence to make an examination on request or to conduct the examination according to its legislation.

55 The Government of Norway proposes that the Court should answer the questions referred as follows:

1. *Article 87(2) of Regulation No 987/2009 does not preclude the debtor institution from challenging the conclusions stated in the detailed medical report provided in form E 213 in its procedure.*

2. *The binding effect mentioned in Article 87(2) of Regulation No 987/2009 does not apply in court proceedings, which, under national procedural rules, follow on from the proceedings before a debtor institution.*

ESA

56 In relation to the first question, ESA argues that Article 87(1) of the implementing Regulation is indicative of the purpose of the Regulation, namely to ensure cooperation between the administrations of two EEA States without creating undue burdens for either the institutions or benefit claimants.

57 ESA notes that the wording of Article 87(2) of the implementing Regulation leaves little room for doubt that the medical report produced by the institution of the place of stay or residence is binding upon the debtor institution.

Untersuchung „vorgenommen“ („shall be carried out“ in der englischen Sprachfassung) wird, kann sich einfach auf eine Verpflichtung des Trägers des Wohnorts beziehen, auf Ersuchen eine Untersuchung vorzunehmen oder die Untersuchung gemäss seinen Rechtsvorschriften durchzuführen.

55 Die Regierung Norwegens schlägt vor, dass der Gerichtshof die vorgelegten Fragen folgendermassen beantwortet:

1. *Artikel 87 Absatz 2 der Verordnung Nr. 987/2009 untersagt es dem leistungspflichtigen Träger nicht, in einem Verfahren die im ausführlichen ärztlichen Bericht gemäss Formular E 213 angeführten Feststellungen in Frage zu stellen.*

2. *Die Bindung nach Artikel 87 Absatz 2 der Verordnung Nr. 987/2009 gilt nicht in einem sich nach nationalen Verfahrensvorschriften an das Verfahren vor einem leistungspflichtigen Träger anschliessenden Gerichtsverfahren.*

DIE EFTA-ÜBERWACHUNGSBEHÖRDE

56 Bezugnehmend auf die erste Frage macht die EFTA-Überwachungsbehörde geltend, dass aus Artikel 87 Absatz 1 der Durchführungsverordnung der Zweck der Verordnung hervorgeht, nämlich die Gewährleistung der Zusammenarbeit der Behörden zweier EWR-Staaten, ohne dabei die Versicherungsträger oder die Antragsteller übermässig zu belasten.

57 Die EFTA-Überwachungsbehörde stellt fest, dass der Wortlaut von Artikel 87 Absatz 2 der Durchführungsverordnung kaum Zweifel daran aufkommen lässt, dass der leistungspflichtige Träger an das vom Träger des Aufenthalts- oder Wohnorts erstellte ärztliche Gutachten gebunden ist.

58 ESA submits that the binding effect is absolute unless the debtor institution avails itself of the right mentioned in the third sentence of Article 87(2) of the implementing Regulation to have the beneficiary examined by a doctor of its own choice. In its view, the two possibilities set out in Article 87(1) and (2) are not mutually exclusive; the competent institution can avail itself of its right to have the beneficiary examined by a doctor of its choice also in the case where it has already received a medical report from the institution of the EEA State of stay or residence. This reading of Article 87(2) is in line with the wording and rationale of the provision and the case law of the ECJ on Regulation No 574/72.[9] Moreover, the fact that the relevant provision of the implementing Regulation expressly states that the debtor institution shall be bound by the findings of the institution of the place of stay or residence could be seen as an attempt to clarify the uncertainty surrounding the issue. Without this binding effect, the objective of effective administrative cooperation between the EEA States and legal certainty for the beneficiary would be jeopardised.

59 According to ESA, it is not clear from the reference from the national court whether the Insurance Fund availed itself of the possibility to have the appellant examined by a doctor of its choice and in what way the Insurance Fund deviated from the medical report received from the institution of the place of residence. Furthermore, it is not obvious if the deviation concerned the nature of the physical condition of the claimant, or the interpretation of the degree of invalidity of the claimant according to national law.

9 Reference is made to the judgments in *Rindone* and *Paletta I*, both cited above.

58 Der EFTA-Überwachungsbehörde zufolge ist die Bindungswirkung absolut, es sei denn, der leistungspflichtige Träger macht von seinem in Artikel 87 Absatz 2 Satz 3 der Durchführungsverordnung festgelegten Recht Gebrauch, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen. Ihrer Auffassung nach schliessen sich die zwei in Artikel 87 Absatz 1 und 2 benannten Möglichkeiten nicht gegenseitig aus. Der zuständige Träger kann auch dann von seinem Recht Gebrauch machen, den Leistungsberechtigten von einem Arzt seiner Wahl untersuchen zu lassen, wenn er bereits das ärztliche Gutachten vom Träger des EWR-Staats des Aufenthalts- oder Wohnorts erhalten hat. Diese Auslegung von Artikel 87 Absatz 2 steht im Einklang mit dem Wortlaut und dem Zweck dieser Bestimmung sowie mit der Rechtsprechung des EuGH zur Verordnung Nr. 574/72.[9] Zudem könnte der Umstand, dass in der entsprechenden Vorschrift der Durchführungsverordnung die Bindung des leistungspflichtigen Trägers an die Feststellungen des Trägers des Aufenthalts- oder Wohnorts ausdrücklich statuiert ist, als Versuch der Klarstellung angesehen werden. Ohne diese Bindungswirkung wäre das Ziel der wirksamen Verwaltungszusammenarbeit zwischen den EWR-Staaten und die Rechtssicherheit für den Leistungsberechtigten in Gefahr.

59 Aus dem Antrag des nationalen Gerichts geht der EFTA-Überwachungsbehörde zufolge nicht hervor, ob die Invalidenversicherung von der Möglichkeit Gebrauch gemacht hat, den Berufungswerber von einem Arzt ihrer Wahl untersuchen zu lassen, bzw. inwiefern die Invalidenversicherung vom ärztlichen Bericht des Trägers des Wohnorts abwich. Darüber hinaus ist unklar, ob die Abweichung den körperlichen Zustand des Antragstellers oder die Auslegung des Grads der Invalidität des Antragstellers nach nationalem Recht betraf.

9 Es wird auf die Urteile in *Rindone* und *Paletta I*, beide oben erwähnt, verwiesen.

60 ESA stresses that, in its view, where a debtor institution makes use of the procedure specified in Article 87(1) of the implementing Regulation it is bound by the report from the institution of the place of stay or residence, unless it later makes use of the right to have a claimant examined by a doctor of its choice, in accordance with the third sentence of Article 87(2), in which case it is not bound by the medical report.

61 However, ESA continues, the determination of the degree of invalidity and the amount of invalidity pension to which a claimant is entitled is a matter of national law, regulated in full by national substantive and procedural law.

62 Turning to the second question, ESA takes the view that the binding effect mentioned in Article 87(2) of the implementing Regulation applies equally in court proceedings following an appeal against a decision by a debtor institution.

63 As a starting point, ESA observes that neither the basic Regulation nor the implementing Regulation is intended to regulate or delineate the rights of access to justice for recipients or claimants of social security benefits in EEA States. This is a matter for national procedural rules.

64 ESA contends that, in the light of the clear wording of Article 87(2) of the implementing Regulation, it would be contrary to the language of that provision and its rationale if the Liechtenstein court could disregard the binding effect of the findings in the medical report, and reverse the decision of the respondent.

60 Die EFTA-Überwachungsbehörde hebt hervor, dass der leistungspflichtige Träger ihrer Ansicht nach in einem Fall, in dem er das in Artikel 87 Absatz 1 der Durchführungsverordnung vorgesehene Verfahren anwendet, an den Bericht des Trägers des Aufenthalts- oder Wohnorts gebunden ist, es sei denn, er macht anschliessend von seinem Recht Gebrauch, den Antragsteller gemäss Artikel 87 Absatz 2 Satz 3 durch einen Arzt seiner Wahl untersuchen zu lassen. In letzterem Fall ist er nicht an den ärztlichen Bericht gebunden.

61 Allerdings, so die EFTA-Überwachungsbehörde weiter, wird die Feststellung des Grads der Invalidität und der Höhe der Invalidenrente, auf die ein Antragsteller Anspruch hat, ausnahmslos durch das nationalen materielle Recht und das nationale Verfahrensrecht geregelt.

62 Zur zweiten Frage trägt die EFTA-Überwachungsbehörde vor, dass die Bindung nach Artikel 87 Absatz 2 der Durchführungsverordnung ebenso für Gerichtsverfahren gilt, die sich an ein Rechtsmittel gegen eine Entscheidung eines leistungspflichtigen Trägers anschliessen.

63 Einleitend hält die EFTA-Überwachungsbehörde fest, dass weder mit der Grund- noch mit der Durchführungsverordnung eine Regelung oder Bestimmung des Umfangs des Rechts auf Zugang zu Gerichten von Antragstellern oder Leistungsempfängern von Sozialversicherungsleistungen in den EWR-Staaten beabsichtigt wurde. Beides bestimmt sich nach nationalem Verfahrensrecht.

64 Die EFTA-Überwachungsbehörde vertritt die Auffassung, dass es in Anbetracht der unmissverständlichen Formulierung von Artikel 87 Absatz 2 der Durchführungsverordnung im Widerspruch zum Wortlaut dieser Bestimmung und ihrem Zweck stünde, wenn das liechtensteinische Gericht die Bindungswirkung der Feststellungen im ärztlichen Bericht ausser Acht lassen und die Entscheidung der Berufungsgegnerin aufheben könnte.

65 ESA notes that such a binding effect for national courts is not foreign to the system of coordination of social security systems in the EEA. The ECJ has held, *inter alia*, that a certificate concerning the applicable legislation, drawn up in accordance with the provisions of Title III of Regulation No 574/72, is binding on the social security institutions of other EEA States in so far as it certifies that workers on postings are covered by the social security system of the EEA State in which their undertaking is established.[10]

66 ESA refers to case law where the ECJ has provided for safeguards in order to avoid abuse or fraud due to the binding effect of the said certificate. In particular, the ECJ has stated that employers are not barred from adducing evidence to support a finding by the national court of abuse or fraudulent conduct on part of the worker.[11]

67 Finally, ESA argues that a full review of the case by national courts is not contrary to the implementing Regulation as long as the debtor institution has made use of its right to have the beneficiary examined by a doctor of its own choice.

68 On 29 January 2016, ESA submitted observations on the relevance of the judgment in *Bautista*. As regards the first question, ESA submits

10 Reference is made to the judgment in *FTS*, C-202/97, EU:C:2000:75. Reference is also made to the Opinion of Advocate General Szpunar in *Bouman*, C-114/13, EU:C:2014:123, points 29 and 30.

11 Reference is made to the judgment in *Paletta II*, C-206/94, EU:C:1996:182, paragraph 18.

65 Laut der EFTA-Überwachungsbehörde ist eine solche Bindung der nationalen Gerichte im System zur Koordinierung der Systeme der sozialen Sicherheit im EWR nicht ungewöhnlich. Der EuGH hat unter anderem festgestellt, dass eine Bescheinigung über die anwendbaren Rechtsvorschriften, die gemäss den Bestimmungen von Titel III der Verordnung Nr. 574/72 ausgestellt wurde, die Träger der sozialen Sicherheit anderer EWR-Staaten insoweit bindet, als sie bescheinigt, dass entsandte Arbeitnehmer dem System der sozialen Sicherheit des EWR-Staats angeschlossen sind, in dem ihr Unternehmen seine Betriebsstätte hat.[10]

66 Die EFTA-Überwachungsbehörde nimmt Bezug auf die Rechtsprechung des EuGH, in der dieser Feststellungen getroffen hat, mit denen Missbrauch oder Betrug infolge der Bindung dieser Bescheinigung verhindert werden sollen. Insbesondere hat der EuGH festgehalten, dass es Arbeitgebern nicht verwehrt ist, Nachweise zu erbringen, anhand derer das nationale Gericht ein missbräuchliches oder betrügerisches Verhalten seitens des Arbeitnehmers feststellen kann.[11]

67 Abschliessend weist die EFTA-Überwachungsbehörde darauf hin, dass die Durchführungsverordnung einer umfassenden Prüfung des Falls durch nationale Gerichte nicht entgegensteht, sofern der leistungspflichtige Träger von seinem Recht Gebrauch gemacht hat, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.

68 Am 29. Januar 2016 reichte die EFTA-Überwachungsbehörde eine Stellungnahme zur Relevanz des *Bautista*-Urteils ein. In Bezug auf

10 Es wird auf das Urteil in *FTS*, C-202/97, EU:C:2000:75, verwiesen. Es wird ausserdem auf die Schlussanträge des Generalanwalts Szpunar in *Bouman*, C-114/13, EU:C:2014:123, Nrn. 29 und 30, verwiesen.

11 Es wird auf das Urteil in *Paletta II*, C-206/94, EU:C:1996:182, Randnr. 18, verwiesen.

that the Court clarified that a debtor institution is indeed bound by a medical examination carried out by the institution of the place of stay or residence when this is done in accordance with Article 87(2) of the implementing Regulation and the competent institution does not avail itself of the right to have the beneficiary examined by a doctor of its own choice.[12]

69 ESA argues that the Court further stated that that the principle of equal treatment enables recipients or claimants of Liechtenstein invalidity benefits staying or residing in another EEA State to challenge the findings of the institution of the place of stay or residence in the proceedings before the Insurance Fund.[13] ESA submits that the principle of equal treatment applies to persons, whereas in the case of the debtor institution the principle of equal treatment is of no relevance. Consequently, Article 87 of the implementing Regulation prevents the debtor institution from deviating from the information stated in the detailed medical report or challenge such medical report unless it avails itself of the possibility to have the person examined by a doctor of its own choice.

70 As regards the second question, ESA submits that the principle of equal treatment would require that recipients or claimants of Liechtenstein invalidity benefits staying or residing in another EEA State must be entitled to challenge the decision of the debtor institution before the national court of the competent State. This applies irrespective of whether the debtor institution accepted the findings in the medical report issued by the institution of the place

12 Reference is made to *Bautista*, cited above, paragraphs 36 and 39.
13 Reference is made to *Bautista*, cited above, paragraph 42.

die erste Frage habe der Gerichtshof klargestellt, dass der leistungspflichtige Träger an das vom Träger des Aufenthalts- oder Wohnorts erstellte ärztliche Gutachten gebunden ist, wenn dieses im Einklang mit Artikel 87 Absatz 2 der Durchführungsverordnung erstellt wurde und der leistungspflichtige Träger nicht von seinem Recht Gebrauch macht, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.[12]

69 Die EFTA-Überwachungsbehörde bringt vor, dass der Gerichtshof weiter festgestellt habe, dass Empfänger von oder Antragssteller auf Leistungen aus der liechtensteinischen Invalidenversicherung, die sich in einem anderen EWR-Staat aufhalten oder dort ihren Wohnsitz haben, nach dem Gleichbehandlungsgrundsatz die Feststellungen des Trägers des Aufenthalts- oder Wohnsitzes in dem Verfahren vor der Invalidenversicherung anfechten können.[13] Der Gleichbehandlungsgrundsatz findet auf Personen Anwendung. Im Fall des leistungspflichtigen Trägers ist er hingegen irrelevant. Artikel 87 der Durchführungsverordnung hindert den leistungspflichtigen Träger entsprechend daran, von den Informationen aus dem ärztlichen Gutachten abzuweichen oder dieses anzufechten, solange er nicht von seinem Recht Gebrauch macht, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.

70 Zur zweiten Frage legt die EFTA-Überwachungsbehörde dar, dass Empfänger oder Antragssteller liechtensteinischer Invalidenversicherungsleistungen nach dem Gleichbehandlungsgrundsatz das Recht haben, die Entscheidung des leistungspflichtigen Trägers vor den nationalen Gerichten des zuständigen Staates anzufechten. Dies gilt unabhängig davon, ob die Feststellungen aus dem ärztlichen Gutachten akzeptiert wurden oder

12 Es wird auf das Urteil in *Bautista*, oben erwähnt, Randnr. 36 und 39 verwiesen.
13 Es wird auf das Urteil in *Bautista*, oben erwähnt, Randnr. 42 verwiesen.

of stay or residence or whether it availed itself of the possibility to have the person examined by a doctor of its own choice.[14]

71 ESA proposes that the Court should answer the questions referred as follows:

1. *The debtor institution is bound by the findings of the institution of the place of residence or stay under the second sentence of Article 87(2) of Regulation No 987/2009 unless the former institution avails itself of the right to have the beneficiary examined by a doctor of its choice, under the third sentence thereof.*

2. *Article 87(2) of Regulation No 987/2009 does not prevent a recipient or claimant of benefits from challenging the findings of an institution of the place of stay or residence before the national courts of the competent State.*

THE COMMISSION

72 The Commission notes that the present case concerns two interrelated issues. The first is the concept of "medical findings" and the second is the extent of the binding effect mentioned in Article 87(2) of the implementing Regulation.

73 The Commission holds that the concept of "medical findings" does not extend to the legal assessment of whether a claimant is entitled to benefits.[15] The basic Regulation and the implementing Regulation merely seek to ensure the coordination and not harmonisation of

14 Reference is made to *Bautista*, cited above, paragraphs 41 to 44.
15 Reference is made to the judgment in *Bautista*, cited above, paragraph 40.

von dem Recht Gebrauch gemacht wurde, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.[14]

71 Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die Fragen folgendermassen beantwortet:

1. *Der leistungspflichtige Träger ist gemäss Artikel 87 Absatz 2 Satz 2 der Verordnung Nr. 987/2009 an die Feststellungen des Trägers des Aufenthalts- oder Wohnorts gebunden, es sei denn, ersterer macht von seinem Recht nach Satz 3 des obigen Absatzes Gebrauch, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.*

2. *Artikel 87 Absatz 2 der Verordnung Nr. 987/2009 hindert einen Leistungsempfänger oder Antragsteller nicht daran, die Feststellungen des Trägers des Aufenthalts- oder Wohnsitzes vor den nationalen Gerichten des zuständigen Staates anzufechten.*

DIE KOMMISSION

72 Die Kommission hält fest, dass die gegenständliche Rechtssache zwei zusammenhängende Fragen betrifft. Zum einen handelt es sich um den Begriff der „ärztlichen Feststellungen“, zum anderen um das Ausmass der in Artikel 87 Absatz 2 der Durchführungsverordnung vorgesehenen Bindung.

73 Die Kommission trägt vor, dass sich der Begriff der „ärztlichen Feststellungen“ nicht auf die rechtliche Beurteilung, ob ein Antragsteller Anspruch auf Leistungen hat, erstreckt.[15] Mit der Grund- und der Durchführungsverordnung soll lediglich eine Koordinierung, nicht jedoch eine Harmonisierung der

14 Es wird auf das Urteil in *Bautista*, oben erwähnt, Randnr. 41 bis 44 verwiesen.
15 Es wird auf das Urteil in *Bautista*, oben erwähnt, Randnr. 40, verwiesen.

social security schemes. The Member States are thus free to determine the criteria and conditions for eligibility for a particular benefit.

74 The Commission finds it unclear from the reference whether the Insurance Fund took full account of the medical findings of the German doctor or whether the Fund's comments on the findings were of a medical nature. This is a factual matter for the national court to determine.

75 The Commission stresses that the medical findings are binding insofar as the debtor institution does not invoke its independent right to obtain an opinion from a doctor of its choice after receiving the medical report from the institution of the place of stay or residence.[16]

76 In the present case it appears to the Commission that the Insurance Fund was not satisfied with the medical findings from the German doctor, but that it did not make use of its right to have a doctor of its choice examine the appellant. Thus, the Commission submits that the debtor institution was precluded from disregarding the medical findings of the doctor in Germany.

77 In relation to the second question, the Commission argues that the binding effect must apply in court proceedings instituted by the claimant where he has received a negative decision. The effectiveness of EU law would be undermined if the binding effect of medical findings did not apply in court proceedings triggered by the fact that the competent institution failed to comply with those findings.

16 Ibid., paragraph 39.

Sozialversicherungssysteme erreicht werden. Somit steht es den Mitgliedstaaten frei, die Kriterien und Voraussetzungen für den Anspruch auf eine bestimmte Leistung festzulegen.

74 Der Kommission zufolge geht aus dem Antrag nicht klar hervor, ob die Invalidenversicherung die ärztlichen Feststellungen der deutschen Ärztin vollumfänglich berücksichtigt hat bzw. ob ihre Stellungnahme der zu diesen Feststellungen medizinischer Natur war. Es ist Aufgabe des nationalen Gerichts, diese sachliche Frage zu klären.

75 Die Kommission betont, dass die ärztlichen Feststellungen insoweit bindend sind, als der leistungspflichtige Träger nicht nach Erhalt des ärztlichen Berichts vom Träger des Aufenthalts- oder Wohnorts von seinem eigenständigen Recht Gebrauch macht, ein Gutachten eines Arztes seiner Wahl einzuholen.[16]

76 Im vorliegenden Fall hat die Kommission den Eindruck, dass die Invalidenversicherung zwar mit den ärztlichen Feststellungen der deutschen Ärztin nicht einverstanden war, jedoch nicht von ihrem Recht Gebrauch machte, den Berufungswerber durch einen Arzt ihrer Wahl untersuchen zu lassen. Dementsprechend, so die Kommission, war es dem leistungspflichtigen Träger untersagt, die ärztlichen Feststellungen der Ärztin in Deutschland ausser Acht zu lassen.

77 Im Zusammenhang mit der zweiten Frage macht die Kommission geltend, dass die Bindungswirkung für vom Antragsteller eingeleitete Gerichtsverfahren gelten muss, wenn dieser eine abschlägige Entscheidung erhalten hat. Die Wirksamkeit des EU-Rechts würde untergraben, wenn ärztliche Feststellungen, denen der zuständige Träger nicht entsprochen hat, in Gerichtsverfahren keine Bindungswirkung hätten.

16 Ebenda, Randnr. 39.

78 The Commission proposes that the Court should answer the questions referred as follows:

1. *Article 87(2) of [Regulation No 987/2009] must be interpreted as precluding the debtor institution from disregarding the medical findings of the doctor of the Member State of residence of the beneficiary – and thus the information stated in the detailed medical report provided in form E213, if it has not made use of the possibility of having that beneficiary examined by a doctor of its choice.*

2. *The binding effect of the medical findings of the doctor of the Member State of residence of the beneficiary also applies in court proceedings which, under national procedural rules, follow on from the proceedings before the debtor institution.*

Per Christiansen
Judge-Rapporteur

78 Die Kommission schlägt vor, dass der Gerichtshof die vorgelegten Fragen folgendermassen beantwortet:

1. *Artikel 87 Absatz 2 [der Verordnung Nr. 987/2009] ist so auszulegen, dass er es dem leistungspflichtigen Träger untersagt, die ärztlichen Feststellungen des Arztes im Mitgliedstaat des Wohnorts des Leistungsberechtigten – und damit die Angaben im ausführlichen ärztlichen Bericht gemäss Formular E 213 – ausser Acht zu lassen, wenn dieser Träger nicht von der Möglichkeit Gebrauch gemacht hat, den Leistungsberechtigten durch einen Arzt seiner Wahl untersuchen zu lassen.*

2. *Die Bindungswirkung der ärztlichen Feststellungen des Arztes im Mitgliedstaat des Wohnorts des Leistungsberechtigten gilt auch in einem sich nach nationalen Verfahrensvorschriften an das Verfahren vor dem leistungspflichtigen Träger anschliessenden Gerichtsverfahren.*

Per Christiansen
Berichterstatter

Case

E-28/15

Yankuba Jabbi

=V=

The Norwegian Government, represented by the Immigration Appeals Board

(Directive 2004/38/EC – Right of residence – Derived rights for third country nationals)

Sak

E-28/15

Yankuba Jabbi

mot

Den norske stat v/Utlendingsnemnda

(Direktiv 2004/38/EF – oppholdsrett – avledede rettigheter for tredjelandsborgere)

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Innholdsfortegnelse

Summary of the Judgment

1 The exercise of free movement persons is conditional. In particular, EU law requires that economically inactive persons have sufficient resources for themselves and their family members so as not to become a burden on the social security system of the host State. That condition is intended to protect the host State's fiscal interests by placing a person's own resources on a like footing with the financial contributions to the social security system made as a result of employment in the labour market. A condition of comprehensive sickness insurance cover also applies.

2 In the EEA context, Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("the Directive") provides that all EEA nationals shall have the right of residence on the territory of another EEA State for more than three months if they fulfil one of the conditions set out in points (a) to (d). At issue in the case was Article 7(1)(b). That provision grants a right of residence provided that (i) the EEA national has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host State during the period of residence and (ii) has comprehensive sickness insurance cover in the host State. Pursuant to Article 7(2), that right of residence shall extend to family members who are not nationals of an EEA State, accompanying or joining the EEA national in the host State.

Sammendrag av dommen

1 Utøvelsen av den frie bevegelighet for personer er betinget. Særlig krever EU-retten at økonomisk inaktive personer skal ha tilstrekkelige midler til seg selv og sine familiemedlemmer, slik at de ikke blir en byrde for vertsstatens sosialhjelpssystem. Dette vilkår er ment å beskytte vertsstatens fiskale interesser ved å likestille en persons egne midler med de finansielle bidrag til sosialhjelpssystemet deltakelse i arbeidsmarkedet ville ha medført. Et vilkår om å ha sykeforsikring med full dekning gjelder også.

2 I EØS-sammenheng fastsetter artikkel 7 nr. 1 i europaparlaments- og rådsdirektiv 2004/38/EF av 29. april 2004 om unionsborgeres og deres familiemedlemmers rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, om endring av forordning (EØF) nr. 1612/68 og om oppheving av direktiv 64/221/EØF, 68/360/EØF, 72/194/EØF, 73/148/EØF, 75/34/EØF, 75/35/EØF, 90/364/EØF, 90/365/EØF og 93/36/EØF ("direktivet") at alle EØS-borgere skal ha rett til å oppholde seg på territoriet til en annen EØS-stat i et tidsrom på over tre måneder, dersom de oppfyller et av vilkårene i bokstav a) til d). Den foreliggende sak gjelder artikkel 7 nr. 1 bokstav b). Denne bestemmelse gir oppholdsrett på betingelse av (i) at EØS-borgeren har tilstrekkelige midler til seg selv og sine familiemedlemmer til ikke å bli en byrde for vertsstatens sosialhjelpssystem under oppholdet, og (ii) at de har sykeforsikring med full dekning i vertsstaten. Etter artikkel 7 nr. 2 skal denne oppholdsrett også omfatte familiemedlemmer som ikke er borgere i en EØS-stat, når de kommer sammen med eller slutter seg til EØS-borgeren i vertsstaten.

3 When an EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national's home State. Accordingly, when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State.

4 However, a derived right of residence for a third country national in the spouse's home State is conditional. In addition to the requirements of sufficient resources and health insurance, the following conditions must be fulfilled. First, the residence of the EEA national in the host State must have been genuine such as to enable family life in that State. The duration of the residence in the host State must exceed a continuous period of three months. Second, pursuant to Article 35 of the Directive, EEA States may, subject to the principle of proportionality and procedural safeguards provided for in the Directive, adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse of rights or fraud, such as marriages of convenience. Third, restrictions on rights granted by the Directive may be justified by reasons of public policy, public security or public health pursuant to Article 27(1) of the Directive.

5 Where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of the Directive, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

3 En EØS-borger som utøver sin rett til fri bevegelighet må ikke hindres i å utøve denne rett ved at ektefellen hindres i å reise inn og oppholde seg i EØS-borgerens hjemstat. Følgelig krever EØS-retten at når en EØS-borger som har benyttet seg av retten til fri bevegelighet, vender tilbake til hjemstaten, må hans ektefelle gis en avledet rett til opphold i samme stat.

4 En avledet rett til opphold for en tredjelandsborger i ektefellens hjemstat er imidlertid betinget. I tillegg til kravene om tilstrekkelige midler og sykeforsikring, må følgende vilkår være oppfylt. For det første må EØS-borgerens opphold i vertsstaten ha vært reelt, slik at det ble lagt til rette for et familieliv i vertsstaten. Oppholdet i vertsstaten må være av minst tre måneders sammenhengende varighet. For det andre kan EØS-statene etter direktivet artikkel 35, med de begrensninger som følger av forholdsmessighetsprinsippet og garantiene for rett saksbehandling fastsatt i direktivet, treffe de nødvendige tiltak for å nekte, oppheve eller tilbakekalle rettigheter etter direktivet ved misbruk av rettigheter eller bedrageri, som for eksempel proformaekteskap. På spørsmål fra retten opplyste representanten for saksøkte at det i saken for den nasjonale domstol så langt ikke hadde kommet frem noen anførsler om misbruk av rettigheter. For det tredje kan begrensninger i rettigheter som gis gjennom direktivet begrunnes i hensynet til offentlig orden, sikkerhet eller helse, jf. direktivet artikkel 27 nr. 1.

5 I en situasjon der en EØS-borger i samsvar med direktivet artikkel 7 nr. 1 bokstav b) og artikkel 7 nr. 2 har etablert eller styrket et familieliv med en tredjelandsborger under et reelt opphold i en annen EØS-stat enn den han er statsborger i, vil bestemmelsene i nevnte direktiv ved analogi komme til anvendelse på en situasjon der EØS-borgeren returnerer til hjemstaten sammen med familiemedlemmet.

Judgment of the Court

26 July 2016[1]

(Directive 2004/38/EC – Right of residence – Derived rights for third country nationals)

In Case E-28/15,

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 Oslo District Court (Oslo tingrett), in the case between

Yankuba Jabbi

=and=

The Norwegian Government, represented by the Immigration Appeals Board

concerning the interpretation of Article 7(1)(b) in conjunction with Article 7(2) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

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

26. juli 2016[1]

(direktiv 2004/38/EF – oppholdsrett – avledede rettigheter for tredjelandsborgere)

I sak E-28/15

ANMODNING til Domstolen etter artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Oslo tingrett i en sak for denne domstol mellom

Yankuba Jabbi

og

Den norske stat v/Utlendingsnemnda

om tolkningen av artikkel 7 nr. l bokstav b) sammenholdt med artikkel 7 nr. 2 i direktiv 2004/38/EF om unionsborgeres og deres familiemedlemmers rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, avsier

1 Språket i anmodningen om rådgivende uttalelse: norsk. Engelske oversettelser av nasjonale bestemmelser er uoffisielle og er basert på oversettelsene i sakens dokumenter.

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:

– Yankuba Jabbi ("the plaintiff"), represented by Arild Humlen, advokat, and Elise Nygård, advokatfullmektig;

– the Norwegian Government, represented by the Immigration Appeals Board ("the defendant"), represented by Pål Wennerås, advokat, Office of the Attorney General (Civil Affairs), acting as Agent;

– the Government of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Maria Moustakali and Marlene Lie Hakkebo, members of its Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Elisabetta Montaguti and Michael Wilderspin, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

Domstolen,

sammensatt av: Carl Baudenbacher, president, Per Christiansen og Páll Hreinsson (saksforberedende dommer), dommere,

justissekretær: Gunnar Selvik,

etter å ha tatt i betraktning de skriftlige innlegg inngitt på vegne av:

– Yankuba Jabbi ("saksøker"), representert ved advokat Arild Humlen og advokatfullmektig Elise Nygård,

– Den norske stat ("saksøkte") v/Utlendingsnemnda (UNE), representert ved advokat Pål Wennerås, Regjeringsadvokaten, som partsrepresentant,

– Liechtensteins regjering, representert ved Dr Andrea Entner-Koch, Director, og Thomas Bischof, Deputy Director, EEA Coordination Unit, som partsrepresentanter,

– EFTAs overvåkningsorgan ("ESA"), representert ved Carsten Zatschler, Maria Moustakali og Marlene Lie Hakkebo, medlemmer av Department of Legal & Executive Affairs, som partsrepresentanter, og

– Europakommisjonen ("Kommisjonen"), representert ved Elisabetta Montaguti og Michael Wilderspin, medlemmer av Kommisjonens juridiske tjeneste, som partsrepresentanter,

med henvisning til rettsmøterapporten,

having heard oral argument of the defendant, represented by Pål Wennerås; the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Thomas Bischof; ESA, represented by Maria Moustakali and Marlene Lie Hakkebo; and the Commission, represented by Elisabetta Montaguti and Michael Wilderspin, at the hearing on 19 April 2016,

gives the following

Judgment

I LEGAL BACKGROUND

EU LAW

1 Article 20 of the Treaty on the Functioning of the European Union ("TFEU") reads:

> *1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*
>
> *2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:*
>
> *(a) the right to move and reside freely within the territory of the Member States;*
>
> *(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;*

og etter å ha hørt muntlige innlegg fra saksøkte, representert ved Pål Wennerås; Liechtensteins regjering, representert ved Dr Andrea Entner-Koch og Thomas Bischof; ESA, representert ved Maria Moustakali og Marlene Lie Hakkebo; og Kommisjonen, representert ved Elisabetta Montaguti og Michael Wilderspin, i rettsmøte 19. april 2016,

slik

Dom

I RETTSLIG BAKGRUNN

EU-RETT

1 Artikkel 20 i traktaten om Den europeiske unions virkemåte ("TEUV") lyder:

> *1. Det innføres et unionsborgerskap. Unionsborger er enhver som er statsborger i en medlemsstat. Unionsborgerskapet kommer i tillegg til og erstatter ikke statsborgerskap.*
>
> *2. Unionsborgere har de rettigheter og plikter som er fastsatt i traktatene. De har blant annet*
>
> *(a) rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium,*
>
> *(b) stemmerett og rett til å stille som kandidat ved valg til Europaparlamentet og ved kommunale valg i bostedsstaten, på samme vilkår som statsborgerne i denne staten,*

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

2 Article 21(1) and (2) TFEU reads:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

EEA LAW

3 Article 28 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") provides as follows:

1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

(c) rett til beskyttelse på territoriet til en tredjestat der medlemsstaten der vedkommende er statsborger, ikke er representert, av enhver medlemsstats diplomatiske og konsulære myndigheter, på samme vilkår som for statsborgere i denne medlemsstaten,

(d) rett til å rette en anmodning til Europaparlamentet og henvende seg til Det europeiske ombud samt til Unionens institusjoner og rådgivende organer på et av traktatens språk og få svar på samme språk.

Rettighetene skal utøves i samsvar med de vilkår og begrensninger som er fastsatt i traktatene og i de gjennomføringsbestemmelser som vedtas i henhold til dem.

2 TEUV artikkel 21 nr. 1 og 2 lyder:

1. Enhver unionsborger har rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, i samsvar med de vilkår og begrensninger som er fastsatt i traktatene og i de gjennomføringsbestemmelser som vedtas i henhold til dem.

2. Dersom et tiltak fra Unionens side viser seg å være nødvendig for å nå dette målet og traktatene ikke inneholder den nødvendige hjemmel, kan Europaparlamentet og Rådet etter den ordinære regelverksprosessen vedta bestemmelser med sikte på å gjøre det lettere å utøve rettighetene omhandlet i nr. 1.

EØS-RETT

3 Artikkel 28 i Avtalen om Det europeiske økonomiske samarbeidsområde ("EØS-avtalen") lyder:

1. Fri bevegelighet for arbeidstagere skal gjennomføres mellom EFs medlemsstater og EFTA-statene.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

...

4 Council Directive 90/364/EEC of 28 June 1990 on the right of residence ("Directive 90/364") was referred to at point 6 of Annex VIII to the EEA Agreement.

5 Recitals 1, 2, 3, 4 and 5 of Directive 90/364 read:

Whereas Article 3 (c) of the Treaty provides that the activities of the Community shall include, as provided in the Treaty, the abolition, as between Member States, of obstacles to freedom of movement for persons;

2. Den frie bevegelighet innebærer at all forskjellsbehandling av arbeidstagere fra EFs medlemsstater og EFTA-statene på grunnlag av statsborgerskap skal avskaffes når det gjelder sysselsetting, lønn og andre arbeidsvilkår.

3. Med forbehold for de begrensninger som er begrunnet ut fra hensynet til den offentlige orden, sikkerhet og folkehelsen, skal den frie bevegelighet gi rett til

a) å ta faktisk tilbudt arbeid,

b) å flytte fritt innen territoriet til EFs medlemsstater og EFTA-statene i dette øyemed,

c) å oppholde seg på territoriet til en av EFs medlemsstater eller en EFTA-stat for å arbeide der i samsvar med de lover og forskrifter som gjelder for innenlandske arbeidstagere,

d) å bli boende på territoriet til en av EFs medlemsstater eller en EFTA-stat etter å ha hatt arbeid der.

[...]

4 EØS-avtalen vedlegg VIII nr. 6 viste til rådsdirektiv 90/364/EØF av 28. juni 1990 om oppholdsrett ("direktiv 90/364").

5 Betraktningene 1, 2, 3, 4 og 5 i direktiv 90/364 lyder:

Etter traktatens artikkel 3 bokstav c) skal Fellesskapets virksomhet, på de vilkår traktaten fastsetter, gå ut på å fjerne hindringer for den frie bevegelighet for personer mellom medlemsstatene.

Whereas Article 8a of the Treaty provides that the internal market must be established by 31 December 1992; whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty;

Whereas national provisions on the right of nationals of the Member States to reside in a Member State other than their own must be harmonized to ensure such freedom of movement;

Whereas beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State;

Whereas this right can only be genuinely exercised if it is also granted to members of the family;

6 Article 1 of Directive 90/364 reads:

1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2.

Traktatens artikkel 8 A fastsetter at det indre marked skal opprettes senest 31. desember 1992. Det indre marked skal omfatte et område uten indre grenser, med fritt varebytte og fri bevegelighet for personer, tjenester og kapital i samsvar med traktatens bestemmelser.

Medlemsstatenes bestemmelser om oppholdsrett for andre medlemsstaters borgere skal harmoniseres for å sikre denne frie bevegelighet.

Personer med rett til opphold skal ikke bli en urimelig byrde for vertsstatens offentlige finanser.

Oppholdsretten kan bare utøves reelt dersom den også gis medlemmene av familien.

6 Direktiv 90/364 artikkel 1 lyder:

1. Medlemsstatene skal gi oppholdsrett til medlemsstaters borgere som ikke har slik rett i henhold til andre bestemmelser i felleskapsretten, samt til medlemmer av deres familie som definert i nr. 2, forutsatt at borgerne og deres familiemedlemmer omfattes av en sykeforsikring som dekker alle risikoer i vertsstaten, og dessuten har tilstrekkelige midler til ikke å bli en byrde for vertsstatens sosialhjelpsystem under oppholdet.

Midlene nevnt i første ledd skal anses som tilstrekkelige dersom de, når det tas hensyn til søkerens personlige forhold og eventuelt forholdene for de personer som får oppholdsrett i henhold til nr. 2, overstiger det nivå som i vertsstaten gir rett til sosial stønad for dens egne statsborgere.

Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a) his or her spouse and their descendants who are dependants;

(b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.

7 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC (*OJ 2004 L 158, p. 77, as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, and Norwegian EEA Supplement 2012 No 5, p. 243)* ("the Directive") was incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by *EEA Joint Committee Decision No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17*) *("the Joint Committee Decision"), which entered into force on 1 March 2009.*

8 *Recitals 8 and 9 of the Joint Committee Decision read as follows*:

(8) The concept of 'Union Citizenship' is not included in the Agreement.

(9) Immigration policy is not part of the Agreement.

9 Article 1 of *the Joint Committee Decision reads:*

...

Når annet ledd ikke kan komme til anvendelse, skal søkerens midler anses som tilstrekkelige dersom de overstiger den minstepensjon som utbetales i vertsstaten.

2. Følgende personer skal, uavhengig av statsborgerskap, ha rett til opphold i en annen medlemsstat sammen med innehaveren av oppholdsretten:

a) ektefellen samt innehaverens og ektefellens etterkommere som forsørges,

b) slektninger i oppstigende linje av oppholdsrettens innehaver og vedkommendes ektefelle, når de forsørges av vedkommende.

7 Europaparlaments- og rådsdirektiv 2004/38/EF av 29. april 2004 om unionsborgeres og deres familiemedlemmers rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, om endring av forordning (EØF) nr. 1612/68 og om oppheving av direktiv 64/221/EØF, 68/360/EØF, 72/194/EØF, 73/148/EØF, 75/34/EØF, 75/35/EØF, 90/364/EØF, 90/365/EØF og 93/36/EØF (EUT 2004 L 158, s. 77, rettet ved EUT 2004 L 229, s. 35, EUT 2005 L 30, s. 27 og EUT 2005 L 197, s. 34, og EØS-tillegg 2012 nr. 5, s. 243) ("direktivet") ble innarbeidet i EØS-avtalens vedlegg V punkt 1 og vedlegg VIII punkt 3 ved EØS-komiteens beslutning nr. 158/2007 av 7. desember 2007 (EUT 2008 L 124, s. 20, og EØS-tillegg 2008 nr. 26, s. 17 ("EØS-komiteens beslutning"), som trådte i kraft 1. mars 2009.

8 Betraktningene 8 og 9 i EØS-komiteens beslutning lyder:

8) Begrepet "unionsborgerskap" inngår ikke i avtalen.

9) Innvandringspolitikk omfattes ikke av avtalen.

9 EØS-komiteens beslutning artikkel 1 lyder:

[...]

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

...

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States".

...

10 Attached to the Joint Committee *Decision* was a *Joint Declaration by the Contracting Parties to the decision. That declaration reads:*

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights

Direktivets bestemmelser skal for avtalens formål gjelde med følgende tilpasninger:

[...]

b) Direktivet får anvendelse for avtalepartenes statsborgere. Deres familiemedlemmer i direktivets betydning som er tredjelandsborgere, tilkommer imidlertid visse rettigheter i medhold av direktivet.

c) Betegnelsen "unionsborger(e)" erstattes med betegnelsen "statsborger(e) i EF-medlemsstatene og EFTA-statene".

[...]

10 Vedlagt EØS-komiteens beslutning var en felleserklæring fra beslutningens avtaleparter. Denne erklæring lyder:

Begrepet unionsborgerskap som innført ved Maastricht-traktaten (nå EF-traktatens artikkel 17 ff) har ingen parallell i EØS-avtalen. Innlemmingen av direktiv 2004/38/EF i EØS-avtalen skal ikke berøre vurderingen av EØS-relevansen av framtidige EU-rettsakter eller framtidig rettspraksis i EF-domstolen basert på begrepet unionsborgerskap. EØS-avtalen medfører ikke et rettslig grunnlag for EØS-borgernes politiske rettigheter.

Avtalepartene er enige om at innvandringspolitikk ikke er omfattet av EØS-avtalen. Bosettingsrettigheter for tredjelandsborgere faller utenfor avtalens anvendelsesområde, med unntak av rettigheter som gis gjennom direktivet til tredjelandsborgere som er familiemedlemmer av en EØS-statsborger som utøver sin rett til fri bevegelighet i henhold til EØS-avtalen, da disse rettighetene er knyttet til retten til fri bevegelighet for EØS-statsborgere. EFTA-statene anerkjenner at det er av betydning for EØS-statsborgere som utøver sin rett til fri bevegelighet for personer, at deres familiemedlemmer i direktivets betydning som er tredjelandsborgere også kan nyte godt av visse avledede rettigheter som

such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

11 *Recital 1 in the preamble to the Directive reads as follows*:

Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

12 *Recital 3 in the preamble to the Directive reads as follows*:

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

13 *Recital 5 in the preamble to the Directive reads as follows*:

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

14 *Article 1 of the Directive reads as follows*:

This Directive lays down:

fastsatt i artikkel 12 nr. 2, artikkel 13 nr. 2 og artikkel 18. Dette berører ikke EØS-avtalens artikkel 118 og den framtidige utvikling av uavhengige rettigheter for tredjelandsborgere, som ikke faller innenfor EØS-avtalens anvendelsesområde.

11 Betraktning 1 i fortalen til direktivet lyder:

Unionsborgerskapet gir alle unionsborgere en grunnleggende og individuell rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, med forbehold for de begrensninger og vilkår som er fastsatt i traktaten og de tiltak som er vedtatt for å gjennomføre den.

12 Betraktning 3 i fortalen til direktivet lyder:

Unionsborgerskap bør være grunnleggende status for borgere i medlemsstatene når de utøver sin rett til fri bevegelighet og fritt opphold. Eksisterende fellesskapsdokumenter som hver for seg omhandler lønnstakere, selvstendig næringsdrivende samt studenter og andre personer utenfor arbeidsstyrken, bør derfor konsolideres og gjennomgås for å forenkle og styrke retten til fri bevegelighet og fritt opphold for alle unionsborgere.

13 Betraktning 5 i fortalen til direktivet lyder:

For at alle unionsborgere skal kunne utøve retten til å ferdes og oppholde seg fritt på medlemsstatenes territorium på objektive vilkår som sikrer frihet og verdighet, bør også familiemedlemmer gis denne rett, uavhengig av statsborgerskap. I dette direktiv bør definisjonen av "familiemedlem" også omfatte registrerte partnere dersom registrert partnerskap i henhold til vertsstatens lovgivning er sidestilt med ekteskap.

14 Direktivet artikkel 1 lyder:

I dette direktiv fastsettes:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by nationals of EC Member States and EFTA States and their family members;

...

15 Article 2 of the Directive provides:

For the purposes of this Directive:

...

2. "family member" means:

(a) the spouse;

...

3. "host Member State" means the Member State to which a national of EC Member States and EFTA States moves in order to exercise his/her right of free movement and residence.

16 Article 3(1) of the Directive reads:

This Directive shall apply to all nationals of EC Member States and EFTA States who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

17 Article 6 of the Directive, which addresses the right of residence for up to three months, states:

1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

a) vilkår for statsborgere i EF-medlemsstatene og EFTA-statenes og deres familiemedlemmers utøvelse av retten til fri bevegelighet og fritt opphold på medlemsstatenes territorium,

[...]

15 Direktivet artikkel 2 lyder:

I dette direktiv menes med:

[...]

2. "familiemedlem"

a) ektefelle,

[...]

3. "vertsstat" den medlemsstat som en statsborger i EF-medlemsstatene og EFTA-statene flytter til for å utøve sin rett til fri bevegelighet og fritt opphold.

16 Direktivet artikkel 3 nr. 1 lyder:

Dette direktiv får anvendelse på alle statsborgere i EF-medlemsstatene og EFTA-statene som flytter til eller oppholder seg i en annen medlemsstat enn den de er borger i, samt på de familiemedlemmer som definert i artikkel 2 nr. 2 som kommer sammen med eller slutter seg til dem.

17 Direktivet artikkel 6, som omhandler retten til opphold i inntil tre måneder, lyder:

1. Statsborgere i EF-medlemsstatene og EFTA-statene skal ha rett til å oppholde seg på territoriet til en annen medlemsstat i et tidsrom på inntil tre måneder uten andre vilkår eller formaliteter enn kravet om å ha et gyldig identitetskort eller pass.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the national of EC Member States and EFTA States.

18 Article 7 of the Directive, which addresses the right of residence for more than three months, provides as follows:

1. All nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

2. Bestemmelsene i nr. 1 får også anvendelse på familiemedlemmer med gyldig pass som ikke er borgere i en medlemsstat, og som kommer sammen med eller slutter seg til statsborgeren i EF-medlemsstatene og EFTA-statene.

18 Direktivet artikkel 7, som omhandler retten til opphold i over tre måneder, fastsetter følgende:

1. Alle statsborgere i EF-medlemsstatene og EFTA-statene skal ha rett til å oppholde seg på territoriet til en annen medlemsstat i et tidsrom på over tre måneder dersom vedkommende

a) er lønnstaker eller selvstendig næringsdrivende i vertsstaten, eller

b) har tilstrekkelige midler til seg selv og sine familiemedlemmer slik at de ikke blir en byrde for vertsstatens sosialhjelpssystem under oppholdet, samt har en sykeforsikring med full dekning i vertsstaten, eller

c) – er tatt opp ved en privat eller offentlig institusjon som er godkjent eller finansiert av vertsstaten på grunnlag av dens lovgivning eller administrative praksis, med hovedformål å følge et studium, herunder yrkesopprettet opplæring, og

– har sykeforsikring med full dekning i vertsstaten og godtgjør overfor den relevante nasjonale myndighet i form av en erklæring eller på en tilsvarende valgfri måte at vedkommende har tilstrekkelige midler til seg selv og sine familiemedlemmer slik at de ikke blir en byrde for vertsstatens sosialhjelpssystem under oppholdet, eller

(d) are family members accompanying or joining a national of EC Member States and EFTA States who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the national of EC Member States and EFTA States in the host Member State, provided that such national of EC Member States and EFTA States satisfies the conditions referred to in paragraph 1(a), (b) or (c).

...

NATIONAL LAW

19 In Norway, the Directive has been implemented by the Act of 15 May 2008 No 35 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (*lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her*) ("the Immigration Act").

20 Chapter 13 of the Immigration Act (Sections 109 to 125) contains special rules relating to foreign nationals covered by the EEA Agreement. Paragraph 2 of Section 110 of the Immigration Act reads:

Family members of an EEA national are subject to the provisions of this chapter as long as they accompany or are reunited with an EEA national. Family members of a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the realm after having exercised the right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country.

d) er familiemedlemmer som kommer sammen med eller slutter seg til en statsborger i EF-medlemsstatene og EFTA-statene som oppfyller vilkårene nevnt i bokstav a), b) eller c).

2. Oppholdsretten fastsatt i nr. 1 skal også omfatte familiemedlemmer som ikke er borgere i en medlemsstat, når de kommer sammen med eller slutter seg til statsborgeren i EF-medlemsstatene og EFTA-statene i vertsstaten, forutsatt at statsborgeren i EF-medlemsstatene og EFTA-statene oppfyller vilkårene nevnt i nr. 1 bokstav a), b) eller c).

[...]

NASJONAL RETT

19 Direktivet er innarbeidet i norsk rett ved lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her ("utlendingsloven").

20 Utlendingsloven kapittel 13 (§§ 109–125) inneholder særlige regler om utlendinger som omfattes av EØS-avtalen. Utlendingsloven § 110 annet ledd lyder:

Familiemedlemmer til en EØS-borger omfattes av bestemmelsene i dette kapittelet så lenge de følger eller gjenforenes med en EØS-borger. Familiemedlemmer til en norsk borger omfattes av bestemmelsene i dette kapittelet dersom de følger eller gjenforenes med en norsk borger som returnerer til riket etter å ha utøvet retten til fri bevegelighet etter EØS-avtalen eller EFTA-konvensjonen i et annet EØS-land eller EFTA-land.

21 Section 112 of the Immigration Act, which concerns the right of residence for more than three months for EEA nationals, reads:

An EEA national has a right of residence for more than three months as long as the person in question:

(a) is employed or self-employed,

(b) is to provide services,

(c) is self-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay, or

...

II FACTS AND PROCEDURE

22 The plaintiff is a Gambian national. On 1 February 2012, he married Inger Johanne Martinsen Amoh (the sponsor), a Norwegian national, in Spain. They stayed together in Spain from September 2011 to October 2012. According to the referring court, Ms Amoh did not engage in economic activity during her stay in Spain, but the plaintiff claims that she had her own funds for the stay. It is disputed whether Ms Amoh met the conditions for receiving a work assessment allowance during her stay in Spain, but it is undisputed that she was entitled to receive a disability pension there.

23 The parties differ on the documentation submitted concerning Ms Amoh's stay in Spain and her connection to Norway during the stay.

24 On 20 November 2012, the plaintiff applied for residence in Norway as the spouse of an EEA national, that is of Ms Amoh. The Directorate of Immigration decided on 19 February 2014 that the plaintiff did not meet the conditions for residence in Norway under

21 Utlendingsloven § 112, som omhandler oppholdsrett i mer enn tre måneder for EØS-borgere, lyder:

En EØS-borger har oppholdsrett utover tre måneder så lenge vedkommende

(a) er arbeidstaker eller selvstendig næringsdrivende,

(b) skal yte tjenester,

(c) råder over tilstrekkelige midler til å forsørge seg selv og eventuelle medfølgende familiemedlemmer og er omfattet av en sykeforsikring som dekker alle risikoer under oppholdet, eller

[...]

II FAKTUM OG SAKSGANG

22 Saksøker er gambisk statsborger. Den 1. februar 2012 giftet han seg i Spania med Inger Johanne Martinsen Amoh, som er norsk statsborger (referansepersonen). De oppholdt seg sammen i Spania fra september 2011 til oktober 2012. Ifølge den anmodende domstol drev Amoh ikke med økonomisk aktivitet under oppholdet i Spania, men saksøker hevder at hun hadde egne midler til opphold. Det er omtvistet om Amoh oppfylte vilkårene for å motta arbeidsavklaringspenger under oppholdet i Spania, men det er uomtvistet at hun hadde rett til å motta uførepensjon der.

23 Partene har ulike syn på den fremlagte dokumentasjon vedrørende Amohs opphold i Spania og hennes tilknytning til Norge under oppholdet.

24 Den 20. november 2012 søkte saksøker om opphold i Norge som ektefelle til en EØS-borger, altså Amoh. Ved vedtak 19. februar 2014 fant Utlendingsdirektoratet at saksøker ikke oppfylte vilkårene for opphold i Norge etter utlendingsloven kapittel 13, og bortviste ham

Chapter 13 of the Immigration Act and expelled him from Norway. Upon appeal, that decision was upheld by the Immigration Appeals Board decision of 13 May 2014. The plaintiff subsequently requested a reversal of the decision, but his request was rejected by the Appeals Board decisions of 8 July 2014 and 15 January 2015.

25 Following those decisions, the plaintiff instigated proceedings before Oslo District Court, claiming that he has a derived right of residence in Norway as a result of his wife's stay in Spain and subsequent return to Norway.

26 By a letter of 9 November 2015, registered on 18 November 2015, the District Court referred the following question to the Court:

Does Article 7(1)(b), cf. Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen?

27 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 ANSWER OF THE COURT

OBSERVATIONS SUBMITTED TO THE COURT

28 The plaintiff argues that he has a derived right of residence in Norway following his wife's stay in Spain and her subsequent return to Norway, based on Article 7(1)(b) and Article 7(2) of the Directive.

fra Norge. Etter klage ble vedtaket opprettholdt ved Utlendingsnemndas vedtak 13. mai 2014. Saksøker anmodet deretter om omgjøring av vedtaket. Dette ble avslått ved Utlendingsnemndas vedtak 8. juli 2014 og 15. januar 2015.

25 Etter disse vedtak brakte saksøker saken inn for Oslo tingrett med påstand om at han har en avledet rett til opphold i Norge som følge av hustruens opphold i Spania og senere retur til Norge.

26 Ved brev 9. november 2015, registrert 18. november 2015, stilte tingretten EFTA-domstolen følgende spørsmål:

Gir Direktiv 2004/38/EF artikkel 7 (1) (b) jf. (2) avledede rettigheter til opphold for en tredjelandsborger som er familiemedlem til en EØS-borger som, etter retur fra en annen EØS-stat, oppholder seg i EØS-staten hvor EØS-borgeren er statsborger?

27 Det vises til rettsmøterapporten for en mer utførlig redegjørelse for den rettslige ramme, de faktiske forhold, saksgangen og de skriftlige innlegg inngitt til EFTA-domstolen, som i det følgende bare vil bli nevnt eller drøftet så langt dette er nødvendig for EFTA-domstolens begrunnelse.

III EFTA-DOMSTOLENS SVAR

INNLEGG INNGITT TIL EFTA-DOMSTOLEN

28 Med grunnlag i direktivet artikkel 7 nr. 1 bokstav b), jf. artikkel 7 nr. 2, gjør saksøker gjeldende at han har en avledet rett til opphold i Norge som følge av hustruens opphold i Spania og senere retur til Norge.

29 According to the plaintiff, Article 7(1)(b) regulates the right of residence in another EEA State for EEA nationals who are not economically active. That person's family members, who are not EEA nationals, derive their right of residence from Article 7(2).

30 The main objective of the EEA Agreement, according to the plaintiff, was to expand the European Union's internal market to the EFTA States, by establishing a dynamic and homogeneous European Economic Area, based on common rules. The plaintiff concludes that the objective of homogeneity must be decisive when it comes to the interpretation of Article 7(1)(b) of the Directive.

31 The plaintiff notes that, under EU law, derived rights in situations such as in the present case, may be based on the concept of Union citizenship laid down in Articles 20 and 21 TFEU, following the judgment of the Court of Justice of the European Union ("ECJ") in *O. and B.* (C-456/12, EU:C:2014:135). The plaintiff acknowledges that the concept of Union citizenship is without parallel in EEA law. He nevertheless claims that the right of free movement must be uniform throughout the EEA.

32 The plaintiff argues that the judgment in *O. and B.* provides reasons for interpreting and applying the Directive in accordance with Article 21 TFEU and thereby in accordance with the principle of homogeneity. Without such an interpretation, the right to free movement by EEA nationals would be hindered. In further support of this, the plaintiff refers to the case law of the Court (Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254).

33 For those reasons, the plaintiff proposes that the Court should answer the question referred in the affirmative.

29 Ifølge saksøker regulerer artikkel 7 nr. 1 bokstav b) retten til opphold i en annen EØS-stat for EØS-borgere som ikke er økonomisk aktive. Dennes familiemedlemmer som ikke er EØS-borgere, avleder sin rett til opphold fra artikkel 7 nr. 2.

30 Hovedformålet med EØS-avtalen var ifølge saksøker å utvide EUs indre marked til å omfatte EFTA-statene, ved å opprette et dynamisk og ensartet Europeisk Økonomisk Samarbeidsområde som er grunnlagt på felles regler. Saksøker konkluderer med at målet om ensartethet må være avgjørende for tolkningen av direktivet artikkel 7 nr. 1 bokstav b).

31 Saksøker påpeker at etter EU-retten kan avledede rettigheter i tilsvarende situasjoner som i den foreliggende sak baseres på begrepet unionsborgerskap fastsatt i TEUV artikkel 20 og 21, som følge av Den europeiske unions domstols ("EU-domstolen") dom i *O. og B.* (C-456/12, EU:C:2014:135). Saksøker erkjenner at begrepet unionsborgerskap ikke har noen parallell i EØS-retten. Uavhengig av dette hevder han at retten til fri bevegelighet må være ensartet i hele EØS.

32 Saksøker anfører at dommen i *O. og B.* gir grunnlag for å tolke og anvende direktivet i samsvar med TEUV artikkel 21 og dermed i samsvar med prinsippet om ensartethet. Uten en slik fortolkning vil retten til fri bevegelighet for EØS-borgere bli hindret. Som videre støtte for dette viser saksøker til EFTA-domstolens praksis (sak E-26/13 *Gunnarsson*, Sml. 2014 s. 254).

33 Av disse grunner anmoder saksøker EFTA-domstolen om å svare bekreftende på det forelagte spørsmål.

34 The defendant, supported by Liechtenstein, argues that the question referred has already been answered in *O. and B.* There, the ECJ held that the Directive does not confer derived rights of residence for third country nationals in the Member State of which their sponsors are nationals, and that such a derived right could only be established on the basis of Article 21(1) TFEU.

35 The defendant points out that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU. Furthermore, the defendant stresses that in *Gunnarsson* the Court observed that the Directive cannot introduce rights into the EEA Agreement based on the concept of Union citizenship in Article 21(1) TFEU.

36 The defendant states that, since it is common ground that Ms Amoh did not pursue an economic activity in Spain, the provisions on the free movement of persons in the main part of the EEA Agreement, Articles 28, 31 and 36, do not apply. Ms Amoh's residence in Spain could therefore only have been based on Article 7(1)(b) of the Directive, subject to the conditions of that provision. It is disputed whether Ms Amoh fulfilled all of those conditions.

37 The defendant acknowledges that the homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and in EU law are to be construed in the same way (reference is made to Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 59). Conversely, the Court has repeatedly dismissed invitations to rely upon, by way of analogy or interpretation, provisions of EU law which have not been made part of EEA law. The defendant maintains that, accordingly, the principle of homogeneity dictates that the provisions of the Directive, which are rules common to the EEA and the EU, are interpreted uniformly and in conformity with the judgment in *O. and B.* In contrast, the rights established in that judgment on the basis of

34 Saksøkte, som støttes av Liechtenstein, anfører at det forelagte spørsmål allerede har blitt besvart i *O. og B.* EU-domstolen kom der til at direktivet ikke gir avledede rettigheter til opphold for tredjelandsborgere i medlemsstaten der deres referansepersoner er statsborgere, og at en slik avledet rettighet bare kan etableres på grunnlag av TEUV artikkel 21 nr. 1.

35 Saksøkte påpeker at EØS-avtalen ikke inneholder noen bestemmelse som tilsvarer TEUV artikkel 21. Saksøkte understreker videre at EFTA-domstolen i *Gunnarsson* påpekte at direktivet ikke kan introdusere rettigheter i EØS-avtalen basert på begrepet unionsborgerskap i TEUV artikkel 21 nr. 1.

36 Saksøkte anfører at bestemmelsene om fri bevegelighet for personer i artiklene 28, 31 og 36 i EØS-avtalens hoveddel ikke får anvendelse siden det er enighet om at Amoh ikke drev økonomisk aktivitet i Spania. Amohs opphold i Spania kan derfor bare ha vært basert på direktivet artikkel 7 nr. 1 bokstav b) og underlagt vilkårene i denne bestemmelse. Det er omtvistet om Amoh oppfylte alle disse vilkår.

37 Saksøkte erkjenner at ensartet tolkning og anvendelse av felles regler er avgjørende for at det indre marked skal virke effektivt i EØS. Prinsippet om ensartethet leder derfor til en formodning om at bestemmelser som er utformet på samme måte i EØS-avtalen som i EU-retten, skal tolkes på samme måte (det vises til sak E-2/06 *ESA* mot *Norge*, Sml. 2007 s. 164 (avsnitt 59)). Motsetningsvis har EFTA-domstolen gjentatte ganger avvist oppfordringer om å støtte seg, ved analogi eller tolkning, på bestemmelser i EU-retten som ikke har blitt innlemmet i EØS-retten. Saksøkte anfører at prinsippet om ensartethet følgelig krever at bestemmelsene i direktivet, som er regler felles for EØS og EU, må tolkes på en ensartet måte og i samsvar med dommen i *O. og B.* Rettighetene nevnte dom etablerer

Article 21(1) TFEU may not be transposed by analogy when interpreting the Directive.

38 ESA, supported by the Commission, submits that the purpose of establishing a derived right of residence for family members of EEA nationals is to ensure that the right to free movement within the EEA is real and effective.

39 ESA acknowledges that the purely hypothetical prospect of exercising the right to freedom of movement does not establish a sufficient connection with EEA law to justify the application of that law's provisions. Consequently, derived rights of residence of third country national family members in principle only exist where these are necessary to ensure that the EEA national can exercise his or her free movement and residence rights effectively.

40 ESA argues that the parties seem to differ on the documentation concerning Ms Amoh's stay in Spain and her connection to Norway during that stay. ESA acknowledges that, on the basis of the information provided in the request for an advisory opinion, it appears that Ms Amoh did not exercise her right to free movement as a worker. However, ESA states that, if she was a worker, which the referring court must assess, then the plaintiff would have a derived right of residence in the host State pursuant to Article 7 of the Directive, as well as in the home State on the basis of Article 28 EEA.

41 Proceeding on the basis that Ms Amoh was not economically active during her stay in Spain, ESA states that Article 7(1)(b) only requires that she must have sufficient resources not to become a burden on the Spanish social assistance system during her period of residence, and that she must have comprehensive sickness insurance cover in Spain during that time. According to ESA, this establishes that the rights guaranteed by Article 7 of the Directive are also applicable in circumstances where the EEA national is non-economically active.

på grunnlag av TEUV artikkel 21 nr. 1, kan derimot ikke innarbeides ved analogi når direktivet fortolkes.

38 ESA, som støttes av Kommisjonen, gjør gjeldende at formålet med å innføre en avledet rett til opphold for familiemedlemmer til EØS-borgere er å sikre at retten til fri bevegelighet i EØS er reell og effektiv.

39 ESA erkjenner at de rent hypotetiske utsikter til å utøve retten til fri bevegelighet ikke etablerer en kobling til EØS-retten som er tilstrekkelig til å rettferdiggjøre anvendelsen av EØS-rettens bestemmelser. Avledede rettigheter til opphold for familiemedlemmer som er tredjelandsborgere eksisterer i prinsippet følgelig bare der slike rettigheter er nødvendige for å sikre at EØS-borgeren effektivt kan utøve sin rett til fri bevegelighet og fritt opphold.

40 ESA gjør gjeldende at partene ser ut til å ha ulike syn på den fremlagte dokumentasjon vedrørende Amohs opphold i Spania og hennes tilknytning til Norge under oppholdet. Ut fra opplysningene som er gitt i anmodningen om rådgivende uttalelse, erkjenner ESA at det synes som om Amoh ikke utøvde sin rett til fri bevegelighet som arbeidstaker. ESA anfører imidlertid at dersom hun var arbeidstaker, noe det tilkommer den anmodende domstol å vurdere, ville saksøker hatt en avledet rett til opphold i vertsstaten etter direktivet artikkel 7, og i hjemstaten etter EØS-avtalen artikkel 28.

41 Dersom det legges til grunn at Amoh ikke var økonomisk aktiv under sitt opphold i Spania, anfører ESA at artikkel 7 nr. 1 bokstav b) bare krever at hun må ha tilstrekkelige midler til ikke å bli en byrde for det spanske sosialhjelpssystem under oppholdet, og at hun må ha en sykeforsikring med full dekning i Spania i det aktuelle tidsrom. Ifølge ESA kan det på dette grunnlag slås fast at rettighetene som er sikret i direktivet artikkel 7 også får anvendelse i situasjoner der EØS-borgeren ikke er økonomisk aktiv.

42 Turning to the applicability of Article 7 of the Directive to the home State of an EEA national, ESA submits that the Court found in *Gunnarsson* that Article 7(1)(b) can be invoked by non-economically active EEA nationals who have exercised their free movement rights against their EEA State of nationality. ESA maintains that the same principle is at stake in this case. For any residence right to be truly effective, the home State must also be prohibited from hindering the exercise of the right. Similarly, the opportunities offered by the Directive could not be fully effective if a national of an EEA State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them.

43 Despite the fact that Union citizenship does not exist under the EEA Agreement, ESA argues for a result that ensures homogeneity. The scope of free movement rights granted to EFTA nationals should be the same as for EU nationals. The lack of a citizenship concept in the EEA Agreement entails that the Directive should be accorded a more important role in the EEA context. Its scope must therefore be broadened on the basis of the principle of effectiveness.

44 ESA submits that the derived rights of third country family members of returning Norwegian nationals must be examined under EEA law on the premise that non-economically active nationals can invoke Article 7(1)(b) of the Directive against their own EEA State and that economically active EEA nationals derive their corresponding rights from Articles 28, 31 and 36 EEA. In both instances, the substance of the rights should be the same. ESA concludes that the plaintiff should thus be able to invoke Article 7(2) of the Directive.

45 The Commission submits that, although the question referred only mentions an interpretation of the Directive, it should be expanded to encompass the issue of whether, where the third country national spouse of an EEA national has acquired a derived right of residence

42 Når det gjelder spørsmålet om direktivet artikkel 7 kan anvendes overfor en EØS-borgers hjemstat, gjør ESA gjeldende at EFTA-domstolen i *Gunnarsson* la til grunn at artikkel 7 nr. 1 bokstav b) kan påberopes av EØS-borgere som ikke er økonomisk aktive, og som har utøvd sin rett til fri bevegelighet, mot EØS-staten der de er statsborgere. ESA hevder at det samme prinsipp gjelder i den foreliggende sak. For at en rett til opphold virkelig skal være effektiv, må hjemstaten også forbys å hindre utøvelsen av retten. Likeledes kan ikke mulighetene direktivet gir, være fullt ut effektive om en borger av en EØS-stat kan bli forhindret fra å benytte seg av dem fordi han ved retur til hjemlandet møtes med hindringer i lovgivning som straffer ham for å ha benyttet seg av disse muligheter.

43 Til tross for det faktum at unionsborgerskap ikke eksisterer etter EØS-avtalen, argumenterer ESA for et resultat som sikrer ensartethet. Den frie bevegelighet for EFTA-borgere bør ha samme omfang som for EU-borgere. Fraværet av et borgerskapsbegrep i EØS-avtalen innebærer at direktivet bør gis en viktigere rolle i EØS-sammenheng. Dets virkeområde må derfor gjøres bredere, basert på effektivitetsprinsippet.

44 ESA anfører at avledede rettigheter til opphold for tredjelandsborgere som er familiemedlemmer av norske borgere som returnerer til Norge, må vurderes etter EØS-retten ut fra det premiss at ikke-økonomisk aktive borgere kan påberope seg direktivet artikkel 7 nr. 1 bokstav b) mot sin egen EØS-stat, og at økonomisk aktive EØS-borgere avleder sine tilsvarende rettigheter fra EØS-avtalen artiklene 28, 31 og 36. Rettighetenes materielle innhold bør være det samme i begge tilfelle. ESA konkluderer med at saksøker dermed bør kunne påberope seg direktivet artikkel 7 nr. 2.

45 Kommisjonen gjør gjeldende at selv om det forelagte spørsmål bare nevner en tolkning av direktivet, bør det utvides til også å omfatte spørsmålet om EØS-avtalen, i tilfelle der tredjelandsborgeren som er gift med en EØS-borger har ervervet en avledet rett til opphold i en

in another EEA State on the basis of Article 7(1)(b) in conjunction with Article 7(2) of the Directive, the EEA Agreement equally confers such a derived right of residence on that family member when he accompanies the EEA national to reside in the EEA State of which she is a national.

46 The Commission provides three reasons why the result in the case of *O. and B.* does not apply to the present case. First, the conclusion in that case, which purports to be based on *McCarthy I* (C-434/09, EU:C:2011:277), fails to take account of the fact that the latter case concerned a wholly internal situation. Second, the ECJ's holding in *O. and B.* concerning the applicability of the Directive must be read in conjunction with the ECJ's conclusion in the same judgment on the possibility of applying the Directive by analogy. Third, *O. and B.* cannot be regarded as the last word on this issue. More precisely, in *McCarthy II* (C-202/13, EU:C:2014:2450), the ECJ indicated that the Directive may indeed be applicable to situations such as that of the present case. The Commission contends that the Court should apply the same methodology to the present case and adds that such a result would be consistent with *Gunnarsson*.

47 Should the Court not agree with the preceding arguments, the Commission claims that the reference to a right under Article 21(1) TFEU in *O. and B.* has to be seen in the context of the case law on which that statement was based, in particular the judgments in *Singh* (C-370/90, EU:C:1992:296) and *Eind* (C-291/05, EU:C:2007:771). Hence, the reference in *O. and B.* to Article 21 TFEU does not mean that the principles laid down in *Singh* and *Eind*, which are based on free movement rather than citizenship, no longer apply. This case law, which concerned circumstances before the Directive entered into force, still applies to the interpretation of EEA law where an EEA national has previously exercised the right of free movement as a worker. However, in the present case, the question is based upon the premise that the EEA national had acquired a right of residence in

annen EØS-stat på grunnlag av direktivet artikkel 7 nr. 1 bokstav b), jf. artikkel 7 nr. 2, også gir en slik avledet rett til opphold for vedkommende familiemedlem når han ledsager EØS-borgeren som bosetter seg i EØS-staten hun er borger av.

46 Kommisjonen oppgir tre grunner til at resultatet i saken *O. og B.* ikke får anvendelse i den foreliggende sak. For det første tar konklusjonen i nevnte sak, som angivelig er basert på *McCarthy I* (C-434/09, EU:C:2011:277), ikke hensyn til det faktum at sistnevnte sak gjaldt en rent intern situasjon. For det andre må EU-domstolens slutning i *O. og B.* vedrørende anvendelsen av direktivet leses i sammenheng med EU-domstolens konklusjon i samme dom om muligheten for å anvende direktivet ved analogi. For det tredje kan dommen i *O. og B.* ikke anses for å være det siste ord om spørsmålet. EU-domstolen indikerte nemlig i *McCarthy II* (C-202/13, EU:C:2014:2450) at direktivet faktisk kan få anvendelse på situasjoner som i den foreliggende sak. Kommisjonen gjør gjeldende at EFTA-domstolen bør følge samme metode i den foreliggende sak, og legger til at et slikt resultat vil være i samsvar med *Gunnarsson*.

47 Dersom EFTA-domstolen ikke skulle være enig i de foregående argumenter, hevder Kommisjonen at henvisningen til en rettighet etter TEUV artikkel 21 nr. 1 i *O. og B.* må ses i sammenheng med den rettspraksis man der baserte seg på, særlig dommene i *Singh* (C-370/90, EU:C:1992:296) og *Eind* (C-291/05, EU:C:2007:771). Henvisningen til TEUV artikkel 21 i *O. og B.* betyr dermed ikke at prinsippene som ble fastsatt i *Singh* og *Eind*, som er basert på fri bevegelighet snarere enn på borgerskap, ikke lenger får anvendelse. Denne rettspraksis, som gjaldt omstendigheter som forelå før direktivet trådte i kraft, får fremdeles anvendelse ved fortolkning av EØS-retten i situasjoner der en EØS-borger tidligere har utøvd sin rett til fri bevegelighet som arbeidstaker. I den foreliggende sak er spørsmålet imidlertid basert på det premiss at EØS-borgeren hadde

Spain as a non-economically active person. Such situations have been dealt with by the Court in *Gunnarsson*, and the logic of the Court in that case can therefore be adopted in the present case.

FINDINGS OF THE COURT

48 The referring court asks, in essence, whether a third-country national who is a family member of an EEA national who, upon returning from another EEA State resides in the EEA State in which the EEA national is a citizen, has a derived right of residence under EEA law in that EEA State.

GENERAL REMARKS

49 The free movement of persons is one of the fundamental freedoms of the EU internal market. A shared and well-functioning labour market was considered important to the realisation of the goals of economic development and integration in the incipient EU cooperation. Therefore, at that time, the States of the European Coal and Steel Community agreed to remove any restriction based on nationality upon employment in the coal and steel industries on workers who were their nationals.

50 A shared labour market would not function adequately if migrant workers were prevented from maintaining established family life. Such a limitation would have acted as a deterrent to labour market mobility. Therefore, from an early stage of integration, a worker and his family members were enabled to maintain their family life when the worker was employed outside of his State of origin, that is his home State.

ervervet en rett til opphold i Spania som ikke-økonomisk aktiv person. Slike situasjoner er blitt behandlet av EFTA-domstolen i *Gunnarsson*, og EFTA-domstolens logikk i nevnte sak kan derfor følges i den foreliggende sak.

RETTENS BEMERKNINGER

48 Den anmodende domstol spør i hovedsak om en tredjelandsborger, som er familiemedlem til en EØS-borger som etter retur fra en annen EØS-stat oppholder seg i EØS-staten hvor EØS-borgeren er statsborger, etter EØS-retten har en avledet rett til opphold i sistnevnte EØS-stat.

GENERELLE BEMERKNINGER

49 Fri bevegelighet av personer er en av de grunnleggende rettigheter i EUs indre marked. Et felles, velfungerende arbeidsmarked ble ansett som viktig for å oppnå målet om økonomisk utvikling og integrasjon for det begynnende EU-samarbeid. Statene i Det europeiske kull- og stålfellesskap ble derfor enige om å oppheve alle hindringer basert på nasjonalitet ved ansettelse i kull- og stålindustrien for arbeidstakere som var statsborgere i disse stater.

50 Et felles arbeidsmarked ville ikke fungere tilfredsstillende dersom migrerende arbeidere var hindret fra å opprettholde et etablert familieliv. En slik begrensning ville hemme mobiliteten på arbeidsmarkedet. Fra et tidlig stadium i integrasjonen fikk en arbeidstaker og hans familiemedlemmer derfor rett til å opprettholde sitt familieliv når arbeidstakeren var sysselsatt utenfor sin opprinnelsesstat, det vil si hans hjemstat.

51 Subsequently, the free movement of persons was broadened. Thus, legislation extended the concept of free movement. In particular, the concept came to include students and other economically inactive persons. Students are seeking education with a view to entering the labour market and other economically inactive persons have, in the majority of cases, participated in the labour market.

52 The exercise of free movement of persons is conditional. In particular, EU law requires that economically inactive persons have sufficient resources for themselves and their family members so as not to become a burden on the social security system of the host State. That condition is intended to protect the host State's fiscal interests by placing a person's own resources on a like footing with the financial contributions to the social security system made as a result of employment in the labour market. A condition of comprehensive sickness insurance cover also applies.

53 The scope of free movement of persons was specified by case law. In *Singh*, cited above, the ECJ set out the right of a worker to return to his home EU State with family members. The ECJ observed that a worker could be deterred from exercising his right to free movement if his family members were not permitted to enter and reside with him when he returned to his home EU State. That effect should be seen as an obstacle to leaving his home State in the first place. Therefore, an EU national who has exercised his right to free movement in order to work in another EU State can rely on EU law when returning to his home State with a spouse from a third country. According to *Eind*, cited above, an EU national may also rely on EU law upon returning as an economically inactive person to his home State with a family member from a third country, provided he exercised his EU rights.

51 Senere ble den frie bevegelighet for personer utvidet. Således ble begrepet fri bevegelighet utvidet i lovgivningen. Særlig ble begrepet utvidet til å omfatte studenter og andre økonomisk inaktive personer. Studenter søker utdanning med sikte på å komme inn på arbeidsmarkedet, og andre økonomisk inaktive personer har i de fleste tilfelle deltatt på arbeidsmarkedet.

52 Utøvelsen av den frie bevegelighet for personer er betinget. Særlig krever EU-retten at økonomisk inaktive personer skal ha tilstrekkelige midler til seg selv og sine familiemedlemmer, slik at de ikke blir en byrde for vertsstatens sosialhjelpssystem. Dette vilkår er ment å beskytte vertsstatens fiskale interesser ved å likestille en persons egne midler med de finansielle bidrag til sosialhjelpssystemet deltakelse i arbeidsmarkedet ville ha medført. Et vilkår om å ha sykeforsikring med full dekning gjelder også.

53 Omfanget av den frie bevegelighet for personer ble presisert i rettspraksis. I *Singh*, som omtalt over, fastslo EU-domstolen at en arbeidstaker har rett til å returnere til sin hjemstat i EU med sine familiemedlemmer. EU-domstolen pekte på at en arbeidstaker kunne bli hindret fra å utøve sin rett til fri bevegelighet dersom hans familiemedlemmer ikke hadde rett til innreise og opphold sammen med ham når han vendte tilbake til sin hjemstat i EU. En slik virkning måtte ses som en hindring for å reise fra hjemstaten i utgangspunktet. Derfor kan en EU-borger som har utøvd sin rett til fri bevegelighet for å arbeide i en annen EU-stat, påberope seg EU-retten når han returnerer til hjemstaten med en ektefelle fra et tredjeland. Ifølge *Eind*, som omtalt over, kan en EU-borger også påberope seg EU-retten når han som en økonomisk inaktiv person vender tilbake til hjemstaten sammen med et familiemedlem fra et tredjeland, forutsatt at han har utøvd sine EU-rettigheter.

54 The Single European Act was adopted in 1986. Its goal was, inter alia, to achieve an internal market without borders. This was built upon by the Maastricht Treaty of 1992. The Maastricht Treaty introduced the concept of Union citizenship. This concept is now expressed in Part II of the TFEU. Every person holding the nationality of an EU State is a Union citizen. Union citizenship is additional to national citizenship of an EU State and entails certain rights under EU law. According to Article 21(1) TFEU, a Union citizen shall have a right to move and reside freely within the territory of the EU States, subject to the limitations and conditions laid down in EU law. Other provisions of Part II of the TFEU entitle Union citizens to political rights including certain electoral rights and a right of petition to the European Parliament including access to the European Ombudsman.

55 Union citizenship comprises the free movement of persons. The ECJ has stated that Union citizenship is destined to be the fundamental status of nationals of the Member States (see, for example, the judgment in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31).

56 The Directive was adopted in 2004. It repealed and replaced a number of EU legal acts including the following: Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Directive 72/194/EEC on extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State, Directive 90/364/EEC on the right of residence, Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, Directive 93/96/EEC on the right of residence for students, and Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community.

54 Den europeiske enhetsakt ble vedtatt i 1986. Ett av målene med den var å etablere et indre marked uten grenser. Maastricht-traktaten fra 1992 bygget videre på dette. Begrepet unionsborgerskap ble innført i Maastricht-traktaten. Begrepet kommer nå til uttrykk i TEUV del II. Unionsborger er enhver som er statsborger i en medlemsstat. Unionsborgerskapet kommer i tillegg til statsborgerskap i en EU-stat og medfører visse rettigheter etter EU-retten. Etter TEUV artikkel 21 nr. 1 har en unionsborger rett til å ferdes og oppholde seg fritt på EU-statenes territorium, i samsvar med de vilkår og begrensninger som er fastsatt i EU-retten. Etter andre bestemmelser i TEUV del II har unionsborgere politiske rettigheter, herunder visse rettigheter som angår valg, og rett til å rette en anmodning til Europaparlamentet og å henvende seg til Det europeiske ombud.

55 Unionsborgerskapet innebærer fri bevegelighet for personer. EU-domstolen har lagt til grunn at unionsborgerskapet er forutbestemt til å bli den grunnleggende status for borgere i medlemsstatene (se for eksempel dommen i *Grzelczyk*, C-184/99, EU:C:2001:458 (avsnitt 31)).

56 Direktivet ble vedtatt i 2004. Det opphevet og erstattet en rekke EU-rettsakter, herunder følgende: direktiv 64/221/EØF om samordning av de særbestemmelser om innreise og opphold for utenlandske statsborgere som er begrunnet med hensynet til den offentlige orden og sikkerhet samt folkehelsen, direktiv 68/360/EØF om opphevelse av reise- og oppholdsrestriksjoner innen Fellesskapet for arbeidstakere fra medlemsstatene og deres familie, direktiv 72/194/EØF om arbeidstakeres rett til å bli boende på en medlemsstats territorium etter å ha hatt arbeid der, direktiv 90/364/EØF om oppholdsrett, direktiv 90/365/EØF om oppholdsrett for lønnsmottakere og selvstendig næringsdrivende som har avsluttet sin yrkesvirksomhet, direktiv 93/96/EØF om studenters oppholdsrett, samt forordning (EØF) nr. 1612/68 om fri bevegelighet for arbeidstakere innen Fellesskapet.

57 Recitals 3 and 5 in the preamble to the Directive express the need to codify and review existing legal instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons, in order to simplify and strengthen the right of free movement and residence of all Union citizens. Furthermore, it is stated that if the right of all Union citizens to move and reside freely within the territory of the EU States is to be exercised under objective conditions of freedom and dignity, it should also be granted to their family members, irrespective of nationality.

58 The Directive is based on Articles 12, 18, 40, 44 and 52 of the Treaty establishing the European Community. The corresponding provisions in the TFEU are Article 18 on non-discrimination on grounds of nationality, Article 21 on Union citizens' right to free movement and residence, Article 46 on measures to bring about freedom of movement for workers, Article 50 on the issue of directives to attain the freedom of establishment and Article 59 on the issue of directives to achieve the liberalisation of a specific service.

59 The legal development described above was reflected in the EEA Agreement, when it entered into force on 1 January 1994. According to the fifth recital of the Preamble to the EEA Agreement, the Contracting Parties are determined to provide for the fullest possible realisation of the four freedoms, including the free movement of persons, within the whole EEA. The objective of abolition of obstacles to the free movement of persons is also reflected in Article 1(2) EEA and the then Article 3(c) of the Treaty Establishing the European Economic Community ("EEC").

60 Article 28 of the EEA Agreement, in Part III on Free Movement of Persons, Services and Capital, corresponds to Article 48 EEC, now Article 45 TFEU. Article 28 EEA gives workers the right of freedom of movement. The freedom entails the abolition of any discrimination

57 I betraktningene 3 og 5 i fortalen til direktivet uttrykkes behovet for å konsolidere og gjennomgå eksisterende rettsakter som hver for seg omhandler lønnstakere, selvstendig næringsdrivende samt studenter og andre personer utenfor arbeidsstyrken, for å forenkle og styrke retten til fri bevegelighet og fritt opphold for alle unionsborgere. Videre legges det til grunn at for at alle unionsborgere skal kunne utøve retten til å ferdes og oppholde seg fritt på EU-statenes territorium på objektive vilkår som sikrer frihet og verdighet, bør også familiemedlemmer gis denne rett, uavhengig av statsborgerskap.

58 Direktivet er basert på artiklene 12, 18, 40, 44 og 52 i traktaten om opprettelse av Det europeiske fellesskap. De tilsvarende bestemmelser i TEUV er artikkel 18 om forbudet mot forskjellsbehandling på grunnlag av nasjonalitet, artikkel 21 om unionsborgernes rett til fri bevegelighet og fritt opphold, artikkel 46 om tiltak for å gjennomføre fri bevegelighet for arbeidstakere, artikkel 50 om direktiver for å oppnå etableringsadgang og artikkel 59 om direktiver for å gjennomføre liberaliseringen av en bestemt tjeneste.

59 Rettsutviklingen beskrevet over ble gjenspeilet i EØS-avtalen da den trådte i kraft 1. januar 1994. Etter femte betraktning i fortalen til EØS-avtalen er avtalepartene bestemt på å sørge for den størst mulige gjennomføring av de fire friheter, herunder fri bevegelighet for personer, i hele EØS. Målet om å fjerne hindringene for den frie bevegelighet for personer gjenspeiles også i EØS-avtalen artikkel 1 nr. 2 og dagjeldende artikkel 3 bokstav c) i traktaten om Det europeiske økonomiske fellesskap ("EØF-traktaten").

60 EØS-avtalen artikkel 28, i del III om fri bevegelighet for personer, tjenester og kapital, tilsvarer EØF-traktaten artikkel 48, nå TEUV artikkel 45. EØS-avtalen artikkel 28 gir arbeidstakere rett til fri bevegelighet. Denne frihet innebærer at all forskjellsbehandling av

based on nationality between workers of EU and EFTA States as regards employment, remuneration and other conditions of work and employment in the EEA market. The freedom forms part of the core of the EEA Agreement. The consideration of homogeneity therefore carries substantial weight.

61 Directives 90/364/EEC, 90/365/EEC and 93/96/EEC were part of the EEA Agreement at the time of its entry into force and were referred to in Annex VIII to the EEA Agreement on freedom of establishment. Therefore, EEA law included the freedom of movement of persons as workers and as economically inactive EEA nationals, in both cases including their family members.

62 The Court notes that a gap between the two EEA pillars has emerged since the signing of the EEA Agreement in 1992. This gap has widened over the years. The EU treaties have been amended four times since then, while the EEA Main Agreement has remained substantially unchanged. This development has created certain discrepancies at the level of primary law. Depending on the circumstances, this fact may have an impact on the interpretation of the EEA Agreement.

63 The EEA Joint Committee Decision incorporating the Directive into the EEA Agreement defines the term Union citizens, for the purposes of the EEA Agreement, as nationals of EU States and EFTA States. Accordingly, EEA nationals may avail themselves of the freedom of movement of persons under EEA law and thus move freely within the internal market on conditions established by EEA law.

64 The Contracting Parties stated in a joint declaration attached to that decision that Union citizenship has no equivalent in the EEA Agreement and that the EEA Agreement does not provide a legal basis for political rights. However, the Contracting Parties also agreed that rights granted by the Directive to third country nationals who are family members of an EEA national, exercising the right to

arbeidstakere fra EU- og EFTA-statene på grunnlag av statsborgerskap skal avskaffes når det gjelder sysselsetting, lønn og andre arbeidsvilkår på EØS-markedet. Friheten er en del av kjernen i EØS-avtalen. Hensynet til ensartethet har derfor stor vekt.

61 Direktiv 90/364/EØF, 90/365/EØF og 93/96/EØF var en del av EØS-avtalen da denne trådte i kraft, og var vist til i EØS-avtalens vedlegg VIII om etableringsrett. Følgelig omfattet EØS-retten den frie bevegelighet for personer som arbeidstakere og som økonomisk inaktive EØS-borgere, i begge tilfelle inklusive deres familiemedlemmer.

62 EFTA-domstolen peker på at de to EØS-pilarer har utviklet seg i forskjellig retning siden EØS-avtalen ble undertegnet i 1992. Avstanden mellom dem har økt med årene. EU-traktatene har blitt endret fire ganger siden da, mens EØS-avtalens hoveddel i det alt vesentlige er uendret. Denne utvikling har skapt visse avvik når det gjelder primærlovgivning. Avhengig av omstendighetene kan dette forhold få betydning for hvordan EØS-avtalen tolkes.

63 EØS-komiteens beslutning som innarbeider direktivet i EØS-avtalen definerer begrepet unionsborger for EØS-avtalens formål som borgere av EU-statene og EFTA-statene. Følgelig kan EØS-borgere benytte seg av den frie bevegelighet for personer etter EØS-retten og dermed fritt ferdes i det indre marked i samsvar med vilkår fastsatt i EØS-retten.

64 Avtalepartene uttalte i en felleserklæring vedlagt nevnte beslutning at unionsborgerskap ikke har noen parallell i EØS-avtalen, og at EØS-avtalen ikke medfører noe rettslig grunnlag for politiske rettigheter. Imidlertid var avtalepartene også enige om at rettigheter direktivet gir til tredjelandsborgere som er familiemedlemmer av en EØS-borger som utøver sin rett til fri bevegelighet etter EØS-avtalen,

free movement under the EEA Agreement, must be included since these rights are corollary to the right of free movement of nationals of EU States and EFTA States. It cannot be assumed that the Contracting Parties intended the introduction of Union citizenship in EU law to restrict further evolution of the free movement of persons in the EEA.

65 In *O. and B.*, cited above, the ECJ held that Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened family life with a third country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of the Directive, in a Member State other than that of which he is a national, the provisions of the Directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see *O. and B.*, cited above, paragraph 61).

66 In the judgment, the ECJ reached its conclusion on a legal basis not existing in the EEA, whereas application of the Directive appears, for the most part, to have been rejected. Consequently, an unequal level of protection of the right to free movement of persons within the EEA could ensue. However, if the Court ensures the same level of protection in the EEA, it must explain why the ECJ's statement in *O. and B.* regarding the Directive cannot decide the matter.

må være omfattet siden disse rettigheter er knyttet til retten til fri bevegelighet for borgere av EU-statene og EFTA-statene. Avtalepartene kan ikke antas å ha hatt til hensikt at innføringen av unionsborgerskapet i EU-retten skulle hindre videre utvikling av den frie bevegelighet for personer i EØS.

65 I *O. og B.*, som omtalt over, la EU-domstolen til grunn at TEUV artikkel 21 nr. 1 må tolkes slik at når en unionsborger under et reelt opphold har etablert eller styrket et familieliv med en tredjelandsborger, i henhold til og i samsvar med vilkårene fastsatt i direktivet artikkel 7 nr. 1 og 2 og artikkel 16 nr. 1 og 2, i en annen medlemsstat enn den han er statsborger i, kommer direktivets bestemmelser til anvendelse ved analogi dersom unionsborgeren vender tilbake til sin hjemstat sammen med det aktuelle familiemedlem. Derfor bør vilkårene for å gi en avledet oppholdsrett til en tredjelandsborger som er familiemedlem til nevnte unionsborger, i sistnevntes hjemstat, i prinsippet ikke være strengere enn vilkårene fastsatt i nevnte direktiv for å gi en avledet rett til opphold for en tredjelandsborger som er familiemedlem til en unionsborger som har utøvd sin rett til fri bevegelighet ved å etablere seg i en annen medlemsstat enn den han er statsborger i (se *O. og B.*, som omtalt over (avsnitt 61)).

66 I dommen baserte EU-domstolen seg på et rettslig grunnlag som ikke foreligger i EØS, mens anvendelsen av direktivet for det meste synes å ha blitt avvist. Følgelig kunne et ulikt beskyttelsesnivå for retten til fri bevegelighet for personer innenfor EØS oppstå. Dersom EFTA-domstolen sikrer samme beskyttelsesnivå i EØS, må den imidlertid forklare hvorfor EU-domstolens uttalelse om direktivet i *O. og B.* ikke er avgjørende.

67 In order to assess the impact of the legal findings in *O. and B.* for the interpretation of EEA law, that judgment must be read in its proper legal context. That context encompasses the concept of Union citizenship. The ECJ did not base its main conclusion on the Directive. Furthermore, the case law resulting from *Singh* and *Eind* was considered applicable under Article 21(1) TFEU to family members of Union citizens upon a return to the home State. The ECJ held that such a derived right seeks to remove obstacles for leaving the home State by guaranteeing that that citizen upon return to the home State will be able to continue the family life created or strengthened in the host State (see *O. and B.*, cited above, paragraphs 48 and 49).

ANSWER TO THE QUESTION REFERRED

68 In the Court's further analysis, emphasis must be placed on the fact that the free movement of persons forms part of the core of the EEA Agreement. The case at hand must be distinguished from *O. and B.* to the extent that that judgment is based on Union citizenship. Therefore, it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law.

69 The case before the Court concerns a Norwegian national who has resided in Spain, where she married a third country national. Later she returned to Norway, where the third country national applied for family reunification.

70 In the fifteenth recital of the Preamble to the EEA Agreement, the Contracting Parties state that their objective is to reach and maintain a uniform interpretation and application of the EEA Agreement and those provisions of EU legislation substantially reproduced in its main part and annexes and, furthermore, to arrive

67 For å vurdere hvilke konsekvenser EU-domstolens konklusjoner i *O. og B.* har for tolkningen av EØS-retten, må dommen leses i sin riktige rettslige sammenheng. Denne sammenheng inneholder begrepet unionsborgerskap. EU-domstolen baserte ikke sin hovedkonklusjon på direktivet. Videre ble rettspraksis etter *Singh* og *Eind* ansett å komme til anvendelse etter TEUV artikkel 21 nr. 1 på familiemedlemmer av unionsborgere ved retur til hjemstaten. EU-domstolen la til grunn at en slik avledet rett søker å fjerne hindringer for å reise fra hjemstaten ved å garantere at borgeren ved retur til hjemstaten kan fortsette et familieliv som er etablert eller styrket i vertsstaten (se *O. og B.*, som omtalt over (avsnitt 48 og 49)).

SVAR PÅ DET FORELAGTE SPØRSMÅL

68 I den videre undersøkelse legger EFTA-domstolen særlig vekt på at fri bevegelighet for personer er en del av kjernen i EØS-avtalen. Den foreliggende sak skiller seg fra *O. og B.* i den grad den nevnte dom er basert på unionsborgerskap. Følgelig må det undersøkes om det er mulig å oppnå ensartethet i EØS basert på et rettsgrunnlag hjemlet i EØS-avtalen. En slik undersøkelse må baseres på EØS-avtalen, rettsakter innlemmet i den samt rettspraksis.

69 Saken forelagt EFTA-domstolen gjelder en norsk statsborger som har hatt opphold i Spania, der hun giftet seg med en tredjelandsborger. Hun vendte senere tilbake til Norge, hvor tredjelandsborgeren søkte familiegjenforening.

70 I femtende betraktning i fortalen til EØS-avtalen fastslår avtalepartene at målet er å nå frem til og opprettholde en lik fortolkning og anvendelse av EØS-avtalen og de bestemmelser i EU-retten som i det vesentlige er gjengitt i hoveddelen og vedleggene, og videre å nå frem til lik behandling av enkeltpersoner

at an equal treatment of individuals and economic operators as regards the four freedoms. However, the same recital also states that a uniform interpretation and application of the EEA Agreement shall be achieved in full deference to the independence of the courts.

71 Without independence in its adjudication no court could claim legitimacy. Every court must exercise its jurisdiction based upon the relevant legal sources. An essential legal source for the Court is the case law of the ECJ and the General Court. That case law must nevertheless be read in its context. Normally, this does not pose particular problems because the context is the same. However, when it comes to the legal sources in this case, the ECJ has partly ruled out the application of the Directive and instead applied the concept of Union citizenship in evolution of the free movement of persons in the EU.

72 In the EEA context, Article 7(1) of the Directive provides that all EEA nationals shall have the right of residence on the territory of another EEA State for more than three months if they fulfil one of the conditions set out in points (a) to (d). At issue in the present case is Article 7(1)(b). That provision grants a right of residence provided that (i) the EEA national has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host State during the period of residence and (ii) has comprehensive sickness insurance cover in the host State. Pursuant to Article 7(2), that right of residence shall extend to family members who are not nationals of an EEA State, accompanying or joining the EEA national in the host State.

73 The Court assumes that the sponsor stayed legally in Spain for more than three months. If this is not the case, the sponsor cannot be said to have acted under EEA law for the purpose of creating a derived right as a family member for a third country national. It is for the referring court to establish the respective facts.

og markedsdeltakere med hensyn til de fire friheter. Det fremgår imidlertid av samme betraktning at man skal komme frem til en lik fortolkning og anvendelse av EØS-avtalen, med full respekt for domstolenes uavhengighet.

71 Uten uavhengighet i sin dømmende virksomhet kunne domstolene ikke påberope seg legitimitet. Enhver domstol må utøve sin myndighet på grunnlag av de relevante rettskilder. En sentral rettskilde for EFTA-domstolen er rettspraksis fra EU-domstolen og Underretten. Denne rettspraksis må likevel leses i sin sammenheng. Vanligvis byr ikke dette på spesielle problemer siden sammenhengen vil være den samme. Når det gjelder rettskilder i den foreliggende sak, har imidlertid EU-domstolen delvis utelukket anvendelsen av direktivet og i stedet anvendt begrepet unionsborgerskap i utviklingen av den frie bevegelighet for personer i EU.

72 I EØS-sammenheng fastsetter direktivet artikkel 7 nr. 1 at alle EØS-borgere skal ha rett til å oppholde seg på territoriet til en annen EØS-stat i et tidsrom på over tre måneder, dersom de oppfyller et av vilkårene i bokstav a) til d). Den foreliggende sak gjelder artikkel 7 nr. 1 bokstav b). Denne bestemmelse gir oppholdsrett på betingelse av (i) at EØS-borgeren har tilstrekkelige midler til seg selv og sine familiemedlemmer til ikke å bli en byrde for vertsstatens sosialhjelpssystem under oppholdet, og (ii) at de har sykeforsikring med full dekning i vertsstaten. Etter artikkel 7 nr. 2 skal denne oppholdsrett også omfatte familiemedlemmer som ikke er borgere i en EØS-stat, når de kommer sammen med eller slutter seg til EØS-borgeren i vertsstaten.

73 EFTA-domstolen antar at referansepersonen hadde lovlig opphold i Spania i over tre måneder. I motsatt fall kan referansepersonen ikke sies å ha benyttet seg av EØS-retten for å etablere en avledet rett som familiemedlem for en tredjelandsborger. Det tilkommer den anmodende domstol å avklare de respektive fakta.

74 The conditional right of residence pursuant to Article 7 of the Directive applies "on the territory of another Member State". That wording reflects the fact that an EEA national has a right of residence under EEA law in other EEA States. This right of residence can only be exercised if the EEA national actually moves from the home State.

75 Since Article 7(1)(b) confers on an EEA national the right to move freely from the home EEA State and take up residence in another EEA State, an EEA State may not deter its nationals from moving to another EEA State in the exercise of the freedom of movement under EEA law (see *Gunnarsson*, cited above, paragraph 82).

76 In the present case, the referring court has established that a Norwegian citizen has married a third country national and lived together with him in Spain and that the sponsor did not engage in economic activity during her stay there. At issue is whether a refusal of a derived right of residence in Norway for the third country national, upon the Norwegian citizen's return to Norway, constitutes an obstacle to the Norwegian citizen's freedom of movement under EEA law.

77 When a EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national's home State. Accordingly, when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State (see, for comparison, *Eind*, cited above, paragraphs 35 and 36). Consequently, the possibility for individuals exercising their right of free movement to invoke this right against their home State has been recognised in the case law of the ECJ.

74 Den betingede oppholdsrett etter direktivet artikkel 7 gjelder "på territoriet til en annen medlemsstat". Denne formulering gjenspeiler det faktum at en EØS-borger etter EØS-retten har rett til å oppholde seg i andre EØS-stater. Denne oppholdsrett kan bare utøves dersom EØS-borgeren faktisk flytter fra hjemstaten.

75 Siden artikkel 7 nr. 1 bokstav b) gir en EØS-borger rett til fritt å flytte fra hjemstaten og bosette seg i en annen EØS-stat, kan ikke en EØS-stat hindre sine borgere i å flytte til en annen EØS-stat som ledd i utøvelsen av fri bevegelighet etter EØS-retten (se *Gunnarsson*, som omtalt over (avsnitt 82)).

76 I den foreliggende sak har den anmodende domstol brakt på det rene at en norsk borger giftet seg med en tredjelandsborger og bodde sammen med ham i Spania og at referansepersonen ikke drev med økonomisk aktivitet under sitt opphold der. Spørsmålet er da om å nekte tredjelandsborgeren en avledet rett til opphold i Norge, når den norske borger vender tilbake til Norge, utgjør en hindring for den norske borgers rett til fri bevegelighet etter EØS-retten.

77 En EØS-borger som utøver sin rett til fri bevegelighet må ikke hindres i å utøve denne rett ved at ektefellen hindres i å reise inn og oppholde seg i EØS-borgerens hjemstat. Følgelig krever EØS-retten at når en EØS-borger som har benyttet seg av retten til fri bevegelighet, vender tilbake til hjemstaten, må hans ektefelle gis en avledet rett til opphold i samme stat (se, for sammenligning, *Eind*, som omtalt over (avsnitt 35 og 36)). Med andre ord har EU-domstolen i sin praksis anerkjent at enkeltpersoner som utøver sin rett til fri bevegelighet kan påberope seg denne rett overfor hjemstaten.

78 This case law concerns EEA nationals having pursued an economic activity in another EEA State. However, economically inactive EEA nationals may enjoy their right under Article 7(1)(b) to reside in another EEA State provided that they have sufficient resources for themselves and their family members, so as to not become a burden on the social security assistance system of the host State, and possess comprehensive sickness insurance cover.

79 The reasoning in the ECJ's *Eind* judgment is equally relevant when an inactive person, who has exercised the right to free movement under Article 7(1)(b) of the Directive, returns to his home EEA State with a spouse who is a third country national. A right to move freely from the home EEA State to another EEA State cannot be fully achieved if that person may be deterred from exercising the freedom by obstacles raised by the home State to the right of residence for a spouse (see, for comparison, *Gunnarsson*, cited above, paragraph 82).

80 However, a derived right of residence for a third country national in the spouse's home State is conditional. In addition to the requirements of sufficient resources and health insurance, the following conditions must be fulfilled. First, the residence of the EEA national in the host State must have been genuine such as to enable family life in that State. The duration of residence in the host State must exceed a continuous period of three months. Second, pursuant to Article 35 of the Directive, EEA States may, subject to the principle of proportionality and procedural safeguards provided for in the Directive, adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. Upon a question from the bench, the Agent for the defendant stated that no abuse of rights has been alleged so far in the national proceedings. Third, restrictions on rights granted by the Directive may be justified by reasons of public policy, public security or public health pursuant to Article 27(1) of the Directive.

78 Denne rettspraksis gjelder EØS-borgere som har drevet en økonomisk aktivitet i en annen EØS-stat. Imidlertid kan økonomisk inaktive EØS-borgere etter artikkel 7 nr. 1 bokstav b) nyte retten til å oppholde seg i en annen EØS-stat, forutsatt at de har tilstrekkelige midler til seg selv og sine familiemedlemmer slik at de ikke blir en byrde for vertsstatens sosialhjelpssystem, og har sykeforsikring med full dekning.

79 EU-domstolens begrunnelse i *Eind*-dommen er like relevant i en situasjon der en inaktiv person som har utøvd sin rett til fri bevegelighet etter direktivet artikkel 7 nr. 1 bokstav b), returnerer til hjemstaten med en ektefelle som er tredjelandsborger. En rett til fritt å flytte fra hjemstaten til en annen EØS-stat kan ikke bli oppnådd fullt ut dersom denne person kan hindres i å utøve friheten ved at hjemstaten har satt opp hindringer for ektefellens rett til opphold (se, for sammenligning, *Gunnarsson*, som omtalt over (avsnitt 82)).

80 En avledet rett til opphold for en tredjelandsborger i ektefellens hjemstat er imidlertid betinget. I tillegg til kravene om tilstrekkelige midler og sykeforsikring, må følgende vilkår være oppfylt. For det første må EØS-borgerens opphold i vertsstaten ha vært reelt, slik at det ble lagt til rette for et familieliv i vertsstaten. Oppholdet i vertsstaten må være av minst tre måneders sammenhengende varighet. For det andre kan EØS-statene etter direktivet artikkel 35, med de begrensninger som følger av forholdsmessighetsprinsippet og garantiene for rett saksbehandling fastsatt i direktivet, treffe de nødvendige tiltak for å nekte, oppheve eller tilbakekalle rettigheter etter direktivet ved misbruk av rettigheter eller bedrageri, som for eksempel proformaekteskap. På spørsmål fra retten opplyste representanten for saksøkte at det i saken for den nasjonale domstol så langt ikke hadde kommet frem noen anførsler om misbruk av rettigheter. For det tredje kan begrensninger i rettigheter som gis gjennom direktivet begrunnes i hensynet til offentlig orden, sikkerhet eller helse, jf. direktivet artikkel 27 nr. 1.

81 The Court adds that all the EEA States are parties to the European Convention on Human Rights, which enshrines in Article 8(1) the right to respect for private and family life. According to established case law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see Case E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49 and case law cited).

82 The answer to the question referred must therefore be that where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of the Directive, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

IV COSTS

83 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.

81 EFTA-domstolen legger til at alle EØS-stater har undertegnet Den europeiske menneskerettighetskonvensjon, som i artikkel 8 nr. 1 nedfeller retten til respekt for privatliv og familieliv. Ifølge fast rettspraksis skal EØS-avtalens bestemmelser fortolkes på bakgrunn av grunnleggende rettigheter (se sak E-4/11 *Arnulf Clauder*, Sml. 2011 s. 216 avsnitt 49 og den rettspraksis som det vises til der).

82 Svaret på det forelagte spørsmål må derfor bli at i en situasjon der en EØS-borger i samsvar med direktivet artikkel 7 nr. 1 bokstav b) og artikkel 7 nr. 2 har etablert eller styrket et familieliv med en tredjelandsborger under et reelt opphold i en annen EØS-stat enn den han er statsborger i, vil bestemmelsene i nevnte direktiv ved analogi komme til anvendelse på en situasjon der EØS-borgeren returnerer til hjemstaten sammen med familiemedlemmet.

IV SAKSOMKOSTNINGER

83 Omkostninger som er påløpt for Liechtensteins 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.

On those grounds,

The Court

in answer to the question referred to it by Oslo District Court hereby gives the following Advisory Opinion:

Where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of Directive 2004/38/EC, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

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

Delivered in open court in Luxembourg on
***26 July 2016**.*

Theresa Haas
Acting Registrar

Carl Baudenbacher
President

På dette grunnlag avgir

EFTA-Domstolen

som svar på spørsmålet forelagt den av Oslo tingrett, følgende rådgivende uttalelse:

I en situasjon der en EØS-borger i samsvar med direktiv 2004/38/EF artikkel 7 nr. 1 bokstav b) og artikkel 7 nr. 2 har etablert eller styrket et familieliv med en tredjelandsborger under et reelt opphold i en annen EØS-stat enn den han er statsborger i, vil bestemmelsene i nevnte direktiv ved analogi komme til anvendelse på en situasjon der EØS-borgeren returnerer til hjemstaten sammen med familiemedlemmet.

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

Avsagt i åpen rett i Luxembourg,
***26. juli 2016**.*

Theresa Haas
Fungerende justissekretær

Carl Baudenbacher
President

Report for the Hearing

in Case E-28/15

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 Oslo tingrett (Oslo District Court), in the case of

Yankuba Jabbi

and

The Norwegian Government

concerning the interpretation of Article 7(1)(b) in conjunction with Article 7(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC.[1]

I INTRODUCTION

1 By a letter of 1 November 2015, registered at the Court on 18 November 2015, Oslo tingrett (Oslo District Court) made a request

1 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC, OJ 2004 L 158, p. 77, as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, as incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII, Norwegian EEA Supplement 2012 No 5, p. 243.

Rettsmøterapport

i sak E-28/15

ANMODNING til EFTA-domstolen i henhold til artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Oslo tingrett i en sak mellom

Yankuba Jabbi

og

Den norske stat

om tolkningen av artikkel 7 nr. l bokstav b) sammenholdt med artikkel 7 nr. 2 i europaparlaments- og rådsdirektiv 2004/38/EF av 29. april 2004 om unionsborgeres og deres familiemedlemmers rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, om endring av forordning (EØF) nr. 1612/68 og om oppheving av direktiv 64/221/EØF, 68/360/EØF, 72/194/EØF, 73/148/EØF, 75/34/EØF, 75/35/EØF, 90/364/EØF, 90/365/EØF og 93/96/EØF.[1]

I INNLEDNING

1 Ved brev datert 1. november 2015, registrert ved EFTA-domstolen 18. november 2015, fremsatte Oslo tingrett en anmodning om

1 Europaparlaments- og rådsdirektiv 2004/38/EF av 29. april 2004 om unionsborgeres og deres familiemedlemmers rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, om endring av forordning (EØF) nr. 1612/68 og om oppheving av direktiv 64/221/EØF, 68/360/EØF, 72/194/EØF, 73/148/EØF, 75/34/EØF, 75/35/EØF, 90/364/EØF, 90/365/EØF og 93/96/EØF, EUT 2004 L 158, s. 77, rettet ved EUT 2004 L 229, s. 35, EUT 2005 L 30, s. 27 og EUT 2005 L 197, s. 34, innarbeidet i EØS-avtalen vedlegg V, punkt 1 og vedlegg VIII, punkt 3, EØS-tillegg 2012 nr. 5, s. 243.

for an Advisory Opinion in a case pending before it between Yankuba Jabbi ("the plaintiff") and the Norwegian Government ("the defendant").

2 The case before Oslo tingrett concerns the validity of the Norwegian Immigration Appeals Board's ("the Appeals Board") decision of 13 May 2014, which rejected an application for residence by the plaintiff and expelled him from Norway, and the Appeals Board's refusal to reverse that decision in its subsequent decisions of 8 July 2014 and 15 January 2015.

II LEGAL BACKGROUND

EEA LAW

3 Article 28 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") provides as follows:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
>
> *(a) to accept offers of employment actually made;*
>
> *(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*

rådgivende uttalelse i en sak som står for tingretten mellom Yankuba Jabbi («saksøker») og Den norske stat («saksøkte»).

2 Saken for tingretten gjelder gyldigheten av Utlendingsnemndas vedtak av 13. mai 2014 om avslag på søknad om opphold og om bortvisning fra Norge, og av Utlendingsnemndas etterfølgende beslutninger av 8. juli 2014 og 15. januar 2015 om ikke å omgjøre vedtaket.

II RETTSLIG BAKGRUNN

EØS-RETT

3 Artikkel 28 i Avtalen om Det europeiske økonomiske samarbeidsområde ("EØS-avtalen" eller "EØS") lyder:

> *1. Fri bevegelighet for arbeidstagere skal gjennomføres mellom EFs medlemsstater og EFTA-statene.*
>
> *2. Den frie bevegelighet innebærer at all forskjellsbehandling av arbeidstagere fra EFs medlemsstater og EFTA-statene på grunnlag av statsborgerskap skal avskaffes når det gjelder sysselsetting, lønn og andre arbeidsvilkår.*
>
> *3. Med forbehold for de begrensninger som er begrunnet ut fra hensynet til den offentlige orden, sikkerhet og folkehelsen, skal den frie bevegelighet gi rett til*
>
> > *a) å ta faktisk tilbudt arbeid,*
> >
> > *b) å flytte fritt innen territoriet til EFs medlemsstater og EFTA-statene i dette øyemed,*

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

...

4 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC ("the Directive") was incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by EEA Joint Committee Decision No 158/2007 ("Decision No 158/2007") of 7 December 2007.[2] The decision entered into force on 1 March 2009.

5 Recital 1 in the preamble to the Directive reads as follows:

Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

6 Recital 3 in the preamble to the Directive reads as follows:

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed

2 OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17.

c) å oppholde seg på territoriet til en av EFs medlemsstater eller en EFTA-stat for å arbeide der i samsvar med de lover og forskrifter som gjelder for innenlandske arbeidstagere,

d) å bli boende på territoriet til en av EFs medlemsstater eller en EFTA-stat etter å ha hatt arbeid der.

[...]

4 Europaparlaments- og rådsdirektiv 2004/38/EF av 29. april 2004 om unionsborgeres og deres familiemedlemmers rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, om endring av forordning (EØF) nr. 1612/68 og om oppheving av direktiv 64/221/EØF, 68/360/EØF, 72/194/EØF, 73/148/EØF, 75/34/EØF, 75/35/EØF, 90/364/EØF, 90/365/EØF og 93/96/EØF ("direktivet") ble innlemmet i EØS-avtalen vedlegg V punkt 1 og vedlegg VIII punkt 3 ved EØS-komiteens beslutning nr. 158/2007 ("beslutning nr. 158/2007") av 7. desember 2007.[2] Beslutningen trådte i kraft 1. mars 2009.

5 Betraktning 1 i fortalen til direktivet lyder:

Unionsborgerskapet gir alle unionsborgere en grunnleggende og individuell rett til å ferdes og oppholde seg fritt på medlemsstatenes territorium, med forbehold for de begrensninger og vilkår som er fastsatt i traktaten og de tiltak som er vedtatt for å gjennomføre den.

6 Betraktning 3 i fortalen til direktivet lyder:

Unionsborgerskap bør være grunnleggende status for borgere i medlemsstatene når de utøver sin rett til fri bevegelighet og fritt opphold. Eksisterende fellesskapsdokumenter som hver for seg omhandler lønnstakere, selvstendig næringsdrivende samt studenter og

2 EUT 2008 L 124, s. 20, og EØS-tillegg 2008 nr. 26, s. 17.

persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

7 Recital 5 in the preamble to the Directive reads as follows:

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

8 Article 1 of the Directive reads as follows:

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

...

9 Under the heading "Definitions", Article 2 of the Directive provides:

For the purposes of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

(a) the spouse;

...

andre personer utenfor arbeidsstyrken, bør derfor konsolideres og gjennomgås for å forenkle og styrke retten til fri bevegelighet og fritt opphold for alle unionsborgere.

7 Betraktning 5 i fortalen til direktivet lyder:

For at alle unionsborgere skal kunne utøve retten til å ferdes og oppholde seg fritt på medlemsstatenes territorium på objektive vilkår som sikrer frihet og verdighet, bør også familiemedlemmer gis denne rett, uavhengig av statsborgerskap. I dette direktiv bør definisjonen av "familiemedlem" også omfatte registrerte partnere dersom registrert partnerskap i henhold til vertsstatens lovgivning er sidestilt med ekteskap.

8 Direktivet artikkel 1 lyder:

I dette direktiv fastsettes:

a) vilkår for unionsborgeres og deres familiemedlemmers utøvelse av retten til fri bevegelighet og fritt opphold på medlemsstatenes territorium,

[...]

9 Under overskriften «Definisjoner» fastsetter direktivet artikkel 2 følgende:

I dette direktiv menes med:

1. "unionsborger" enhver person som er borger i en medlemsstat,

2. "familiemedlem"

a) ektefelle,

[...]

3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

10 Article 3(1) of the Directive reads:

This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

11 Article 6 of the Directive, which addresses the right of residence for up to three months, states:

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

12 Article 7 of the Directive, which addresses the right of residence for more than three months, provides as follows:

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

3. *"vertsstat" den medlemsstat som en unionsborger flytter til for å utøve sin rett til fri bevegelighet og fritt opphold.*

10 Direktivet artikkel 3 nr. 1 lyder:

Dette direktiv får anvendelse på alle unionsborgere som flytter til eller oppholder seg i en annen medlemsstat enn den de er borger i, samt på de familiemedlemmer som definert i artikkel 2 nr. 2 som kommer sammen med eller slutter seg til unionsborgeren.

11 Direktivet artikkel 6, som omhandler retten til opphold i inntil tre måneder, lyder:

1. *Unionsborgere skal ha rett til å oppholde seg på territoriet til en annen medlemsstat i et tidsrom på inntil tre måneder uten andre vilkår eller formaliteter enn kravet om å ha et gyldig identitetskort eller pass.*

2. *Bestemmelsene i nr. 1 får også anvendelse på familiemedlemmer med gyldig pass som ikke er borgere i en medlemsstat, og som kommer sammen med eller slutter seg til unionsborgeren.*

12 Direktivet artikkel 7, som omhandler retten til opphold i over tre måneder, fastsetter følgende:

1. *Alle unionsborgere skal ha rett til å oppholde seg på territoriet til en annen medlemsstat i et tidsrom på over tre måneder dersom vedkommende*

   a) *er lønnstaker eller selvstendig næringsdrivende i vertsstaten, eller*

   b) *har tilstrekkelige midler til seg selv og sine familiemedlemmer slik at de ikke blir en byrde for vertsstatens sosialhjelpssystem under oppholdet, samt har en sykeforsikring med full dekning i vertsstaten, eller*

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

...

13 Article 10(1) of the Directive reads:

The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

c) – er tatt opp ved en privat eller offentlig institusjon som er godkjent eller finansiert av vertsstaten på grunnlag av dens lovgivning eller administrative praksis, med hovedformål å følge et studium, herunder yrkesopprettet opplæring, og

– har sykeforsikring med full dekning i vertsstaten og godtgjør overfor den relevante nasjonale myndighet i form av en erklæring eller på en tilsvarende valgfri måte at vedkommende har tilstrekkelige midler til seg selv og sine familiemedlemmer slik at de ikke blir en byrde for vertsstatens sosialhjelpssystem under oppholdet, eller

d) er familiemedlemmer som kommer sammen med eller slutter seg til en unionsborger som oppfyller vilkårene nevnt i bokstav a), b) eller c).

2. Oppholdsretten fastsatt i nr. 1 skal også omfatte familiemedlemmer som ikke er borgere i en medlemsstat, når de kommer sammen med eller slutter seg til unionsborgeren i vertsstaten, forutsatt at unionsborgeren oppfyller vilkårene nevnt i nr. 1 bokstav a), b) eller c).

[...]

13 Direktivet artikkel 10 nr. 1 lyder:

Oppholdsretten til unionsborgeres familiemedlemmer som ikke er borgere i en medlemsstat, skal fastslås ved at det utstedes et dokument kalt «oppholdskort for en unionsborgers familiemedlem» senest seks måneder etter datoen da søknaden ble innlevert. Det skal umiddelbart utstedes et bevis på at søknad om oppholdskort er innlevert.

14 Article 16(1) of the Directive reads:

Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

15 Article 1 of Decision No 158/2007 reads:

...

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

...

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States".

...

16 Attached to Decision No 158/2007 was a Joint Declaration by the Contracting Parties to the decision. That declaration reads:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

14 Direktivet artikkel 16 nr. 1 lyder:

Unionsborgere som har oppholdt seg lovlig i et sammenhengende tidsrom på fem år i vertsstaten, skal ha rett til fast opphold der. Denne rett skal ikke være underlagt vilkårene i kapittel III.

15 Artikkel 1 i beslutning nr. 158/2007 lyder:

[...]

Direktivets bestemmelser skal for avtalens formål gjelde med følgende tilpasninger:

[...]

b) Direktivet får anvendelse for avtalepartenes statsborgere. Deres familiemedlemmer i direktivets betydning som er tredjelandsborgere, tilkommer imidlertid visse rettigheter i medhold av direktivet.

c) Betegnelsen "unionsborger(e)" erstattes med betegnelsen "statsborger(e) i EF-medlemsstatene og EFTA-statene".

[...]

16 Vedlagt beslutning nr. 158/2007 var en felleserklæring fra avtalepartene i forbindelse med vedtaket. Denne erklæring lyder:

Begrepet unionsborgerskap som innført ved Maastricht-traktaten (nå EF-traktatens artikkel 17ff) har ingen parallell i EØS-avtalen. Innlemmingen av direktiv 2004/38/EF i EØS-avtalen skal ikke berøre vurderingen av EØS-relevansen av framtidige EU-rettsakter eller framtidig rettspraksis i EF-domstolen basert på begrepet unionsborgerskap. EØS-avtalen medfører ikke et rettslig grunnlag for EØS-borgernes politiske rettigheter.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

NATIONAL LAW[3]

17 In Norway, the Directive has been implemented by the Act of 15 May 2008 No 35 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm ("the Immigration Act").[4]

18 Chapter 13 of the Immigration Act (Sections 109 to 125) contains special rules relating to foreign nationals covered by the EEA Agreement. Paragraph 2 of Section 110 of the Immigration Act reads:

Family members of an EEA national are subject to the provisions of this chapter as long as they accompany or are reunited with an EEA national. Family members of a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the realm after having exercised the

3 Translations of national provisions are unofficial.

4 *Lov om utlendingers adgang til riket og deres opphold her.* LOV-2008-05-15-35.

Avtalepartene er enige om at innvandringspolitikk ikke er omfattet av EØS-avtalen. Bosettingsrettigheter for tredjelandsborgere faller utenfor avtalens anvendelsesområde, med unntak av rettigheter som gis gjennom direktivet til tredjelandsborgere som er familiemedlemmer av en EØS-statsborger som utøver sin rett til fri bevegelighet i henhold til EØS-avtalen, da disse rettighetene er knyttet til retten til fri bevegelighet for EØS-statsborgere. EFTA-statene anerkjenner at det er av betydning for EØS-statsborgere som utøver sin rett til fri bevegelighet for personer, at deres familiemedlemmer i direktivets betydning som er tredjelandsborgere også kan nyte godt av visse avledede rettigheter som fastsatt i artikkel 12 nr. 2, artikkel 13 nr. 2 og artikkel 18. Dette berører ikke EØS-avtalens artikkel 118 og den framtidige utvikling av uavhengige rettigheter for tredjelandsborgere, som ikke faller innenfor EØS-avtalens anvendelsesområde.

NASJONAL RETT[3]

17 Direktivet er innarbeidet i norsk rett ved lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her ("utlendingsloven").[4]

18 Utlendingsloven kapittel 13 (§§ 109-125) inneholder særlige regler om utlendinger som omfattes av EØS-avtalen. Utlendingsloven § 110 annet ledd lyder:

Familiemedlemmer til en EØS-borger omfattes av bestemmelsene i dette kapittelet så lenge de følger eller gjenforenes med en EØS-borger. Familiemedlemmer til en norsk borger omfattes av bestemmelsene i dette kapittelet dersom de følger eller gjenforenes med en norsk borger som returnerer til riket etter å ha utøvet retten til fri bevegelighet etter

3 Engelske oversettelser av nasjonale bestemmelser er uoffisielle.
4 LOV-2008-05-15-35.

right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country.

19 Section 112 of the Immigration Act, which concerns the right of residence for more than three months for EEA nationals, reads:

An EEA national has a right of residence for more than three months as long as the person in question:

(a) is employed or self-employed,

(b) is to provide services,

(c) is self-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay, or

...

III FACTS AND PROCEDURE

20 The plaintiff is a Gambian national. On 1 February 2012, he married Inger Johanne Martinsen Amoh, who is a Norwegian national, in Spain. They stayed together in Spain from September 2011 to October 2012. Ms Amoh did not engage in economic activity during her stay in Spain, but the plaintiff claims that she had her own funds for the stay. It is disputed whether Ms Amoh met the conditions for receiving a work assessment allowance during her stay in Spain, but it is undisputed that she was entitled to receive a disability pension there.

21 The parties differ on the documentation submitted concerning Ms Amoh's stay in Spain and her connection to Norway during the stay.

EØS-avtalen eller EFTA-konvensjonen i et annet EØS-land eller EFTA-land.

19 Utlendingsloven § 112, som omhandler oppholdsrett i mer enn tre måneder for EØS-borgere, lyder:

En EØS-borger har oppholdsrett utover tre måneder så lenge vedkommende

a) er arbeidstaker eller selvstendig næringsdrivende,

b) skal yte tjenester,

c) råder over tilstrekkelige midler til å forsørge seg selv og eventuelle medfølgende familiemedlemmer og er omfattet av en sykeforsikring som dekker alle risikoer under oppholdet, eller

[...]

III FAKTUM OG SAKSGANG

20 Saksøker er gambisk statsborger. Den 1. februar 2012 giftet han seg i Spania med Inger Johanne Martinsen Amoh, som er norsk borger. De oppholdt seg sammen i Spania fra september 2011 til oktober 2012. Amoh drev ikke med økonomisk aktivitet under oppholdet i Spania, men saksøker hevder at hun hadde egne midler til opphold. Det er omtvistet om Amoh oppfylte vilkårene for å motta arbeidsavklaringspenger under oppholdet i Spania, men det er uomtvistet at hun hadde rett til å motta uførepensjon der.

21 Partene har ulike syn på den fremlagte dokumentasjon vedrørende Amohs opphold i Spania og hennes tilknytning til Norge under oppholdet.

22 On 20 November 2012, the plaintiff applied for residence in Norway as the spouse of an EEA national, i.e. of Ms Amoh. The Directorate of Immigration decided on 19 February 2014 that the plaintiff did not meet the conditions for residence in Norway under Chapter 13 of the Immigration Act and expelled him from Norway. That decision was appealed and upheld by the Immigration Appeals Board's decision of 13 May 2014. The plaintiff subsequently requested a reversal of the decision, but his request was rejected by the Appeals Board's decisions of 8 July 2014 and 15 January 2015.

23 Following those decisions, the plaintiff instigated the proceedings before the referring court, claiming that he has a derived right of residence in Norway as a result of his wife's stay in Spain and subsequent return to Norway.

24 The following question was submitted to the Court:

Does Article 7(1)(b), cf. Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third-country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen?

IV WRITTEN OBSERVATIONS

25 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 advokat Arild Humlen;
- the defendant, represented by advokat Pål Wennerås, the Attorney General of Civil Affairs;

22 Den 20. november 2012 søkte saksøker om opphold i Norge som ektefelle til en EØS-borger, dvs. Amoh. Ved vedtak av 19. februar 2014 besluttet Utlendingsdirektoratet at saksøker ikke oppfylte vilkårene for opphold i Norge etter utlendingsloven kapittel 13, og bortviste ham fra Norge. Vedtaket ble påklaget og opprettholdt ved Utlendingsnemndas vedtak av 13. mai 2014. Saksøker anmodet deretter om omgjøring av vedtaket. Dette ble avslått ved Utlendingsnemndas vedtak av 8. juli 2014 og 15. januar 2015.

23 Etter disse vedtak brakte saksøker saken inn for den anmodende domstol med påstand om at han har en avledet rett til opphold i Norge som følge av hustruens opphold i Spania og senere retur til Norge.

24 Følgende spørsmål ble forelagt EFTA-domstolen:

Gir Direktiv 2004/38/EF artikkel 7 (1)(b) jf. (2) avledede rettigheter til opphold for en tredjelandsborger som er familiemedlem til en EØS-borger som, etter retur fra en annen EØS-stat, oppholder seg i EØS-staten hvor EØS-borgeren er statsborger?

IV SKRIFTLIGE INNLEGG

25 I medhold av artikkel 20 i Domstolens vedtekter og artikkel 97 i Domstolens rettergangsordning er skriftlige innlegg inngitt av:

- saksøker, representert ved advokat Arild Humlen,
- saksøkte, representert ved advokat Pål Wennerås, Regjeringsadvokaten,

– the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;

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

– the European Commission ("the Commission"), represented by Elisabetta Montaguti and Michael Wilderspin, members of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS SUBMITTED

THE PLAINTIFF

26 The plaintiff maintains that he has a derived right of residence in Norway following his wife's stay in Spain and her subsequent return to Norway, based on Article 7(1)(b), cf. Article 7(2), of the Directive.

27 According to the plaintiff, Article 7(1)(b) of the Directive regulates the right of residence in another EEA State for EEA nationals who are not economically active. That person's family members, who are not EEA nationals, derive their right of residence from Article 7(2).

28 The plaintiff states that the main legal issue at stake is the extent to which Article 7(1)(b), cf. Article 7(2), of the Directive applies to non-economically active EEA nationals and their family members upon their return to the EEA State of which the EEA national is a citizen. Articles 28 and 31 EEA regulate the freedom of movement of economically active persons, while the Directive equates the movement of economically active and non-economically active persons.

– Fyrstedømmet Liechtensteins regjering, representert ved Dr. Andrea Entner-Koch, Director, og Thomas Bischof, Deputy Director, EEA Coordination Unit, som partsrepresentanter,

– EFTAs overvåkningsorgan ("ESA"), representert ved Carsten Zatschler, Director, Maria Moustakali, Senior Officer, og Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, som partsrepresentanter, og

– Europakommisjonen ("Kommisjonen"), representert ved Elisabetta Montaguti og Michael Wilderspin, medlemmer av Kommisjonens juridiske tjeneste, som partsrepresentanter.

V SAMMENDRAG AV FREMSATTE ANFØRSLER

SAKSØKER

26 Med grunnlag i direktivet artikkel 7 nr. 1 bokstav b), jf. artikkel 7 nr. 2, fastholder saksøker at han har en avledet rett til opphold i Norge som følge av hustruens opphold i Spania og senere retur til Norge.

27 Ifølge saksøker regulerer direktivet artikkel 7 nr. 1 bokstav b) retten til opphold i en annen EØS-stat for EØS-borgere som ikke er økonomisk aktive. Dennes familiemedlemmer som ikke er EØS-borgere, avleder sin rett til opphold fra artikkel 7 nr. 2.

28 Saksøker anfører at det sentrale rettslige spørsmål i saken er i hvilken grad direktivet artikkel 7 nr. 1 bokstav b), jf. artikkel 7 nr. 2, får anvendelse for EØS-borgere som ikke er økonomisk aktive, og deres familiemedlemmer, ved retur til EØS-staten hvor EØS-borgeren er statsborger. EØS-avtalen artiklene 28 og 31 regulerer fri bevegelighet for økonomisk aktive personer, mens direktivet likestiller bevegeligheten for økonomisk aktive og ikke økonomisk aktive.

29 The main objective of the EEA Agreement, according to the plaintiff, was to expand the European Union's internal market to the EEA/EFTA States. In this regard, the plaintiff recalls that the preamble to the EEA Agreement states that its objective is to establish a dynamic and homogeneous European Economic Area, based on common rules.

30 The plaintiff concludes that the objective of homogeneity must be decisive when it comes to the interpretation of Article 7(1)(b) of the Directive.

31 The plaintiff acknowledges that the concept of "Union citizenship" is without parallel in EEA law. He claims, notwithstanding that fact, that the right of free movement must be uniform throughout the EEA.

32 The plaintiff emphasises the importance of the judgment of the Court of Justice of the European Union ("ECJ") in the case of *O. and B.*[5] There, the plaintiff maintains, the ECJ based its result upon Article 21(1) of the Treaty on the Functioning of the European Union ("TFEU"). Nonetheless, the plaintiff states that, the ECJ's judgment provides reasons for interpreting and applying the Directive in the manner claimed by the plaintiff, and thereby in accordance with the principle of homogeneity. Without such an interpretation, the right to free movement by EEA nationals would be hindered. In further support of this, the plaintiff refers to the case law of the Court.[6]

33 For all of those reasons, the plaintiff proposes that the Court should answer the question referred in the affirmative.

5 Reference is made to the judgment in *O.* v *Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel* v *B.*, C-456/12, EU:C:2014:135, paragraphs 51, 54 and 56.

6 Reference is made to Case E-26/13 *Atli Gunnarsson* [2014] EFTA Ct. Rep. 254.

29 Hovedformålet med EØS-avtalen var ifølge saksøker å utvide EUs indre marked til å omfatte EØS/EFTA-statene. I denne sammenheng minner saksøker om at det i fortalen til EØS-avtalen slås fast at avtalens formål er å opprette et dynamisk og ensartet Europeisk Økonomisk Samarbeidsområde som er grunnlagt på felles regler.

30 Saksøker konkluderer med at målet om ensartethet må være avgjørende for tolkningen av direktivet artikkel 7 nr. 1 bokstav b).

31 Saksøker erkjenner at begrepet "unionsborgerskap" ikke har noen parallell i EØS-retten. Uavhengig av dette hevder han at retten til fri bevegelighet må være ensartet i hele EØS.

32 Saksøker understreker betydningen av dommen avsagt av Den europeiske unions domstol ("EU-domstolen") i saken *O. og B.*[5] Saksøker anfører at EU-domstolen der baserte sitt resultat på artikkel 21 nr. 1 i traktaten om Den europeiske unions virkemåte ("TEUV"). Saksøker mener at EU-domstolens dom likevel gir grunnlag for å tolke og anvende direktivet på den måte saksøker tar til orde for, og dermed også i samsvar med prinsippet om ensartethet. Uten en slik fortolkning vil retten til fri bevegelighet for EØS-borgere bli hindret. Som videre støtte for dette viser saksøker til EFTA-domstolens praksis.[6]

33 Av alle disse grunner anmoder saksøker EFTA-domstolen om å svare bekreftende på det forelagte spørsmål.

5 Det vises til dommen i *O.* mot *Minister voor Immigratie, Integratie en Asiel* og *Minister voor Immigratie, Integratie en Asiel* mot *B.*, C-456/12, EU:C:2014:135 (avsnitt 51, 54 og 56).

6 Det vises til sak E-26/13 *Atli Gunnarsson*, Sml. 2014 s. 254.

THE DEFENDANT

34 The defendant argues that the question referred has already been answered in the case of *O. and B.* There, the ECJ held that the Directive does not confer derived rights of residence for third-country nationals in the Member State of which their sponsors, i.e. the EU citizens, are nationals, and that such a derived right could only be established on the basis of Article 21(1) TFEU.[7]

35 In this regard, the defendant points out that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU. Furthermore, the defendant stresses that the Court has already had occasion to point out that the Directive cannot introduce rights into the EEA Agreement based on the concept of Union citizenship in Article 21(1) TFEU.[8]

36 The defendant states that, since it is common ground that Ms Amoh did not pursue any economic activity in Spain, the provisions on the free movement of persons in the main part of the EEA Agreement, Articles 28, 31 and 36, are not applicable in the present proceedings. Ms Amoh's residence in Spain could therefore only have been based on Article 7(1)(b) of the Directive, subject to the conditions of that provision. It is disputed whether Ms Amoh fulfilled all of those conditions.

37 Turning to the plaintiff's arguments concerning homogeneity, the defendant acknowledges that the homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and in EU law are to be construed in the

7 Reference is made to *O. and B.*, cited above, in particular paragraphs 37 to 56.
8 Reference is made to *Atli Gunnarsson*, cited above, paragraph 80.

SAKSØKTE

34 Saksøkte anfører at det forelagte spørsmål allerede er blitt besvart i saken *O. og B.* EU-domstolen la der til grunn at direktivet ikke gir avledede rettigheter til opphold for tredjelandsborgere i medlemsstaten der deres referansepersoner, dvs. EU-borgerne, er statsborgere, og at en slik avledet rettighet bare kan etableres på grunnlag av TEUV artikkel 21 nr. 1.[7]

35 I denne sammenheng påpeker saksøkte at EØS-avtalen ikke inneholder noen bestemmelse som tilsvarer TEUV artikkel 21. Saksøker understreker videre at EFTA-domstolen allerede har hatt anledning til å slå fast at direktivet ikke kan introdusere rettigheter i EØS-avtalen basert på begrepet unionsborgerskap i TEUV artikkel 21 nr. 1.[8]

36 Saksøkte anfører at bestemmelsene om fri bevegelighet for personer i artiklene 28, 31 og 36 i EØS-avtalens hoveddel ikke får anvendelse i den foreliggende sak ettersom det er enighet om at Amoh ikke drev med økonomisk aktivitet i Spania. Amohs opphold i Spania kan derfor bare ha vært basert på direktivet artikkel 7 nr. 1 bokstav b) og underlagt vilkårene i denne bestemmelse. Det er omtvistet om Amoh oppfylte alle disse vilkår.

37 Når det gjelder saksøkers argumenter vedrørende ensartethet, erkjenner saksøkte at ensartet tolkning og anvendelse av felles regler er avgjørende for at det indre marked skal virke effektivt i EØS. Prinsippet om ensartethet leder derfor til en formodning om at bestemmelser som er utformet på samme måte i EØS-avtalen som i

7 Det vises til *O. og B.*, som omtalt over (særlig avsnitt 37–56).
8 Det vises til *Atli Gunnarsson*, som omtalt over (avsnitt 80).

same way. Thus, Article 6 EEA provides that EEA rules, in so far as they are identical in substance to corresponding EU rules, shall be interpreted in conformity with the rulings of the ECJ given prior to the signing of the EEA Agreement. Conversely, the Court has repeatedly dismissed invitations to rely upon, by way of analogy or interpretation, provisions of EU law which have not been made part of EEA law.[9] The defendant maintains that, accordingly, the principle of homogeneity dictates that the provisions of the Directive, which are rules common to the EEA and the EU, are interpreted uniformly and in conformity with the judgment in *O. and B.* In contrast, the rights established in that judgment on the basis of Article 21(1) TFEU may not be transposed by analogy when interpreting the Directive.

38 The defendant proposes that the Court should answer the question referred as follows:

Directive 2004/38/EC does not establish a derived right of residence for third-country nationals who are family members of an EEA national in the EEA state of which that citizen is a national.

GOVERNMENT OF THE PRINCIPALITY OF LIECHTENSTEIN

39 Liechtenstein concurs with the defendant that the question referred has already been answered in the case of *O. and B.*[10] For that reason, Article 7(1)(b), cf. Article 7(2), of the Directive cannot confer rights of residence on a third-country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is citizen.

9 Reference is made to Case E-1/01 *Hörður Einarsson* [2002] EFTA Ct. Rep. 2, paragraph 45, and Case E-1/02 *ESA* v *Norway* [2003] EFTA Ct. Rep. 1, paragraph 55.

10 Reference is made to *O. and B.*, cited above, in particular paragraphs 36, 37, 39, 49 to 51 and 56.

EU-retten, skal tolkes på samme måte. EØS-avtalen artikkel 6 fastsetter således at EØS-regler som i det alt vesentlige er identiske med tilsvarende EU-regler, skal tolkes i samsvar med avgjørelser EU-domstolen har truffet før undertegningen av EØS-avtalen. Motsetningsvis har EFTA-domstolen gjentatte ganger avvist oppfordringer om å støtte seg, ved analogi eller tolkning, på bestemmelser i EU-retten som ikke er blitt innlemmet i EØS-retten.[9] Saksøkte anfører at prinsippet om ensartethet følgelig krever at bestemmelsene i direktivet, som er regler felles for EØS og EU, må tolkes på en ensartet måte og i samsvar med dommen i *O. og B.* Rettighetene nevnte dom etablerer på grunnlag av TEUV artikkel 21 nr. 1, kan derimot ikke innarbeides ved analogi når direktivet fortolkes.

38 Saksøkte anmoder EFTA-domstolen om å besvare det forelagte spørsmål på følgende måte:

Direktiv 2004/38/EF gir ikke en avledet rettighet til opphold for tredjelandsborgere som er familiemedlemmer til en EØS-borger, i EØS-staten hvor EØS-borgeren er statsborger.

FYRSTEDØMMET LIECHTENSTEINS REGJERING

39 Liechtenstein er enig med saksøkte i at det forelagte spørsmål allerede er blitt besvart i saken *O. og B.*[10] Følgelig kan ikke direktivet artikkel 7 nr. 1 bokstav b), jf. direktivet artikkel 7 nr. 2, gi rettigheter til opphold for en tredjelandsborger som er familiemedlem til en EØS-borger som, etter retur fra en annen EØS-stat, oppholder seg i EØS-staten hvor EØS-borgeren er statsborger.

9 Det vises til sak E-1/01 *Hörður Einarsson*, Sml. 2002 s. 2 (avsnitt 45), og sak E-1/02 *ESA* mot *Norge*, Sml. 2003 s. 1 (avsnitt 55).

10 Det vises til *O. og B.*, som omtalt over (særlig avsnitt 36, 37, 39, 49–51 og 56).

40 Liechtenstein submits that this finding is also supported by the Joint Declaration by the Contracting Parties to Decision No 158/2007. With regard to the ECJ's interpretation of Article 21(1) TFEU in the case of *O. and B.*, Liechtenstein adds that it must be borne in mind that the EEA Agreement does not contain a provision corresponding to Article 21(1) TFEU. The concept of "Union citizenship" therefore has no equivalence in the EEA Agreement.[11]

41 According to Liechtenstein, it is for each of the EEA/EFTA States to decide for itself on the derived rights of residence for third-country nationals in situations such as that of the present case.

42 Liechtenstein proposes that the Court should answer the question referred as follows:

Article 7(1)(b) cf. Article 7(2) of Directive 2004/38/EC do not confer derived rights of residence to a third-country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen.

ESA

43 ESA submits that the purpose of establishing a derived right of residence for family members of EEA nationals is to ensure that the right to free movement within the EEA is real and effective.[12]

44 ESA acknowledges that the purely hypothetical prospect of exercising the right to freedom of movement does not establish a sufficient connection with EEA law to justify the application of that law's provisions.[13] Consequently, derived rights of residence of third-

11 Reference is made to *Atli Gunnarsson*, cited above, paragraph 80.
12 Reference is made to the judgment in *Metock*, C-127/08, EU:C:2008:449, paragraphs 56, 62 and 84, and Case E4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49.
13 Reference is made to the judgment in *Friedrich Kremzow* v *Republik Österreich*, C-299/95, EU:C:1997:254, paragraph 16.

40 Liechtenstein gjør gjeldende at dette også understøttes av felleserklæringen fra avtalepartene i forbindelse med beslutning nr. 158/2007. Når det gjelder EU-domstolens tolkning av TEUV artikkel 21 nr. 1 i saken *O. og B.*, legger Liechtenstein til at man bør ta hensyn til at EØS-avtalen ikke inneholder noen bestemmelse som tilsvarer TEUV artikkel 21 nr. 1. Begrepet "unionsborgerskap" har følgelig ingen parallell i EØS-avtalen.[11]

41 Ifølge Liechtenstein er det opp til den enkelte EØS/EFTA-stat å regulere avledede rettigheter til opphold for tredjelandsborgere i situasjoner som i den foreliggende sak.

42 Liechtenstein anmoder EFTA-domstolen om å besvare det forelagte spørsmål på følgende måte:

Direktiv 2004/38/EF artikkel 7 nr. 1 bokstav b), jf. artikkel 7 nr. 2, gir ikke avledede rettigheter til opphold for en tredjelandsborger som er familiemedlem til en EØS-borger som, etter retur fra en annen EØS-stat, oppholder seg i EØS-staten hvor EØS-borgeren er statsborger.

ESA

43 ESA gjør gjeldende at formålet med å innføre en avledet rett til opphold for familiemedlemmer til EØS-borgere er å sikre at retten til fri bevegelighet i EØS er reell og effektiv.[12]

44 ESA erkjenner at de rent hypotetiske utsikter til å utøve retten til fri bevegelighet ikke etablerer en kobling til EØS-retten som er tilstrekkelig til å rettferdiggjøre anvendelsen av EØS-rettens bestemmelser.[13] Avledede rettigheter til opphold for

11 Det vises til *Atli Gunnarsson*, som omtalt over (avsnitt 80).
12 Det vises til dommen i *Metock*, C-127/08, EU:C:2008:449 (avsnitt 56, 62 og 84), og sak E4/11 *Arnulf Clauder*, Sml. 2011 s. 216 (avsnitt 49).
13 Det vises til dommen i *Friedrich Kremzow* mot *Republik Österreich*, C-299/95, EU:C:1997:254 (avsnitt 16).

country national family members in principle only exist where these are necessary to ensure that the EEA national can exercise his or her free movement and residence rights effectively.

45 ESA points out that the parties seem to differ on the documentation concerning Ms Amoh's stay in Spain and her connection to Norway during the stay. ESA acknowledges that, on the basis of the information provided in the request for an Advisory Opinion, it appears that Ms Amoh did not exercise her right to free movement as a worker. However, ESA states that, if she was a worker, which the referring court must assess, then the plaintiff would have a derived right of residence in the host State pursuant to Article 7 of the Directive, as well as in the home State on the basis of Article 28 EEA.

46 Proceeding on the basis that Ms Amoh was not economically active during her stay in Spain, ESA states that Article 7(1)(b) only requires that she must have sufficient resources not to become a burden on the Spanish social assistance system during her period of residence, and that she must have comprehensive sickness insurance cover in Spain during that time. According to ESA, this establishes that the rights guaranteed by Article 7 of the Directive are also applicable in circumstances where the EEA national is non-economically active.

47 Turning to the applicability of Article 7 of the Directive to the home State of an EEA national, ESA submits that the Court has already found that Article 7(1)(b) can be invoked by non-economically active EEA nationals, who have exercised their free movement rights, against their EEA State of nationality.[14] ESA maintains that the same principle is at stake in this case. For any residence right to be truly effective, the home State must also be prohibited from hindering the exercise of the right. Similarly, the opportunities offered by the

14 Reference is made to *Atli Gunnarsson*, cited above, paragraphs 75, 77, 78 and 80.

familiemedlemmer som er tredjelandsborgere eksisterer i prinsippet følgelig bare der slike rettigheter er nødvendige for å sikre at EØS-borgeren kan effektivt utøve sin rett til fri bevegelighet og fritt opphold.

45 ESA påpeker at partene ser ut til å ha ulike syn på den fremlagte dokumentasjon vedrørende Amohs opphold i Spania og hennes tilknytning til Norge under oppholdet. Ut fra opplysningene som er gitt i anmodningen om rådgivende uttalelse, erkjenner ESA at det synes som om Amoh ikke utøvde sin rett til fri bevegelighet som arbeidstaker. ESA anfører imidlertid at dersom hun var arbeidstaker, noe det tilkommer den anmodende domstol å vurdere, ville saksøker hatt en avledet rett til opphold i vertsstaten etter direktivet artikkel 7, og i hjemstaten etter EØS-avtalen artikkel 28.

46 Dersom det legges til grunn at Amoh ikke var økonomisk aktiv under sitt opphold i Spania, anfører ESA at artikkel 7 nr. 1 bokstav b) bare krever at hun må ha tilstrekkelige midler til ikke å bli en byrde for det spanske sosialhjelpssystem under oppholdet, og at hun må ha en sykeforsikring med full dekning i Spania i det aktuelle tidsrom. Ifølge ESA kan det på dette grunnlag slås fast at rettighetene som er sikret i direktivet artikkel 7 også får anvendelse i situasjoner der EØS-borgeren ikke er økonomisk aktiv.

47 Når det gjelder spørsmålet om direktivet artikkel 7 kan anvendes overfor en EØS-borgers hjemstat, gjør ESA gjeldende at EFTA-domstolen allerede har lagt til grunn at artikkel 7 nr. 1 bokstav b) kan påberopes av EØS-borgere som ikke er økonomisk aktive, og som har utøvd sin rett til fri bevegelighet, mot EØS-staten der de er statsborgere.[14] ESA hevder at det samme prinsipp gjelder i den foreliggende sak. For at en rett til opphold reelt sett skal være effektiv, må hjemstaten også forbys å hindre utøvelsen av retten.

14 Det vises til *Atli Gunnarsson*, som omtalt over (avsnitt 75, 77, 78 og 80).

Directive could not be fully effective if a national of an EEA State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them.[15]

48 In other words, despite the fact that Union citizenship does not exist under the EEA Agreement, ESA argues for a result that ensures homogeneity. The scope of free movement rights granted to EEA/EFTA nationals should be the same as for EU nationals. ESA adds that the lack of a citizenship concept in the EEA Agreement entails that the Directive should be accorded a more important role in the EEA context. Its scope must therefore be broadened on the basis of the principle of effectiveness.[16]

49 ESA submits that the derived rights of third-country family members of returning Norwegian nationals must be examined under EEA law on the premise that non-economically active nationals can invoke Article 7(1)(b) of the Directive against their own EEA State and that economically active EEA nationals derive their corresponding rights from Articles 28, 31 and 36 EEA. In both instances, the substance of the rights should be the same. ESA concludes that the plaintiff should thus be able to invoke Article 7(2) of the Directive.

50 ESA proposes that the Court should answer the question referred as follows:

15 Reference is made to the judgments in *Pusa*, C-224/02, EU:C:2004:273, paragraph 18, and in *D'Hoop*, C224/98, EU:C:2002:432, paragraphs 30 and 31.

16 Regarding the principle of effectiveness, reference is made to Case E-17/15 *Ferskjar kjötvörur*, judgment of 1 February 2016, not yet reported, paragraph 66, *Clauder*, cited above, paragraphs 34 and 46, and Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Ct. Rep. 534, paragraph 54.

Likeledes kan ikke mulighetene direktivet gir være fullt ut effektive om en borger av en EØS-stat kan bli forhindret fra å benytte seg av dem, fordi han eller hun ved retur til hjemlandet møtes med hindringer i form av lovgivning som straffer ham eller henne for å ha benyttet seg av disse muligheter.[15]

48 ESA argumenterer med andre ord for et resultat som sikrer ensartethet, til tross for det faktum at unionsborgerskap ikke eksisterer etter EØS-avtalen. Den fri bevegelighet for EØS/EFTA-borgere bør ha samme omfang som for EU-borgere. ESA legger til at fraværet av et borgerskapsbegrep i EØS-avtalen innebærer at direktivet bør gis en viktigere rolle i EØS-sammenheng. Dets virkeområde må derfor gjøres bredere, basert på effektivitetsprinsippet.[16]

49 ESA anfører at avledede rettigheter til opphold for tredjelandsborgere som er familiemedlemmer av norske borgere som returnerer til Norge, må vurderes etter EØS-retten ut fra det premiss at ikke økonomisk aktive borgere kan påberope seg direktivet artikkel 7 nr. 1 bokstav b) mot sin egen EØS-stat, og at økonomisk aktive EØS-borgere avleder sine tilsvarende rettigheter fra EØS-avtalen artiklene 28, 31 og 36. Rettighetenes materielle innhold bør være det samme i begge tilfeller. ESA konkluderer med at saksøker dermed bør kunne påberope seg direktivet artikkel 7 nr. 2.

50 ESA anmoder EFTA-domstolen om å besvare det forelagte spørsmål på følgende måte:

15 Det vises til dommene i *Pusa*, C-224/02, EU:C:2004:273 (avsnitt 18), og *D'Hoop*, C224/98, EU:C:2002:432 (avsnitt 30 og 31).

16 Med hensyn til effektivitetsprinsippet vises det til sak E-17/15 *Ferskar kjötvörur*, dom 1. februar 2016, ennå ikke i Sml. (avsnitt 66), *Clauder*, som omtalt over (avsnitt 34 og 46), og sak E-15/12 *Jan Anfinn Wahl*, Sml. 2013 s. 534 (avsnitt 54).

Article 7(1)(b) in combination with Article 7(2) of Directive 2004/38/EC confer derived rights of residence to a third country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen.

THE COMMISSION

51 The Commission submits that, although the question referred only mentions an interpretation of the Directive, it should be expanded to encompass the issue of whether, where the third-country national spouse of an EEA national has acquired a derived right of residence in another EEA State on the basis of Article 7(1)(b) in conjunction with Article 7(2) of the Directive, the EEA Agreement equally confers such a derived right of residence on that family member when he accompanies the EEA national to reside in the EEA State of which she is a national.

52 The Commission acknowledges that in *O. and B.* the ECJ held, first, that the Directive was not intended to govern the rights of entry and residence of a Union citizen in a Member State of which he is national, and, second, that any rights that such a Union citizen, or a member of his family as derived rights, might be able to assert against that Member State must be derived, if at all, from Article 21(1) TFEU.[17]

53 The Commission provides three reasons why the result in the case of *O. and B.* does not apply to the present case. Firstly, the conclusion in that case, which purports to be based on *McCarthy I*, fails to take

17 Reference is made to *O. and B.*, cited above, paragraphs 42 to 44.

Direktiv 2004/38/EF artikkel 7 nr. 1 bokstav b), jf. artikkel 7 nr. 2, gir avledede rettigheter til opphold for en tredjelandsborger som er familiemedlem til en EØS-borger som, etter retur fra en annen EØS-stat, oppholder seg i EØS-staten hvor EØS-borgeren er statsborger.

KOMMISJONEN

51 Kommisjonen gjør gjeldende at selv om det forelagte spørsmål bare nevner en tolkning av direktivet, bør det utvides til også å omfatte spørsmålet om EØS-avtalen, i tilfelle der tredjelandsborgeren som er gift med en EØS-borger har ervervet en avledet rett til opphold i en annen EØS-stat på grunnlag av direktivet artikkel 7 nr. 1 bokstav b), jf. artikkel 7 nr. 2, også gir en slik avledet rett til opphold for vedkommende familiemedlem når han ledsager EØS-borgeren som bosetter seg i EØS-staten hun er borger av.

52 Kommisjonen erkjenner at EU-domstolen i *O. og B.* la til grunn for det første at direktivet ikke hadde til formål å regulere en unionsborgers rettigheter til innreise og opphold i en medlemsstat hvor vedkommende er borger, og for det andre at de rettigheter som måtte kunne gjøres gjeldende overfor denne medlemsstat av en slik unionsborger, eller av et familiemedlem av vedkommende i form av avledede rettigheter, eventuelt vil måtte være avledet fra TEUV artikkel 21 nr. 1.[17]

53 Kommisjonen oppgir tre grunner til at resultatet i saken *O. og B.* ikke får anvendelse i den foreliggende sak. For det første tar konklusjonen i nevnte sak, som angivelig er basert på *McCarthy I*, ikke hensyn til

17 Det vises til *O. og B.*, som omtalt over (avsnitt 42–44).

account of the fact that the latter case concerned a wholly internal situation.[18] Second, the ECJ's holding in *O. and B.* concerning the applicability of the Directive must be read in conjunction with the ECJ's conclusion on the possibility of applying the Directive by analogy.[19] Third, despite being a recent judgment, *O. and B.* cannot be regarded as the last word on this issue. More precisely, in a recent case, *McCarthy II*, the ECJ indicated, albeit with somewhat perfunctory reasoning, that the Directive may indeed be applicable to situations such as that of the present case.[20] The Commission contends that the Court should apply the same methodology to the present case and adds that such a result would be consistent with the Court's reasoning in *Atli Gunnarsson*.[21]

54 Should the Court not agree with the preceding arguments, the Commission claims that the reference to a right under Article 21(1) TFEU in *O. and B.* has to be seen in the context of the case law on which that statement was based, in particular the cases of *Singh* and *Eind*.[22] Hence, the reference in *O. and B.* to Article 21 TFEU does not mean that the principles laid down in *Singh* and *Eind*, which are based on free movement rather than citizenship, no longer apply. According to the Commission, this case law, which concerned circumstances before the Directive entered into force, still applies to the interpretation of EEA law where an EEA national has previously exercised the right of free movement as a worker. However, in the present case, the question is based upon the premise that the EEA

18 Reference is made to the judgment in *McCarthy I*, C-434/09, EU:C:2011:277, paragraphs 27 to 29.

19 Reference is made to *O. and B.*, cited above, paragraph 61.

20 Reference is made to the judgment in *McCarthy II*, C-202/13, EU:C:2014:2450, paragraphs 31 to 38, and to the Opinion of Advocate General Szpunar in the same case, EU:C:2014:345, point 88.

21 Reference is made to *Atli Gunnarsson*, cited above.

22 Reference is made to the judgments in *Singh*, C-370/90, EU:C:1992:296, and in *Eind*, C-291/05, EU:C:2007:771.

det faktum at sistnevnte sak gjaldt en rent intern situasjon.[18] For det andre må EU-domstolens slutning i *O. og B.* vedrørende anvendelsen av direktivet leses i sammenheng med EU-domstolens konklusjon om muligheten for å anvende direktivet ved analogi.[19] For det tredje kan dommen i *O. og B.*, til tross for at den er av nyere dato, ikke anses for å være det siste ord om spørsmålet. Nærmere bestemt har EU-domstolen nylig, i *McCarthy II*, signalisert – riktignok med en noe overfladisk begrunnelse – at direktivet faktisk kan få anvendelse på situasjoner som i den foreliggende sak.[20] Kommisjonen gjør gjeldende at EFTA-domstolen bør følge samme metode i den foreliggende sak, og legger til at et slikt resultat vil være i samsvar med EFTA-domstolens begrunnelse i *Atli Gunnarsson*.[21]

54 Dersom EFTA-domstolen ikke skulle være enig i de foregående argumenter, hevder Kommisjonen at henvisningen til en rettighet etter TEUV artikkel 21 nr. 1 i *O. og B.* må ses i sammenheng med den rettspraksis man der baserte seg på, og særlig sakene *Singh* og *Eind*.[22] Henvisningen til TEUV artikkel 21 i *O. og B.* betyr dermed ikke at prinsippene som ble fastsatt i *Singh* og *Eind*, som er basert på fri bevegelighet snarere enn på borgerskap, ikke lenger får anvendelse. Ifølge Kommisjonen får denne rettspraksis, som gjaldt omstendigheter som forelå før direktivet trådte i kraft, fremdeles anvendelse ved fortolkning av EØS-retten i situasjoner der en EØS-borger tidligere har utøvd sin rett til fri bevegelighet som arbeidstaker. I den foreliggende sak er spørsmålet imidlertid basert

18 Det vises til dommen i *McCarthy I*, C-434/09, EU:C:2011:277 (avsnitt 27–29).

19 Det vises til *O. og B.*, som omtalt over (avsnitt 61).

20 Det vises til dommen i *McCarthy II*, C-202/13, EU:C:2014:2450 (avsnitt 31–38), og uttalelse fra generaladvokat Szpunar i samme sak, EU:C:2014:345 (avsnitt 88).

21 Det vises til *Atli Gunnarsson*, som omtalt over.

22 Det vises til dommene i *Singh*, C-370/90, EU:C:1992:296, og *Eind*, C-291/05, EU:C:2007:771.

national had acquired a right of residence in Spain as a non-economically active person. Such situations have, according to the Commission, been dealt with by the Court in *Atli Gunnarsson*, and the logic of the Court in that case can, therefore, be adopted in the present case.[23]

55 The Commission proposes that the Court should answer the question referred as follows:

Where an EEA national has acquired a right of residence in another EEA State on the basis of Article 7(1)(b) of Directive 2004/38/EC (and family members have acquired such a right there on the basis of Article 7(2) thereof) the EEA Agreement requires the same rights of residence to be conferred on those family members when they accompany or join the EEA national to the EEA State of which that person is a citizen.

Páll Hreinsson
Judge-Rapporteur

23 Reference is made to *Atli Gunnarsson*, cited above, paragraphs 71 to 83.

på det premiss at EØS-borgeren hadde ervervet en rett til opphold i Spania som ikke økonomisk aktiv person. Slike situasjoner er ifølge Kommisjonen blitt behandlet av EFTA-domstolen i *Atli Gunnarsson*, og EFTA-domstolens logikk i nevnte sak kan derfor følges i den foreliggende sak.[23]

55 Kommisjonen anmoder EFTA-domstolen om å besvare det forelagte spørsmål på følgende måte:

I situasjoner der en EØS-borger har ervervet en rett til opphold i en annen EØS-stat på grunnlag av direktiv 2004/38/EF artikkel 7 nr. 1 bokstav b) (og familiemedlemmer har ervervet en slik rett der på grunnlag av artikkel 7 nr. 2 i samme direktiv), krever EØS-avtalen at de samme rettigheter til opphold gis til nevnte familiemedlemmer når de kommer sammen med eller slutter seg til EØS-borgeren i EØS-staten hvor vedkommende er statsborger.

Páll Hreinsson
Saksforberedende dommer

23 Det vises til *Atli Gunnarsson*, som omtalt over (avsnitt 71–83).

Case

E-25/15

EFTA Surveillance Authority

v

Iceland

(Failure by an EFTA State to fulfil its obligations – State aid – Article 14(3) of Part II of Protocol 3 SCA – Failure to recover unlawfully granted aid)

Summary of the Judgment

1 An EFTA State is free to choose the means by which to fulfil an obligation to recover unlawful aid, provided that the measures chosen do not adversely affect the scope and effectiveness of EEA law. Furthermore, the obligation to recover is fulfilled only if the measures adopted by the EFTA State are suitable to re-establish the normal conditions of competition which were distorted by the grant of the unlawful aid.

2 Under Article 3 EEA the EFTA States have an obligation to facilitate the achievement of ESA's tasks, in particular by ensuring that decisions adopted by ESA are applied and complied with. Effective recovery would have required Iceland to demonstrate that the agreements conferring unlawful State aid were no longer in force, for example by terminating the investment agreements or, if applicable, declaring the investment agreements void.

3 The only defence in opposing an application for failure to implement a binding State aid recovery decision would have been to plead that it was absolutely impossible to implement the decision properly. Iceland has not demonstrated the existence of such an absolute impossibility. Provisions, practices or situations prevailing in the domestic legal order cannot justify a failure to observe obligations under EEA law. Such circumstances are fully in the hands of the national authorities.

4 Iceland failed to fulfil its obligations under Article 14(3) of Part II of Protocol 3 SCA and Articles 6, 7 and 8 of Recovery Decision No 404/14/COL, by failing, within the time limits prescribed, (i) to take all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the EEA Agreement by Articles 3, 4 and 5 of that decision, (ii) to cancel any outstanding payments referred to in Article 7 third sentence of the Recovery Decision, and (iii) to provide ESA with the Information outlined in Article 8 of that decision.

Judgment of the Court

29 July 2016

(Failure by an EFTA State to fulfil its obligations – State aid – Article 14(3) of Part II of Protocol 3 SCA – Failure to recover unlawfully granted aid)

In Case E-25/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Markus Schneider and Clémence Perrin, Members of its Department of Legal & Executive Affairs, acting as Agents,

— applicant,

≡V≡

Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, acting as Agent, Haraldur Steinþórsson, Legal Officer, Ministry of Finance and Economic Affairs, and Þórður Reynisson, Legal Officer, Ministry of Industries and Innovation, acting as Co-Agents,

— defendant,

APPLICATION for a declaration that by failing to take within the prescribed time all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the Agreement on the European Economic Area by Articles 2, 3, 4 and 5 of EFTA Surveillance Authority Decision No 404/14/COL of 8 October 2014 *on the Investment Incentive Scheme in Iceland*; by failing to cancel, within the prescribed time any outstanding payments referred to in Article 7 third sentence of that decision; and by failing to provide the EFTA Surveillance Authority, within the prescribed time, with the information

outlined in Article 8 of that decision, Iceland has failed to fulfil its obligations under Article 14(3) 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, and under Articles 6, 7 and 8 of EFTA Surveillance Authority Decision No 404/14/COL,

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 23 October 2015, the EFTA Surveillance Authority ("ESA") brought an action under the second subparagraph of Article 1(2) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). ESA seeks a declaration that Iceland has failed to fulfil its obligations under Article 14(3) of Part II of Protocol 3 SCA and Articles 6, 7 and 8 of ESA Decision No 404/14/COL of 8 October 2014 on the Investment

Incentive Scheme in Iceland (OJ 2016 L 63, p. 9 and EEA Supplement 2016 No. 14, p. 1), by failing, within the time limits prescribed, (i) to take all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the Agreement on the European Economic Area (the "EEA Agreement" or "EEA") by Articles 2, 3, 4 and 5 of ESA's decision, (ii) to cancel any outstanding payments referred to in Article 7 third sentence of that decision, and (iii) to provide ESA with the information outlined in Article 8 of that decision.

II RELEVANT LAW

EEA LAW

2 The first and second paragraphs of Article 3 EEA read:

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 61(3) EEA reads:

The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

4 The first paragraph of Article 24 SCA reads:

The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States.

5 Protocol 3 SCA contains rules on the functions and powers of ESA in the field of State aid. The first and second paragraphs of Article 1(2) of Part I of Protocol 3 SCA read:

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

If the EFTA State concerned does not comply with this decision within the prescribed time, the EFTA Surveillance Authority or any other interested EFTA State may, in derogation from Articles 31 and 32 of this Agreement, refer the matter to the EFTA Court directly.

6 Article 14 of Part II of Protocol 3 SCA reads:

1. Where negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State

concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The EFTA Surveillance Authority shall not require recovery of the aid if this would be contrary to a general principle of EEA law.

2. *The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the EFTA Surveillance Authority. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.*

3. *Without prejudice to any order of the EFTA Court pursuant to Article 40 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, recovery shall be effected without delay and in accordance with the procedures under the national law of the EFTA State concerned, provided that they allow the immediate and effective execution of the EFTA Surveillance Authority's decision. To this effect and in the event of a procedure before national courts, the EFTA States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to EEA law.*

7 Article 23(1) of Part II of Protocol 3 SCA reads:

Where the EFTA State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 14, the EFTA Surveillance Authority may refer the matter to the EFTA Court direct in accordance with Article 1(2) in Part I.

III FACTUAL BACKGROUND AND PRE-LITIGATION PROCEDURE

8 In June 2010, the Icelandic authorities notified to ESA pursuant to Article 1(3) of Part I of Protocol 3 SCA a scheme on investment incentives ("the Scheme"). The aim was to create jobs in

disadvantaged regions in Iceland. The Scheme allowed for granting new aid to companies in all sectors except the financial sector. Aid could take the form of direct grants, tax exemptions or sale and lease of land below market value. By Decision No 390/10/COL of 13 October 2010, ESA approved the Scheme. The Scheme expired on 31 December 2013.

9 The legal basis for the Scheme was Act No 99/2010 of 29 June 2010 on Incentives for Initial Investments in Iceland (*Lög um ívilnanir vegna nýfjárfestinga á Íslandi*) and Regulation No 985/2010 of 25 November 2010 on Incentives for Initial Investments in Iceland (*Reglugerð um ívilnanir vegna nýfjárfestinga á Íslandi*). That regulation was amended by Regulation No 1150/2010 of 30 December 2010 ("the Supplementary Regulation"). ESA was not notified of that amendment.

10 Between December 2010 and January 2013 Iceland entered into six separate investment agreements under the Scheme, one of which is not relevant to the present proceedings. The remaining five agreements were concluded with companies referred to as Becromal, Verne, Kísilfélagið, Thorsil and GMR Endurvinnslan, respectively.

11 In December 2012, Iceland notified ESA of certain proposed amendments to the Scheme. During the preliminary examination of the proposals, ESA also became aware of the Supplementary Regulation. ESA took the preliminary view that the amendments altered the Scheme to such an extent that the Scheme became new aid. It would therefore be subject to an approval procedure. In particular, the Supplementary Regulation appeared to allow for State aid to projects which had started before the Scheme entered into force. Another concern was whether aid under the investment agreements had been kept within the scope of the Scheme. On 30 April 2013, ESA initiated a formal investigation procedure with regard to the Scheme and the investment agreements, by way of Decision No 177/13/COL.

12 On 8 October 2014, ESA adopted Decision No 404/14/COL ("the Recovery Decision") and notified it to Iceland. Articles 1 to 9 of the Recovery Decision read:

Article 1

The formal investigation procedure concerning the Icelandic Investment Incentives Scheme, with amendments notified by the Icelandic authorities is hereby closed.

...

Article 2

The Supplementary Regulation entails State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(3) thereof.

Article 3

The Becromal Investment Agreement entails State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(3) thereof.

Article 4

The Verne Investment Agreement entails ad hoc State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(3) thereof.

Article 5

The Kísilfélagið, Thorsil and GMR Endurvinnslan Investment Agreements do not comply with the conditions set out in the Scheme as approved by Decision No 390/10/COL, since the agreements neither contain references to eligible investment costs, nor to the aid intensities and aid ceiling.

The Kísilfélagið, Thorsil and GMR Endurvinnslan Investment Agreements entail ad hoc State aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(3) thereof.

Article 6

The Icelandic authorities shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 3, 4 and 5 which was unlawfully made available to them.

The aid to be recovered shall bear compound interest from the date on which it was at the disposal of the beneficiaries, until the date of its actual recovery.

Article 7

Recovery of aid shall be immediate and effective in accordance with the procedures of national law.

The Icelandic authorities must ensure that the recovery of aid is implemented within four months from the date of notification of this Decision.

The Icelandic authorities shall cancel any outstanding payments of the aid referred to in Articles 3 to 5, with effect from the date of notification of this Decision.

Article 8

The Icelandic authorities shall, within two months from the notification of this Decision, submit the following information to the Authority:

a) the total amount (principal and recovery interests) to be recovered by the beneficiaries;

b) the dates on which the sums to be recovered were put at the disposal of the beneficiaries;

c) a detailed report on the progress made and the measures already taken to comply with this Decision,

d) documents proving that recovery of the unlawful and incompatible aid from the recipients is under way (e.g. circulars, recovery orders issued etc.).

Article 9

This Decision is addressed to Iceland.

13 By letter of 23 March 2015, Iceland informed ESA of the steps adopted to comply with the Recovery Decision. The letter contained preliminary information on the amounts of aid granted to each beneficiary during the years 2011 to 2013. The aid had been granted in the form of tax derogations and discounted excise duties, social security charges and stamp duties. However, as noted in Iceland's letter to ESA dated 30 April 2013, Iceland submitted that in the cases of Thorsil and Kísilfélagið neither had in fact received State aid under the investment agreements made, since the underlying projects had not been initiated.

14 By emails of 10 and 15 July 2015, Iceland provided ESA with information concerning the precise aid amounts granted to Verne. A draft termination agreement between Iceland and Verne was also provided. However, ESA received no further information concerning the recovery amounts or the recovery procedure relating to the other beneficiaries.

15 On 16 September 2015, ESA took the view that Iceland had failed to comply with the Recovery Decision and decided to bring the matter before the Court pursuant to Article 1(2) of Part I and Article 23(1) of Part II of Protocol 3 SCA.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

16 ESA lodged its application at the Court Registry on 23 October 2015. Iceland's statement of defence was registered at the Court on 5 January 2016. On 8 February 2016, ESA submitted its reply and Iceland submitted its rejoinder on 24 February 2016.

17 The applicant, ESA, requests the Court to:

1. *declare that by failing to take within the prescribed time all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the Agreement on the European Economic Area by Articles 2, 3, 4 and 5 of EFTA Surveillance Authority Decision No 404/14/COL of 8 October 2014 on the Investment Incentive Scheme in Iceland; by failing to cancel, within the prescribed time any outstanding payment referred to in Article 7 third sentence of that decision; and by failing to provide the EFTA Surveillance Authority, within the prescribed time, with all the information outlined in Article 8 of that Decision, Iceland has failed to fulfil its obligations under Article 14(3) 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 and Articles 6, 7 and 8 of Decision No 404/14/COL.*

2. *order Iceland to bear the costs.*

18 The defendant, Iceland, submits that no State aid was in fact conferred under the Thorsil and Kísilfélagið investment agreements, as the underlying projects were not initiated. The Court takes this submission to mean that Iceland is of the opinion that it is not obliged therefore to take measures to recover any State aid in those two cases. Apart from that, Iceland does not dispute that it was obliged to take steps to fulfil the Recovery Decision or that the time limit for the implementation of those steps had expired. However, Iceland remarks that the prolonged procedure was not unreasonable

given the circumstances of the case, the legislative framework and national procedures. Iceland also notes that the amounts at stake do not have any, or at most minimal, effects on trade between the Contracting Parties of the EEA Agreement.

19 After having received the express consent of the parties by emails of 18 and 30 March 2016, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure pursuant to Article 41(2) of the Rules of Procedure ("RoP").

V PLEAS AND ARGUMENTS SUBMITTED TO THE COURT

20 ESA contends that Iceland has breached its obligations under Article 14(3) of Part II of Protocol 3 SCA and Articles 6, 7 and 8 of the Recovery Decision. ESA's application is based on the pleas that, within the time limits prescribed, (i) Iceland has breached Articles 6 and 7 of the Recovery Decision by failing to recover aid declared incompatible with the functioning of the EEA Agreement by Articles 2, 3, 4 and 5 of the Recovery Decision; (ii) Iceland has breached Article 7 of the Recovery Decision by failing to immediately cancel outstanding payments of the aid; and (iii) Iceland has breached Article 8 of the Recovery Decision by failing to inform ESA of the total amount to be recovered and of the measures planned or taken to recover the aid.

First plea – failure to recover unlawful aid within the prescribed time

21 ESA points out that, under Articles 6 and 7 of the Recovery Decision, Iceland was required to take all necessary measures to recover the unlawful State aid referred to in Articles 2, 3, 4 and 5 of the Recovery Decision. This recovery was to be immediate and effective in accordance with the procedures of national law. The deadline set for implementing the recovery of aid elapsed on 9 February 2015.

22 Iceland has not challenged ESA's assessment, as set out in the Recovery Decision, by an action for annulment. Thus, according to ESA, the Recovery Decision has become binding on Iceland. ESA submits that, after a decision on recovery of unlawful aid has become binding on an EEA State, the only defence left in opposing an application would be to plead that it was absolutely impossible to implement the decision properly. In ESA's view, Iceland has neither raised the argument that it was absolutely impossible for it to recover the aid nor did it appear that Iceland was in the position where it was impossible to recover the aid.

23 ESA submits that although Iceland had provided an estimation of the aid granted thus far to Verne, Becromal and GMR Endurvinnslan, no recovery had been completed by the deadline of 9 February 2015. Thus, Iceland had not taken all the steps necessary to recover the amounts granted under the aid. Consequently, Iceland has breached Articles 6 and 7 of the Recovery Decision and Article 14(3) of Part II of Protocol 3 SCA.

24 In its reply, ESA rejects Iceland's argument that no State aid was granted to Kísilfélagið and Thorsil. It points out that the grant of aid to the beneficiary under EEA State aid law lies in the fact that the State makes available an advantage to an undertaking, irrespective of whether it is actually paid out (reference is made to the judgment in *ThyssenKrupp Acciai Speciali Terni* v *Commission*, T-62/08, EU:T:2010:268, paragraph 234). In any event, ESA's decision has become final and is no longer open to challenge.

25 Moreover, ESA claims that Iceland neither submitted any termination agreements with regard to the Kísilfélagið and Thorsil projects, nor did it inform ESA within the prescribed time that no recovery was necessary. The letters from Iceland dated 30 April 2013 and 23 March 2015 do not contain any statements to this effect.

26 ESA observes that Iceland does not argue that the *de minimis* rules apply in this case, but states that the amounts recovered are below the relevant threshold. ESA nevertheless notes that for the *de minimis* rules to apply, specific conditions must be fulfilled and procedures followed in addition to the amounts being below the relevant thresholds. In ESA's view, Iceland has failed to prove that the relevant conditions have been fulfilled in the present case.

27 ESA stresses the importance of recovering unlawful aid within fixed deadlines. Any delay of such recovery perpetuates the distortion of competition created by the unlawful aid. This is contrary to the purpose of EEA State aid rules (reference is made to the judgment in *Commission* v *Italy*, C-454/09, EU:C:2011:650, paragraph 37). In ESA's view, there are currently systemic deficiencies in Iceland's State aid management. No adequate procedures appear to be in place to ensure timely recovery of unlawful aid. This leads to delays in the recovery procedure. A case has previously been brought before the Court due to a failure to implement a recovery decision (reference is made to Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 202). According to ESA, there seems to be no improvement over time. While the present case concerns a "blatant failure" on the part of Iceland to comply with its obligations under a particular recovery decision, ESA urges the Court to take "this alarming wider factual context into account", in particular in light of the obligations imposed on Iceland under Article 3 EEA.

Second plea – failure to cancel outstanding payments of the aid within the prescribed time

28 Under the third sentence of Article 7 of the Recovery Decision, Iceland was obliged to cancel all outstanding payments of the aid with effect from 8 October 2014. In the present case, ESA submits that the effective elimination of potential State aid could adequately take the form of a termination agreement of the investment agreements. However, Iceland has not informed ESA whether the

draft termination agreement with Verne, forwarded to ESA in July 2015, has been finalised. No termination agreement has been presented with regard to the other investment agreements.

29 In ESA's view, Iceland has therefore not presented any evidence of actions taken to effectively eliminate State aid. This suggests that the beneficiaries have continued to receive aid under the investment agreements, and thus perpetuating the distortion of competition created by the unlawful aid.

30 Consequently, ESA submits that Iceland has failed to fulfil its obligation under the third sentence of Article 7 of the Recovery Decision, namely to cancel any outstanding payments of the illegal aid referred to in Articles 3 to 5.

31 ESA notes that Iceland's claim that any outstanding payments were immediately cancelled, could be interpreted as Iceland disputing ESA's plea that Iceland failed to immediately cancel outstanding payments. However, the statement made by Iceland is unsubstantiated and lacks the necessary clarity to draw any conclusion on this point. ESA submits that, should the Court consider the statement in issue as a formal plea, it does not meet the requirements in Article 35 RoP and should be dismissed as inadmissible.

Third plea – failure to inform ESA within the prescribed time of the total amount to be recovered and of the measures planned or taken to recover the aid

32 According to Article 8 of the Recovery Decision, Iceland was obliged by 9 December 2014 to provide ESA with information on the total amount to be recovered, the dates on which the sums to be recovered were put at the disposal of the beneficiaries, a detailed report on the progress made and the measures taken to comply with the Recovery Decision, and documents proving that recovery of the unlawful aid from the recipients was under way.

33 ESA submits that it has only received preliminary information concerning the amount of aid granted in three instances, and that Iceland confirmed that Kísilfélagið and Thorsil did in fact not receive any aid. Furthermore, this information was provided in March 2015, that is more than three months after the fixed deadline. Moreover, Iceland failed to provide a detailed report on the progress made to comply with the Recovery Decision or documents evidencing the recovery of the aid.

34 ESA therefore submits that Iceland has failed to provide ESA with the information listed under Article 8 of the Recovery Decision within the prescribed time.

35 Iceland claims that it cooperated with ESA after the adoption of the Recovery Decision. However, ESA submits that it was not regularly informed about the recovery process. This is evidenced by the limited exchange of letters and updates after the adoption of the Recovery Decision. A satisfactory cooperation would in any event have involved a request for an extension of the prescribed period or suggestions of appropriate amendments to the Recovery Decision. However, ESA was never contacted to discuss such issues. Moreover, Iceland failed to describe and evidence the various measures it had allegedly taken to immediately stop the payment of the aid. Finally, the figures provided in Iceland's defence with regard to the aid amounts are different from those provided by Iceland in the letter of 23 March 2015. No explanation or supporting evidence was provided for the differences.

36 Iceland submits that the facts of the case, as brought forward in the application, are correct and undisputed. The only exception is that the investment agreements made with Kísilfélagið and Thorsil did not confer any State aid to the undertakings, as the underlying projects were not initiated. Iceland informed ESA of this by letters of 30 April 2013 and 23 March 2015. This point is not meant to challenge the substance of the Recovery Decision. Rather, Iceland

considers that the information given to ESA on the non-implementation of the aid in both cases were sufficient. Furthermore, new agreements had been concluded with regard to those two projects and thus according to Iceland, there was no need for a separate termination. This fact had been brought to ESA's attention by letters of 27 and 29 August 2014.

37 With regard to the three remaining investment agreements, namely with Becromal, Verne and GMR Endurvinnslan, where aid was granted, Iceland submits that the aid amounts were minimal and thus entailed limited distortion of competition and effects on intra-EEA trade. The aid granted to Verne, GMR Endurvinnslan and Becromal amounted to EUR 15 819, EUR 36 903 and EUR 214 143, respectively. According to Iceland, these amounts are "extremely low" when compared to the *de minimis* threshold in Article 3(2) of Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ 2013 L 352, p. 1). The reference to the *de minimis* rules is not intended to demonstrate the applicability of those rules, but merely to show that the amounts at hand are minimal.

38 Iceland observes that studies done on the recovery of unlawful aid demonstrate that recovery faces a number of challenges, which generally result in an excessive length of recovery proceedings. Iceland argues that even though it faced obstacles, it did take immediate and effective action to fulfil the Recovery Decision by cancelling outstanding payments, terminating or amending investment agreements and calculating the amount of aid to be recovered from each beneficiary.

39 Iceland notes that, despite the small amounts of aid to be recovered, administrative procedures and a dialogue with the aid beneficiaries on efficient recovery and termination of the agreements resulted in a more prolonged recovery process than anticipated. For these reasons

and due to the Government's heavy workload, a full recovery of the aid was unfortunately not completed within the prescribed time. As a result, the Recovery Decision is still in the process of being implemented. Iceland submits that the full recovery will be completed within a reasonable timeframe, taking into consideration the facts of the case and difficulties routinely faced in similar proceedings. It is expected that full recovery of the aid will be completed by the first quarter of the year 2016.

40 Iceland argues that it endeavoured to fulfil its duty of cooperation under Article 3 EEA and case law on recovery procedures by regularly informing ESA of the progress made in implementing the Recovery Decision. The difference in opinion between the parties with regard to the adequacy of the information supplied during the recovery process is a matter for Iceland and ESA to work out and improve in the future.

41 Iceland objects to the allegations made by ESA with regard to the current situation of State aid recovery in Iceland. The swiftness of the recovery procedure varies from case to case. Cases where the exact amounts have to be determined by calculating whether and how much fiscal aid has been granted, may be more time consuming than those where the exact amounts to be recovered are clear from the date when a recovery decision is adopted. Moreover, the one-year delay experienced in the present case, while unfortunate and in breach of the Recovery Decision, is not out of the ordinary in the wider EEA context. Furthermore, there have only been four recovery decisions from ESA addressed to Iceland since the EEA Agreement entered into force. Nothing in those cases suggests a systematic delay in the recovery. Consequently, ESA's description of the present case as a "blatant failure" and the wider factual context as "alarming" is an unnecessary exaggeration, which in Iceland's view must be rejected.

VI FINDINGS OF THE COURT

FIRST PLEA – FAILURE TO RECOVER UNLAWFUL AID WITHIN THE PRESCRIBED TIME

42 By Articles 3, 4 and 5 of the Recovery Decision, ESA found the five investment agreements to entail unlawful State aid. Pursuant to Article 6 of the Recovery Decision, and in accordance with Article 14(1) of Part II of Protocol 3 SCA, Iceland was ordered to take all necessary measures to recover from the beneficiaries the State aid unlawfully made available to them. Pursuant to Article 7 of the Recovery Decision, and in accordance with Article 14(3) of Part II of Protocol 3 SCA, the recovery of aid was to be immediate and effective in accordance with the procedures of national law, but at the latest within four months from notification.

43 An EFTA State is free to choose the means by which to fulfil an obligation to recover unlawful aid, provided that the measures chosen do not adversely affect the scope and effectiveness of EEA law. Furthermore, the obligation to recover is fulfilled only if the measures adopted by the EFTA State are suitable to re-establish the normal conditions of competition which were distorted by the grant of the unlawful aid (compare the judgment in *Commission* v *Germany*, C-209/00, EU:C:2002:747, paragraphs 34 and 35).

44 ESA's first plea is undisputed by Iceland, with the exception that no aid was granted under the Kísilfélagið and Thorsil investment agreements since the underlying projects were not initiated. However, since Iceland did not challenge the Recovery Decision within the mandatory period of two months prescribed in the third paragraph of Article 36 SCA, Iceland cannot any longer dispute ESA's finding that the two investment agreements entailed unlawful State aid.

45 Nevertheless, the Court finds it appropriate to add the following: An allegation that there is nothing to be recovered, because the projects to which the investment agreements relate were not implemented, is flawed. The grant of aid lies in the fact that the State makes available an advantage to an undertaking, irrespective of whether money is actually paid out (compare *ThyssenKrupp Acciai Speciali Terni* v *Commission*, cited above, paragraph 234).

46 Where an EFTA State decides to recover aid by other means than a cash payment, it is obliged to provide, in a transparent manner, ESA with evidence enabling it to establish that the measures are suitable for achieving, in full compliance with EEA law, the result required by the decision. This entails close cooperation between the EFTA States and ESA. The Court points to the obligation in Article 3 EEA to facilitate the achievement of ESA's tasks, in particular by ensuring that decisions adopted by ESA are applied and complied with (compare the judgment in *Commission* v *Germany*, cited above, paragraphs 39 and 42).

47 Iceland was therefore obliged to demonstrate that the advantages made available to the recipients under the two agreements have been effectively recovered. A mere assertion that the two projects were not initiated does not demonstrate effective recovery of advantages. Effective recovery would have required Iceland to demonstrate that the agreements conferring unlawful State aid were no longer in force, for example by terminating the investment agreements or, if applicable, declaring the investment agreements void.

48 As regards the three other investment agreements, it is undisputed that unlawful aid had been granted and that Iceland has failed to recover that aid within the time prescribed. Iceland's mention of the *de minimis* rules cannot alter this finding as these rules are not applicable in the present case.

49 Since the Recovery Decision is final and binding on Iceland, the only defence in opposing an application for failure to implement the decision would have been to plead that it was absolutely impossible to implement the decision properly (see *ESA* v *Iceland*, cited above, paragraph 38 and case law cited). Justifications put forward by Iceland to explain the delay, namely the heavy workload of the Government and the lack of relevant information from the beneficiaries, are manifestly unsuitable to establish an absolute impossibility in light of the relevant case law. Provisions, practices or situations prevailing in the domestic legal order cannot justify a failure to observe obligations under EEA law (see Case E-19/14 *ESA* v *Norway* [2015] EFTA Ct. Rep. 300, paragraph 48). Such circumstances are fully in the hands of the national authorities.

50 On this background, ESA's first plea is well-founded.

SECOND PLEA – FAILURE TO CANCEL OUTSTANDING PAYMENTS OF THE AID WITHIN THE PRESCRIBED TIME

51 Pursuant to Article 7 third sentence of the Recovery Decision, Iceland was obliged to cancel any outstanding payments of unlawful aid, with effect from the date of notification of that decision.

52 ESA claims that no termination agreements have been presented for the five investment agreements. This suggests that the beneficiaries have continued to receive aid under the investment agreements. Iceland claims, for its part, that all outstanding payments were immediately cancelled following the Recovery Decision.

53 The Court has not seen clear proof that the investment agreements are no longer in force. Therefore, it cannot be ruled out that the favourable treatment constituting unlawful State aid, according to ESA's assessment, continued to apply to the beneficiaries after the notification of the Recovery Decision. Consequently, Iceland has not demonstrated that it complied with the obligation to cancel any

outstanding payments. In light of this finding, it is not necessary to address ESA's alternative inadmissibility plea.

54 ESA's second plea is therefore well-founded.

THIRD PLEA – FAILURE TO INFORM ESA WITHIN THE PRESCRIBED TIME OF THE TOTAL AMOUNT TO BE RECOVERED AND OF THE MEASURES PLANNED OR TAKEN TO RECOVER THE AID

55 Article 8 of the Recovery Decision obliged Iceland within two months from notification to inform ESA of the total amount to be recovered and the measures planned or taken to recover the aid.

56 An estimation of the total amount of aid that had been provided under the investment agreements was submitted on 23 March 2015. That was more than three months after the deadline for submitting such information had expired. In any event, the information submitted did not fully comply with the obligations laid down in Article 8 of the Recovery Decision. Exact amounts were not indicated, and no detailed report or documents, as required under Article 8(c) and (d), was submitted.

57 If an EFTA State encounters difficulties in implementing a recovery decision, it must submit those difficulties for consideration by ESA. The EFTA State may, for example, request an extension of the recovery period and suggest appropriate amendments to that decision, so that ESA may take an informed decision (compare the judgment in *Commission* v *Germany*, C-527/12, EU:C:2014:2193, paragraph 51 and case law cited). Iceland did not resort to any of these possibilities.

58 Thus, ESA's third plea is also well-founded.

59 Finally, ESA's application claims failure to recover unlawful aid described in Articles 2 to 5 of the Recovery Decision. However, it follows from the Recovery Decision itself that only aid described in Articles 3 to 5 must be recovered. Failure to recover unlawful aid described in Article 2 of the Recovery Decision is therefore not in breach of EEA law.

CONCLUSION

60 It must be held that Iceland has failed to fulfil its obligations under Article 14(3) of Part II of Protocol 3 SCA and Articles 6, 7 and 8 of the Recovery Decision, by failing, within the time limits prescribed, (i) to take all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the EEA Agreement by Articles 3, 4 and 5 of that decision, (ii) to cancel any outstanding payments referred to in Article 7 third sentence of that decision, and (iii) to provide ESA with the information outlined in Article 8 of that decision.

VII COSTS

61 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, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Iceland must be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under Article 14(3) 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, and Articles 6, 7 and 8 of EFTA Surveillance Authority Decision No 404/14/COL of 8 October 2014 on the Investment Incentive Scheme in Iceland, by failing, within the time limits prescribed, to take all the necessary measures to recover from the recipients the State aid declared incompatible with the functioning of the Agreement on the European Economic Area by Articles 3, 4 and 5 of that decision, to cancel any outstanding payments referred to in Article 7 third sentence of that decision, and to provide the EFTA Surveillance Authority with the information outlined in Article 8 of that decision.**

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

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

Delivered in open court in Luxembourg on
***29 July 2016**.*

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President

Case

E-30/15

EFTA Surveillance Authority

v

Iceland

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2011/62/EU amending Directive 2001/83/EC on the Community Code relating to medicinal products for human use)

Summary of the Judgment

1 Article 3 EEA imposes upon the 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 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 in Iceland also.

2 The question whether an 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 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) 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

29 July 2016

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2011/62/EU amending Directive 2001/83/EC on the Community Code relating to medicinal products for human use)

In Case E-30/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Clémence Perrin and Marlene Lie Hakkebo, Members of its Department of Legal & Executive Affairs, acting as Agents,

— applicant,

≡V≡

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

— defendant,

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under 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) as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event by failing to inform the EFTA Surveillance Authority thereof,

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 16 December 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 the Act referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), that is 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 Icelandic EEA Suppl. 2013 No 56, p. 521) ("the Act" or "the Directive"), as adapted to the EEA Agreement under its Protocol 1, and under Article 7 EEA, by

failing to adopt or in any event to inform ESA of the measures necessary to implement the Act within the time prescribed.

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 159/2013 of 8 October 2013 (OJ 2014 L 58, p. 12, and EEA Supplement 2014 No 13, p. 14) ("Decision 159/2013") amended Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement by adding the Directive to point 15q of Chapter XIII of the Annex. Constitutional requirements were indicated by Norway and Liechtenstein for the purposes of Article 103 EEA. By April 2014 both States had notified that the constitutional requirements had been fulfilled. Consequently, Decision 159/2013 entered into force on 1 June 2014. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III FACTS AND PRE-LITIGATION PROCEDURE

6 On 17 September 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 measures necessary to implement the Directive. Iceland did not reply to the letter of formal notice.

7 On 14 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 measures necessary to comply with the reasoned opinion within two months following the notification, that is, no later than 14 March 2015. Iceland did not reply to the reasoned opinion.

8 Since Iceland did not comply with the reasoned opinion by the set deadline, 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

9 ESA lodged the present application at the Court Registry on 16 December 2015. Iceland's statement of defence was registered at the Court on 23 February 2016. By letter of 3 March 2016, 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 6 May 2016, Iceland also consented to dispense with the oral procedure.

10 The applicant, ESA, requests the Court to:

1. *Declare that Iceland has failed to fulfil its obligations under 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) as adapted to the Agreement under its Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event by failing to inform the EFTA Surveillance Authority thereof; and*

2. *Order Iceland to bear the costs of these proceedings.*

11 The defendant, Iceland, submits that it does not dispute the facts of the case as they are set out in ESA's application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its defence, Iceland indicated that it was foreseen that the

implementation of the Directive would be finalised around 1 June 2016.

12 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

13 Article 3 EEA imposes upon the 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-21/15 *ESA* v *Iceland*, judgment of 1 February 2016, not yet reported, paragraph 14 and case law cited).

14 Under Article 7 EEA, the 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 in Iceland also. The EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Iceland,* cited above, paragraph 15 and case law cited).

15 Decision 159/2013 entered into force on 1 June 2014. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

16 The question whether an 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 17 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.

17 Since Iceland did not implement the Directive within the time prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to inform ESA of the measures implementing the Directive.

18 It must therefore be held that Iceland has failed to fulfil its obligations under 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) 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, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Iceland must be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under 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) 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
***29 July 2016**.*

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President

Case

E-31/15

EFTA Surveillance Authority

=V=

Iceland

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights)

Summary of the Judgment

1 Article 3 EEA imposes upon the 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 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 in Iceland also.

2 The question whether an 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 the Act referred to at the indent in point 9f of Annex XVII to the Agreement on the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) 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

29 July 2016

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights)

In Case E-31/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Øyvind Bø and Íris Ísberg, Members of its Department of Legal & Executive Affairs, acting as Agents,

— applicant,

≡V≡

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

— defendant,

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under the Act referred to at the indent in point 9f of Annex XVII to the Agreement of the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed or in any event by failing to inform the EFTA Surveillance Authority thereof,

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 17 December 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 the Act referred to at the indent in point 9f of Annex XVII to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), that is Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (OJ 2011 L 265, p. 1 and Icelandic EEA Supplement 2013 No 28, p. 360) ("the Act" or "the Directive") 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 or in any event failing to inform ESA thereof.

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 94/2013 of 3 May 2013 (OJ 2013 L 291, p. 60, and EEA Supplement 2013 No 61, p. 68) ("Decision 94/2013") amended Annex XVII (Intellectual Property) to the EEA Agreement by adding the Directive to point 9f of the Annex. Constitutional requirements were indicated by all EFTA States for the purposes of Article 103 EEA. By June 2014, all States had notified that the constitutional requirements had been fulfilled. Consequently, Decision 94/2013 entered into force on 1 August 2014. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III FACTS AND PRE-LITIGATION PROCEDURE

6 On 12 November 2014, after correspondence with the Icelandic authorities, ESA issued a letter of formal notice concluding that Iceland had failed to fulfil its obligations under Article 2 of the Act and Article 7 EEA by failing to adopt or in any event to inform ESA of the measures necessary to implement the Directive.

7 By letter of 18 February 2015, Iceland replied to the letter of formal notice, explaining that it had not yet adopted the measures necessary to implement the Act. It indicated that the bill implementing the Directive was expected to be handled by Parliament by the end of the spring session.

8 On 8 April 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 8 June 2015.

9 By letter of 13 August 2015, Iceland responded to the reasoned opinion, explaining that when the Parliament adjourned in the spring of 2015 the implementing bill had only been through a first

reading in Parliament. Thus, the bill would be presented again during Parliament's autumn session.

10 Since Iceland did not comply with the reasoned opinion by the deadline set, 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

11 ESA lodged the present application at the Court Registry on 17 December 2015. Iceland's statement of defence was registered at the Court on 7 March 2016. By letter of 31 March 2016, 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 3 May 2016, Iceland also consented to dispense with the oral procedure.

12 The applicant, ESA, requests the Court to:

1. *Declare that Iceland has failed to fulfil its obligations under the Act referred to at the indent in point 9f of Annex XVII to the Agreement on the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event by failing to inform the EFTA Surveillance Authority thereof; and*

2. *Order Iceland to bear the costs of these proceedings.*

13 The defendant, Iceland, submits that it does not dispute the facts of the case as they are set out in ESA's application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its

defence, Iceland states that the Directive has been implemented to the Icelandic legal order as of 5 March 2016.

14 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

15 Article 3 EEA imposes upon the 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-21/15 *ESA* v *Iceland*, judgment of 1 February 2016, not yet reported, paragraph 14 and case law cited).

16 Under Article 7 EEA, the 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 in Iceland also. The EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Iceland,* cited above, paragraph 15 and case law cited).

17 Decision 94/2013 entered into force on 1 August 2014. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

18 The question whether an 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 17 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.

19 Since Iceland did not implement the Directive within the time prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to inform ESA of the measures implementing the Directive.

20 It must therefore be held that Iceland has failed to fulfil its obligations under the Act referred to at the indent in point 9f of Annex XVII to the Agreement on the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) 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

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 Iceland be ordered to pay the costs, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Iceland must be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under the Act referred to at the indent in point 9f of Annex XVII to the Agreement on the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) 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
***29 July 2016**.*

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President

Case

E-32/15

EFTA Surveillance Authority

v

The Principality of Liechtenstein

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2006/126/EC – Directive 2011/94/EU – Directive 2012/36/EU)

Summary of the Judgment

1 Article 3 EEA imposes upon the 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 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 16 of Directive 2006/126/EC, Article 2 of Directive 2011/94/EU and Article 2 of Directive 2012/36/EU.

2 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion. It is undisputed that Liechtenstein had not adopted the measures necessary to implement the Directives by the expiry of the time limits given in the reasoned opinions.

3 Liechtenstein failed to fulfil its obligations under the Acts referred to at point 24f of Annex XIII to the EEA Agreement (Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licenses (recast), Commission Directive 2011/94/EU of 28 November 2011 amending directive 2006/126/EC and Commission Directive 2012/36/EU of 19 November 2012 amending Directive 2006/126/EC), 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 Acts within the times prescribed.

Judgment of the Court

29 July 2016

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2006/126/EC – Directive 2011/94/EU – Directive 2012/36/EU)

In Case E-32/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Øyvind Bø and Marlene Lie Hakkebo, members of its Department of Legal & Executive Affairs, acting as Agents,

— applicant,

The Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Nadja Rossettini-Lambrecht, Senior Legal Officer, EEA Coordination Unit, acting as Agents,

— defendant,

APPLICATION for a declaration that the Principality of Liechtenstein has failed to fulfil its obligations under the Acts referred to at point 24f of Annex XIII to the Agreement on the European Economic Area (Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (recast), Commission Directive 2011/94/EU of 28 November 2011 amending Directive 2006/126/EC and Commission Directive 2012/36/EU of 19 November 2012 amending Directive 2006/126/EC), as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Acts within the time prescribed, or in any event by failing to inform the EFTA Surveillance Authority thereof,

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 December 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 the Principality of Liechtenstein has failed to fulfil its obligations under the Acts referred to at point 24f of Annex XIII to the Agreement on the European Economic Area ("EEA" or "EEA Agreement"), that is Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (recast) (OJ 2006 L 403, p. 18), Commission Directive 2011/94/EU of 28 November 2011 amending Directive 2006/126/EC (OJ 2011 L 314, p. 31) and Commission Directive 2012/36/EU of 19 November 2012 amending Directive 2006/126/EC (OJ 2012 L 321, p. 54) ("the Directives" or "the Acts" or respectively "Directive 2006/126/EC", "Directive 2011/94/EU" and "Directive 2012/36/EU"), as adapted to the Agreement under

its Protocol 1, and under Article 7 of the Agreement, by failing to adopt or in any event to inform ESA of the measures necessary to implement the Acts within the times prescribed.

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 29/2008 of 14 March 2008 (OJ 2008 L 182, p. 21 and EEA Supplement 2008 No 42, p. 13) ("Decision 29/2008"), No 110/2012 of 15 June 2012 (OJ 2012 L 270, p. 33 and EEA Supplement 2012 No 56, p. 33) ("Decision 110/2012") and No 143/2013 of 15 July 2013 (OJ 2013 L 345, p. 12 and EEA Supplement 2013 No 72, p. 18) ("Decision 143/2013") amended Annex XIII (Transport) to the EEA Agreement by adding the respective Directives to point 24f of the Annex.

6 As regards Directive 2006/126/EC, constitutional requirements were indicated by Norway for the purposes of Article 103 EEA. By February 2009, Norway had notified that the constitutional requirements had been fulfilled. Consequently, Decision 29/2008 entered into force on 1 April 2009. As regards Directives 2011/94/EU and 2012/36/EU, no constitutional requirements were indicated. Consequently, Decision 110/2012 entered into force on 16 June 2012, and Decision 143/2013 entered into force on 16 July 2013.

7 Pursuant to Article 16 of Directive 2006/126/EC, the EEA States were required to adopt and publish, no later than 19 January 2011, the laws, regulations and administrative provisions necessary to comply with a number of the obligations arising under that directive and to apply those provisions as of 19 January 2013.

8 Pursuant to Article 2 of Directive 2011/94/EU, the EEA States were required to adopt and publish, no later than 30 June 2012, the laws, regulations and administrative provisions necessary to comply with that directive, and to apply those provisions from 19 January 2013.

9 Pursuant to Article 2 of Directive 2012/36/EU, the EEA States were required to bring into force the laws, regulations and administrative

provisions necessary to comply with that directive no later than 31 December 2013.

III FACTS AND PRE-LITIGATION PROCEDURE

DIRECTIVES 2006/126/EC AND 2011/94/EU

10 On 20 February 2013, following correspondence with Liechtenstein authorities, ESA issued two letters of formal notice concluding that Liechtenstein had failed to fulfil its obligations under Directives 2006/126/EC and 2011/94/EU and Article 7 EEA by failing to adopt the national measures necessary to implement the Acts, or in any event to inform ESA thereof.

11 By two separate letters of 17 April 2013, Liechtenstein replied to the letters of formal notice. In its observations, Liechtenstein confirmed that the measures necessary to implement the two Acts had not yet been adopted. Liechtenstein contended that due to a delay of implementation of the Acts in Switzerland, the transposition of the Acts would also need to be delayed in Liechtenstein, as the two legal orders were closely interlinked in the field of driving licenses. Liechtenstein considered a national transposition of the Acts independently from Switzerland to be impossible, as the production of the driving licence blanks and the subsequent issuance of driving licences would be tightly linked to the Swiss driving licence registry. Implementation of the Acts in Liechtenstein independently from Switzerland would be impractical and result in substantial financial expenditure, which Liechtenstein considered to be disproportionate in light of the small number of driving licences issued annually. Lastly, Liechtenstein stated that it would apply the same time plan as Switzerland, which foresaw that the legislative measures implementing the Acts would enter into force early 2016.

12 On 18 February 2015, ESA delivered two reasoned opinions, maintaining the conclusions set out in its letters of formal notice. ESA stated that the EFTA States could not rely on provisions, practices or situations prevailing in their domestic legal order to justify a failure to observe obligations arising under EEA law. Neither could it rely on financial difficulties in order to justify non-compliance with obligations and time-limits laid down in directives. Pursuant to the second paragraph of Article 31 SCA, ESA required Liechtenstein to take the measures necessary to comply with the reasoned opinions within two months following the notifications, that is, no later than 18 April 2015.

13 On 17 April 2015, Liechtenstein responded to the reasoned opinions by two separate letters, acknowledging that it had not yet adopted the necessary measures to implement the Acts. Liechtenstein also reiterated the arguments referred to in its letters of 17 April 2013.

14 Since Liechtenstein had not complied with the reasoned opinions by the deadline set therein, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

DIRECTIVE 2012/36/EU

15 On 18 February 2015, ESA issued a letter of formal notice to Liechtenstein concluding that Liechtenstein had also failed to fulfil its obligations under Directive 2012/36/EU and Article 7 EEA by failing to adopt the national measures necessary to implement the Act, or in any event, to inform ESA thereof.

16 By a letter of 17 April 2015, Liechtenstein confirmed that it had not yet adopted the measures necessary to implement the Act. Liechtenstein pointed out that it was dependent on Directive 2006/126/EC on driving licences being transposed in Switzerland. Liechtenstein further reiterated the arguments referred to in its

replies to the letters of formal notice and reasoned opinions concerning Directives 2006/126/EC and 2011/94/EU.

17 On 24 June 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 measures necessary to comply with the reasoned opinion within two months following the notification, that is, no later than 24 August 2015.

18 By a letter of 28 August 2015, Liechtenstein replied to the reasoned opinion, stating that it had not yet adopted the necessary measures to implement the Act.

19 Since Liechtenstein had not complied with the reasoned opinion by the deadline set therein, 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

20 ESA lodged the present application at the Court Registry on 17 December 2015. Liechtenstein's statement of defence was registered at the Court on 4 March 2016. By letter of 14 March 2016, 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 18 March 2016, Liechtenstein also consented to dispense with the oral procedure.

21 The applicant, ESA, requests the Court to:

1. *Declare that the Principality of Liechtenstein has failed to fulfil its obligations under the Acts referred to at point 24f of Annex XIII to the Agreement on the European Economic Area:*

   – *Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences, and*

– *Commission Directive 2011/94/EU of 28 November 2011 amending Directive 2006/126/EC of the European Parliament and of the Council on driving licences*

– *Commission Directive 2012/36/EU of 19 November 2012 amending Directive 2006/126/EC of the European Parliament and of the Council on driving licences,*

as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Acts within the time prescribed, or in any event by failing to inform the EFTA Surveillance Authority thereof; and

2. *order the Principality of Liechtenstein to bear the costs of these proceedings.*

22 The defendant, Liechtenstein, submits that the facts of the case as set out in the application are correct and undisputed. Liechtenstein does not dispute the declaration sought by ESA, but requests the Court to order each party to bear its own costs of the proceedings.

23 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

24 Article 3 EEA imposes upon the 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-23/15 *ESA* v *Liechtenstein*, judgment of 1 February 2016, not yet reported, paragraph 16 and case law cited).

25 Under Article 7 EEA, the 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 16 of Directive 2006/126/EC, Article 2 of Directive 2011/94/EU and Article 2 of Directive 2012/36/EU. The Court points out that the lack of direct legal effect of acts referred to in decisions from the EEA Joint Committee, makes timely implementation crucial for the proper functioning of the EEA Agreement also in Liechtenstein. The EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Liechtenstein*, cited above, paragraph 17 and case law cited).

26 Decision 29/2008 entered into force on 1 April 2009, Decision 110/2012 entered into force on 16 June 2012 and Decision 143/2013 entered into force on 16 July 2013. The time limit for the EFTA States to adopt and apply the necessary measures to implement the first two Directives expired on 19 January 2013. The time limit to adopt the necessary measures to comply with Directive 2012/36/EU expired on 31 December 2013.

27 The question whether an 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 *Liechtenstein*, cited above, paragraph 19 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 limits given in the reasoned opinions, that is on 18 April 2015 for Directives 2006/126/EC and 2011/94/EU and on 24 August 2015 for Directive 2012/36/EU.

28 Since Liechtenstein did not implement the Directives within the time limits prescribed, there is no need to examine the alternative form of order sought against Liechtenstein for failing to notify ESA of the measures implementing the Directives.

29 It must therefore be held that the Principality of Liechtenstein has failed to fulfil its obligations under the Acts referred to at point 24f of Annex XIII to the EEA Agreement (Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (recast), Commission Directive 2011/94/EU of 28 November 2011 amending Directive 2006/126/EC and Commission Directive 2012/36/EU of 19 November 2012 amending Directive 2006/126/EC), as adapted to the EEA Agreement under its Protocol 1, and under Article 7 EEA, by failing to adopt the measures necessary to implement the Acts within the time prescribed.

VI COSTS

30 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) apply, Liechtenstein must therefore be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that, the Principality of Liechtenstein has failed to fulfil its obligations under the Acts referred to at point 24f of Annex XIII to the Agreement on the European Economic Area (Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (recast), Commission Directive 2011/94/EU of 28 November 2011 amending Directive 2006/126/EC and Commission Directive 2012/36/EU of 19 November 2012 amending Directive 2006/126/EC), 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 Acts within the times prescribed.**

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
***29 July 2016**.*

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President

Case

E-33/15

EFTA Surveillance Authority

v

Iceland

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2012/26/EU amending Directive 2001/83/EC as regards pharmacovigilance)

Table of Contents

Summary of the Judgment

1 Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. Furthermore, Article 3 EEA imposes upon Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligation arising out of the EEA Agreement.

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

3 Iceland failed to fulfil its obligations under the Act referred to at point 15q of Chapter XIII of Annex II to the EEA Agreement, that is 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 EEA Agreement by Protocol 1 thereto, 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

2 August 2016

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2012/26/EU amending Directive 2001/83/EC as regards pharmacovigilance)

In Case E-33/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Clémence Perrin, and Íris Ísberg, Members of the Department of Legal & Executive Affairs, acting as Agents,

— applicant,

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

— defendant,

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under the Act referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area (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 under Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event by failing to inform the EFTA Surveillance Authority thereof.

The Court

composed of: Carl Baudenbacher, President (Judge-Rapporteur), Per Christiansen 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 17 December 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 the Act referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), that is 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, and Icelandic EEA Supplement 2013 No 56, p. 535) ("the Directive" or "the Act"), as adapted to the Agreement under its Protocol 1 and under Article 7 EEA, by failing to adopt or in any event to inform ESA of the measures necessary to implement the Act within the time prescribed.

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 160/2013 of 8 October 2013 (OJ 2014 L 58, p. 13, and EEA Supplement 2014 No 13, p. 15) ("Decision 160/2013") amended Annex II (Technical Regulations, Standards, Testing and Certification) to the EEA Agreement by adding the Directive to point 15q of Chapter XIII of the Annex. Constitutional requirements were indicated by Liechtenstein for the purposes of Article 103 EEA. By 29 April 2014, Liechtenstein had notified that the constitutional requirements had been fulfilled. Consequently, Decision 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 Directive expired on the same date.

III FACTS AND PRE-LITIGATION PROCEDURE

6 On 17 September 2014, after correspondence, 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.

7 On 14 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 14 March 2015. Iceland did not reply to the reasoned opinion within the time limit.

8 Since Iceland did not comply with the reasoned opinion by the deadline set therein, 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

9 ESA lodged the present application at the Court Registry on 17 December 2015. Iceland's statement of defence was registered at the Court on 7 March 2016. By letter of 31 March 2016, 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 3 May 2016, Iceland also consented to dispense with the oral procedure.

10 The applicant, ESA, requests the Court to:

1. *Declare that Iceland has failed to fulfil its obligations under the Act referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area (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 under its Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event by failing to inform the EFTA Surveillance Authority thereof; and*

2. *Order Iceland to bear the costs of these proceedings.*

11 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 indicated that an administrative regulation implementing the Directive was intended to be adopted by 1 July 2016.

12 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

13 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-21/15 *ESA* v *Iceland*, judgment of 1 February 2016, not yet reported, paragraph 14 and case law cited).

14 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 in Iceland also. The EEA/EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Iceland,* cited above, paragraph 15 and case law cited).

15 Decision 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 Directive expired on the same date.

16 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 17 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.

17 Since Iceland did not implement the Directive within the time prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to inform ESA of the measures implementing the Directive.

18 It must therefore be held that Iceland has failed to fulfil its obligations under the Act referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area (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 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 the Act referred to at point 15q of Chapter XIII of Annex II to the Agreement on the European Economic Area (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 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
2 August 2016.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President

Case

E-34/15

EFTA Surveillance Authority

=V=

Iceland

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2012/46/EU amending Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery)

Summary of the Judgment

1 Article 3 EEA imposes upon the 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 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 in Iceland also.

2 The question whether an 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 the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) 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

2 August 2016

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2012/46/EU amending Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery)

In Case E-34/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Øyvind Bø and Íris Ísberg, Members of its Department of Legal & Executive Affairs, acting as Agents,

— applicant,

≡V≡

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

— defendant,

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the

Act within the time prescribed or, in any event, by failing to inform the EFTA Surveillance Authority thereof,

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 17 December 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 the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), that is Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to

measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road machinery (OJ 2012 L 353, p. 80 and Icelandic EEA Supplement 2014 No 73, p. 199) ("the Act" or "the Directive") as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt or in any event to inform ESA of the measures necessary to implement the Act within the time prescribed.

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 186/2014 of 25 September 2014 (OJ 2015 L 202, p. 37 and EEA Supplement 2015 No 43, p. 37) ("Decision 186/2014") 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 186/2014 entered into force on 26 September 2014 in accordance with its Article 3. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III FACTS AND PRE-LITIGATION PROCEDURE

6 On 14 January 2015, after correspondence with the Icelandic authorities, 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 measures necessary to implement the Directive. Iceland did not respond to the letter of formal notice.

7 On 13 May 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 13 July 2015. Iceland did not reply to the reasoned opinion.

8 Since Iceland did not comply with the reasoned opinion by the deadline set, 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

9 ESA lodged the present application at the Court Registry on 17 December 2015. Iceland's statement of defence was registered at the Court on 7 March 2016. By letter of 31 March 2016, 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 3 May 2016, Iceland also consented to dispense with the oral procedure.

10 The applicant, ESA, requests the Court to:

1. *Declare that Iceland has failed to fulfil its obligations under the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) as adapted to the Agreement by the way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any*

event by failing to inform the EFTA Surveillance Authority thereof; and

2. Order Iceland to bear the costs of these proceedings.

11 The defendant, Iceland, submits that it does not dispute the facts of the case as they are set out in ESA's application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its defence, Iceland emphasised that it has all intentions to fulfil its obligations, and indicated that the implementation of the Directive would be accomplished shortly after March 2016.

12 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

13 Article 3 EEA imposes upon the 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-21/15 *ESA* v *Iceland*, judgment of 1 February 2016, not yet reported, paragraph 14 and case law cited).

14 Under Article 7 EEA, the 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 in Iceland also. The EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA* v *Iceland,* cited above, paragraph 15 and case law cited).

15 Decision 186/2014 entered into force on 26 September 2014. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

16 The question whether an 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 17 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.

17 Since Iceland did not implement the Directive within the time prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to inform ESA of the measures implementing the Directive.

18 It must therefore be held that Iceland has failed to fulfil its obligations under the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) 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, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Iceland must be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) 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
2 August 2016.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President

Case

E-35/15

EFTA Surveillance Authority

v

The Kingdom of Norway

(Failure by an EFTA State to fulfil its obligations – Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues)

Table of Contents

Summary of the Judgment

1 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

2 Decision 77/2001 entered into force on 1 February 2002 and the time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on 28 December 2002.

3 Article 5(1) of the Directive imposes on EEA States a duty to develop and implement an appropriate waste reception and handling plan for each port covered by the Directive. Therefore, it cannot be satisfied merely by the creation of an appropriate regulatory framework for attaining that objective. Norway acknowledged that it has not developed a waste reception and handling plan for each port on its territory, before the time limit expired.

4 Article 5(3) of the Directive imposes on EEA States a duty to evaluate and approve waste reception and handling plans, monitor their implementation and ensure their re-approval at least every three years and after significant changes in the operation of the port.

5 Only with the adoption of the Amending Regulation did Norway comply with Article 5(3) of the Directive. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion. Since the Amending Regulation came into force on 3 October 2013, and the period laid down in the reasoned opinion expired on 10 September 2013, Norway has failed to fulfil its obligations under Article 5(3) of the Directive. In a letter to ESA dated 23 October 2015 Norway acknowledged that a waste reception and handling plan had been approved only for 969 of the 4443 ports in Norway identified.

6 Article 4(1) of the Directive obliges EEA States to ensure the availability of adequate port reception facilities; however, Norway acknowledged in its defence that, as of 10 September 2013, not all the ports it had identified on its territory had adequate port reception.

7 Norway has failed to fulfil its obligations under the Directive by i) failing to develop and implement an appropriate waste reception and handling plan for each port in Norway, as required by Article 5(1) of the Directive; ii) failing to evaluate and approve the waste reception and handling plans for all ports in Norway, monitor their implementation and ensure their re-approval at least every three years, as required by Article 5(3) of the Directive; and iii) failing to ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the port without causing undue delay to ships, as required by Article 4(1) of the Directive.

Judgment of the Court

2 August 2016

(Failure by an EFTA State to fulfil its obligations – Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues)

In Case E-35/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Markus Schneider and Øyvind Bø, members of its Department of Legal & Executive Affairs, acting as Agents,

— applicant,

v

The Kingdom of Norway, represented by Ingunn Skille Jansen, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents,

— defendant,

APPLICATION for a declaration that the Kingdom of Norway has failed to fulfil its obligations under the Act referred at point 56i of Annex XIII to the Agreement on the European Economic Area (Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues) by failing to (i) develop and implement an appropriate waste reception and handling plan for each port as required by Article 5(1) of Directive 2000/59/EC; (ii) evaluate and approve the waste reception and handling plans, monitor their implementation and ensure their re-approval at least every three years as required by Article 5(3) of Directive 2000/59/EC; and

(iii) ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the ports without causing undue delay to ships as required by Article 4(1) of Directive 2000/59/EC.

The Court

composed of: Carl Baudenbacher, President (Judge-Rapporteur), Per Christiansen 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 22 December 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 that the Kingdom of Norway has failed to fulfil its obligations under the Act referred at point 56i of Annex XIII to the Agreement on the European Economic Area ("the EEA Agreement or "EEA"), that is Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on

port reception facilities for ship-generated waste and cargo residues (OJ 2000 L 332, p. 81 and EEA Supplement 2002 No 12, p. 224) ("the Directive") by failing to (i) develop and implement an appropriate waste reception and handling plan for each port as required by Article 5(1) of the Directive; (ii) evaluate and approve the waste reception and handling plans, monitor their implementation and ensure their re-approval at least every three years as required by Article 5(3) of the Directive; and (iii) ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the ports without causing undue delay to ships as required by Article 4(1) of the Directive.

II LAW

EEA 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 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.

4 EEA Joint Committee Decision No 77/2001 of 19 June 2001 (OJ 2001 L 238, p. 27 and EEA Supplement 2001 No 44, p. 22) ("Decision 77/2001") amended Annex XIII (Transport) to the EEA Agreement by adding the Directive to point 56i of the Annex.

5 Norway indicated constitutional requirements for the purposes of Article 103 EEA. In December 2001, Norway notified that the constitutional requirements had been fulfilled. Consequently, the Directive entered into force on 1 February 2002. According to Article 16(1) of the Directive, the time limit for EEA States to comply with the Directive expired on 28 December 2002.

6 Article 2 of the Directive reads:

For the purpose of this Directive:

...

(e) "port reception facilities" shall mean any facility, which is fixed, floating or mobile and capable of receiving ship-generated waste or cargo residues;

...

(h) "port" shall mean a place or a geographical area made up of such improvement works and equipment as to permit, principally, the reception of ships, including fishing vessels and recreational craft.

...

7 Article 3 of the Directive reads:

This Directive shall apply to:

(a) all ships, including fishing vessels and recreational craft, irrespective of their flag, calling at, or operating within, a port of a Member State, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service; and

(b) all ports of the Member States normally visited by ships falling under the scope of point (a).

Member States shall take measures to ensure that ships which are excluded from the scope of this Directive under point (a) of the preceding paragraph deliver their ship-generated waste and cargo residues in a manner consistent, in so far as is reasonable and practicable, with this Directive.

8 Article 4 of the Directive reads:

1. Member States shall ensure the availability of port reception facilities adequate to meet the needs of the ships normally using the port without causing undue delay to ships.

2. To achieve adequacy, the reception facilities shall be capable of receiving the types and quantities of ship-generated waste and cargo residues from ships normally using that port, taking into account the operational needs of the users of the port, the size and the geographical location of the port, the type of ships calling at that port and the exemptions provided for under Article 9.

3. Member States shall establish procedures, in accordance with those agreed by the International Maritime Organization (IMO), for reporting to the port State alleged inadequacies of port reception facilities.

9 Article 5 of the Directive reads:

> *1. An appropriate waste reception and handling plan shall be developed and implemented for each port following consultations with the relevant parties, in particular with port users or their representatives, having regard to the requirements of Articles 4, 6, 7, 10 and 12. Detailed requirements for the development of such plans are set out in Annex I.*
>
> *2. The waste reception and handling plans referred to in paragraph 1 may, where required for reasons of efficiency, be developed in a regional context with the appropriate involvement of each port, provided that the need for, and availability of, reception facilities are specified for each individual port.*
>
> *3. Member States shall evaluate and approve the waste reception and handling plan, monitor its implementation and ensure its re-approval at least every three years and after significant changes in the operation of the port.*

NATIONAL LAW

10 The Directive was implemented into Norwegian law by Regulation No 1243 of 12 October 2003 on reception facilities for ship-generated waste and cargo waste. That regulation was repealed and replaced by Regulation No 931 of 1 June 2004 relating to pollution control ("the Regulation"). Chapter 20 of the Regulation concerns port reception facilities for ship-generated waste and cargo residues. That chapter has later been amended, inter alia by Regulation No 1210 of 3 October 2013 ("the Amending Regulation").

11 Section 20-5 of the Regulation imposes an obligation on the operator or the owner of a port to ensure that there are sufficient port reception facilities to satisfy a normal need to deliver waste and cargo residues in the port without causing undue delay to the ships.

12 Section 20-6 of the Regulation provides, in particular, that the operator or owner of a port must develop a waste plan.

13 Following the Amending Regulation, Section 20-6, fourth paragraph, of the Regulation provides that the waste plan must be submitted to the County Governor for evaluation and approval, and that it must be approved every three years, and/or after significant changes in the operation of the port.

14 Following the Amending Regulation, Section 20-6, last paragraph, of the Regulation provides that municipalities shall draw up an overview of all ports within their respective areas. Such overview shall be submitted to the competent County Governor by 1 January 2014.

15 Pursuant to Section 20-12 of the Regulation, County Governors shall monitor whether the operators of the ports comply with their obligations under Chapter 20 of the Regulation.

III FACTS AND PRE-LITIGATION PROCEDURE

16 At ESA's request, the European Maritime Safety Agency ("EMSA") carried out an inspection in Norway from 7 to 11 June 2010 to determine to what extent Norway's port reception facilities system complied with the requirements of the Directive. The infrastructure was inspected, as well as legislative and administrative provisions adopted. On 28 September 2010, EMSA issued a report presenting the results of the inspection and setting out its conclusions.

17 On 13 March 2013, following extensive correspondence and meetings with Norwegian officials, ESA issued a letter of formal notice, concluding that Norway had failed to fulfil some of its obligations under the Directive, in particular those arising from Article 4(1), Article 5(1) and Article 5(3).

18 By letter dated 14 May 2013, Norway replied to the letter of formal notice.

19 On 10 July 2013, ESA issued a reasoned opinion, maintaining the conclusions set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA requested Norway to take the necessary measures to comply with the reasoned opinion within two months following the notification, that is no later than 10 September 2013.

20 By letter dated 11 September 2013, Norway replied to the reasoned opinion.

21 Between 2013 and 2015, several letters concerning the case were exchanged between ESA and Norway, and the case was discussed in three different meetings. Unconvinced by Norway's arguments, and due to the late progress of the case, ESA decided on 17 November 2015 to bring the present action.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

22 On 22 December 2015, ESA lodged its application at the Court Registry.

23 The applicant, ESA, requested the Court to:

1. *Declare that the Kingdom of Norway has failed to fulfil its obligation arising under the Act referred to at point 56i of Annex XIII to the Agreement on the European Economic Area (Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues) within the time-limit prescribed by*

a. failing to develop and implement an appropriate waste reception and handling plan for each port in Norway as required by Article 5(1) of Directive 2000/59/EC;

b. failing to evaluate and approve the waste reception and handling plans for all ports in Norway, monitor their implementation and ensure their re-approval at least every three years as required by Article 5(3) of Directive 2000/59/EC; and

c. failing to ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the port without causing undue delay to ships as required by Article 4(1) of Directive 2000/59/EC.

2. Order the defendant to bear the costs of these proceedings.

24 On 7 March 2016, Norway's statement of defence was registered at the Court.

25 Although Norway pointed out that its reasoning in relation to Article 4(1) of the Directive differed to some extent from ESA's, Norway acknowledged that it had failed to fully comply with its obligations under Article 4(1), Article 5(1) and Article 5(3) of the Directive within the time-limit prescribed in the reasoned opinion. On these grounds, Norway requested the Court to declare the application founded.

26 By letter dated 18 April 2016, ESA waived its right to submit a reply.

27 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 PLEAS AND ARGUMENTS SUBMITTED TO THE COURT

28 ESA contends that Norway failed to fully comply with its obligations under Article 4(1), Article 5(1) and Article 5(3) of the Directive within the time-limit prescribed in the reasoned opinion, that is by 10 September 2013.

FIRST PLEA – FAILURE TO COMPLY WITH ARTICLE 5(1) OF THE DIRECTIVE

29 First, ESA submits that only with the adoption of the Amending Regulation did Norway implement Article 5(1) of the Directive. Since that regulation came into force after the period laid down in the reasoned opinion expired, implementation of Article 5(1) of the Directive was late.

30 Second, ESA argues that, even had the Amending Regulation come into force before the period laid down in the reasoned opinion expired, implementation of Article 5(1) of the Directive would nonetheless have been incomplete. The duty on EEA States to draw up waste reception and handling plans is an obligation as to the result to be achieved, and it cannot therefore be satisfied by the mere creation of the appropriate regulatory framework. Actual implementation is required, and in the present case that has not been achieved, since not all Norwegian ports have submitted a waste reception and handling plan.

31 Norway does not dispute ESA's arguments.

SECOND PLEA – FAILURE TO COMPLY WITH ARTICLE 5(3) OF THE DIRECTIVE

32 First, ESA contends that originally, the Regulation merely obliged port operators and owners to submit a waste reception and handling plan. The obligation on County Governors to evaluate and approve such plans was introduced by the Amending Regulation. Since that

regulation came into force after the expiry of the period laid down in the reasoned opinion, implementation of Article 5(3) of the Directive was late.

33 Second, ESA argues that the obligation to evaluate and approve waste reception and handling plans is an obligation as to the result to be achieved, which cannot be satisfied merely by the creation of the appropriate regulatory framework. Since a waste reception and handling plan had not been approved for all Norwegian ports within the time limit prescribed in the reasoned opinion, Norway has failed to fulfil its obligations under Article 5(3) of the Directive.

34 Norway does not dispute ESA's arguments.

THIRD PLEA - FAILURE TO COMPLY WITH ARTICLE 4(1) OF THE DIRECTIVE

35 First, ESA submits that only with the adoption of the Amending Regulation did County Governors have an obligation to ensure the availability of port reception facilities. Since that regulation came into force after the expiry of the period laid down in the reasoned opinion, implementation of Article 4(1) of the Directive was late.

36 Second, ESA contends that the obligation to ensure the availability of port reception facilities laid down in Article 4(1) of the Directive is an obligation as to the result to be achieved. In the present case, as of 16 October 2015 not all coastal municipalities have submitted to the competent County Governor an overview of the ports in their area. Without an overview of all ports covered by the Directive, Norway cannot determine whether all the relevant ports have an adequate port reception facility.

37 Norway claims that the obligation on port owners or operators to have an adequate reception facility has always been included in the Regulation. The Amending Regulation merely facilitated the monitoring of ports.

38 Norway acknowledges that not all municipalities have submitted an overview of the ports in their area, and it has no exact knowledge of the number of ports to which the Directive applies according to its Article 3(b). However, even without such knowledge, Norway may fulfil its obligations under Article 4(1) of the Directive, since according to recital 10 in the preamble to the Directive EEA, States may comply with Article 4(1) either by providing fixed reception installations or by appointing service providers bringing to the ports mobile units for the reception of waste when needed. Nevertheless, Norway acknowledges that it is difficult to assert that as of 10 September 2013, a port reception facility was available in all Norwegian ports.

VI FINDINGS OF THE COURT

39 Article 3 EEA imposes upon the 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-21/15 *ESA* v *Iceland*, judgment of 1 February 2016, not yet reported, paragraph 14 and case law cited).

40 Decision 77/2001 entered into force on 1 February 2002. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on 28 December 2002.

FIRST PLEA – FAILURE TO COMPLY WITH ARTICLE 5(1) OF THE DIRECTIVE

41 Article 5(1) of the Directive imposes on EEA States a duty to develop and implement an appropriate waste reception and handling plan for each port covered by the Directive. Such duty is an obligation as to the result to be achieved. Therefore, it cannot be satisfied merely by the creation of an appropriate regulatory framework for attaining

that objective (compare the judgment in *Commission* v *Spain*, C-480/07, EU:C:2008:715, paragraph 22).

42 Norway acknowledged in its defence that it has not developed a waste reception and handling plan for each port on its territory, before the time limit set in the reasoned opinion expired. In particular, in a letter dated 23 October 2015, that is, more than two years after the deadline expired, Norway stated that of the 4443 ports it had until then identified on its territory, only 1514 had submitted a waste reception and handling plan.

43 Therefore, ESA's first plea is well-founded.

SECOND PLEA – FAILURE TO COMPLY WITH ARTICLE 5(3) OF THE DIRECTIVE

44 Article 5(3) of the Directive imposes on EEA States a duty to evaluate and approve waste reception and handling plans, monitor their implementation and ensure their re-approval at least every three years and after significant changes in the operation of the port.

45 Prior to the Amending Regulation, the Regulation merely provided in Section 20-6 that waste reception and handling plans had to be sent to the County Governor and comply with the provisions of Chapter 20 of the Regulation. Section 20-6 of the Regulation now provides that the waste reception and handling plan must be submitted to the County Governor for evaluation and approval, and that it must be approved every three years, and/or after significant changes in the operation of the port.

46 Therefore, only with the adoption of the Amending Regulation did Norway comply with Article 5(3) of the Directive. It is settled case law that the question whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see Case E-21/15 *ESA* v *Iceland*, not yet reported, paragraph

17. Since the Amending Regulation came into force on 3 October 2013, and the period laid down in the reasoned opinion expired on 10 September 2013, Norway has failed to fulfil its obligations under Article 5(3) of the Directive.

47 Moreover, the duty to evaluate and approve waste reception and handling plans and monitor their implementation pursuant to Article 5(3) of the Directive is, like the duty to implement and develop such plans provided for by Article 5(1), an obligation as to the result to be achieved. In a letter to ESA dated 23 October 2015, Norway acknowledged that a waste reception and handling plan had been approved only for 969 of the 4443 ports identified.

48 Therefore, ESA's second plea is well-founded.

THIRD PLEA – FAILURE TO COMPLY WITH ARTICLE 4(1) OF THE DIRECTIVE

49 Article 4(1) of the Directive obliges EEA States to ensure the availability of adequate port reception facilities.

50 Prior to the Amending Regulation, the Regulation provided in Section 20-5 that the operator or owner of a port must ensure that there are sufficient port reception facilities to satisfy a normal need to deliver waste and cargo residues. As submitted by Norway, the Amending Regulation merely made it easier for County Governors to implement such obligation by requiring municipalities to submit an overview of all ports within their area to the competent County Governor by 1 January 2014.

51 However, as submitted by ESA, Article 4(1) of the Directive imposes on EEA States an obligation as to the result to be achieved, that is, an obligation to ensure that adequate port reception facilities are actually available in all ports on the national territory. In that regard, the Court notes that it is irrelevant whether the port reception facility within the meaning of Article 4(1) is a fixed

installation or, as mentioned in recital 10 in the preamble to the Directive, a mobile unit. What matters is that an adequate port reception facility, whether fixed or mobile, is available in each port on the national territory. Norway acknowledged in its defence that as of 10 September 2013, not all the ports it had identified on its territory had adequate port reception facilities. Therefore, the Court finds that Norway has failed to fulfil its obligations under Article 4(1) of the Directive.

52 It must therefore be held that Norway has failed to fulfil its obligations under the Directive by i) failing to develop and implement an appropriate waste reception and handling plan for each port in Norway, as required by Article 5(1) of the Directive; ii) failing to evaluate and approve the waste reception and handling plans for all ports in Norway, monitor their implementation and ensure their re-approval at least every three years, as required by Article 5(3) of the Directive; and iii) failing to ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the port without causing undue delay to ships, as required by Article 4(1) of the Directive.

VII COSTS

53 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 Norway be ordered to pay the costs, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Norway must be ordered to pay the costs.

On those grounds,

The Court

hereby:

1. **Declares that the Kingdom of Norway has failed to fulfil its obligation arising under the Act referred to at point 56i of Annex XIII to the Agreement on the European Economic Area (Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues) within the time-limit prescribed by**

    a. **failing to develop and implement an appropriate waste reception and handling plan for each port in Norway as required by Article 5(1) of Directive 2000/59/EC;**

    b. **failing to evaluate and approve the waste reception and handling plans for all ports in Norway, monitor their implementation and ensure their re-approval at least every three years as required by Article 5(3) of Directive 2000/59/EC; and**

    c. **failing to ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the port without causing undue delay to ships as required by Article 4(1) of Directive 2000/59/EC.**

2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

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

Delivered in open court in Luxembourg on
***2 August 2016**.*

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President

Joined Cases

E-26/15 and E-27/15

Criminal proceedings against B

=and=

B

=v=

Finanzmarktaufsicht

(Freedom to provide services – Article 36 EEA – Directive 2005/60/EC – Proportionality)

Verbundene Rechtssachen

E-26/15 und E-27/15

Strafsache gegen B

sowie

B

gegen

Finanzmarktaufsicht

(Freier Dienstleistungsverkehr – Artikel 36 des EWR-Abkommens – Richtlinie 2005/60/EG – Verhältnismässigkeit)

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Inhaltsverzeichnis

Summary of the Judgment

1 The supervision of trust and company service providers under Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing ("the Directive") is governed by Articles 36 and 37 thereof, while cooperation between the competent authorities of the EEA States is addressed in Article 38. These provisions, in particular the requirement of licencing or registration in Article 36, demonstrate that, with regard to the supervision of trust and company service providers operating across borders, the references to EEA States and their competent authorities in the Directive must, in principle be understood, as referring to the home EEA State of the service provider, which is the EEA State of establishment, and its competent authorities.

2 However, the Directive only provides for a minimum level of harmonisation and, in particular, Article 5 thereof allows EEA States to adopt stricter provisions, where those provisions seek to strengthen the combating of money laundering or terrorist financing.

3 The Directive must be interpreted as not precluding the host EEA State from making a trust and company service provider operating in its territory under the freedom to provide services subject to due diligence requirements laid down in its national legislation.

4 However, in so far as such legislation gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services and is liable to be additional to the controls already conducted in the home EEA State of the trust and

Zusammenfassung des Urteils

1 Die Überwachung von Dienstleistern für Trusts und Gesellschaften im Rahmen der Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung ("Richtlinie") ist in deren Artikeln 36 und 37 geregelt, während in Artikel 38 auf die Zusammenarbeit zwischen den zuständigen Behörden der EWR-Staaten eingegangen wird. Diese Bestimmungen, insbesondere die Anforderung der Zulassung oder Eintragung laut Artikel 36, zeigen, dass die Verweise in der Richtlinie auf EWR-Staaten und ihre zuständigen Behörden hinsichtlich der Überwachung von grenzüberschreitend tätigen Dienstleistern für Trusts und Gesellschaften im Grunde so zu verstehen sind, dass sie sich auf den EWR-Herkunftsstaat des Dienstleisters, also den EWR-Staat des rechtlichen Sitzes, und seine zuständigen Behörden beziehen.

2 Die Richtlinie sieht jedoch nur ein Mindestmass an Harmonisierung vor, und insbesondere ihr Artikel 5 erlaubt den EWR-Staaten den Erlass strengerer Vorschriften, sofern dadurch die Bekämpfung von Geldwäsche und Terrorismusfinanzierung gefördert wird.

3 Die Richtlinie ist so auszulegen, dass sie es einem Aufnahme-EWR-Staat nicht untersagt, einen Dienstleister für Trusts und Gesellschaften, der im Rahmen des freien Dienstleistungsverkehrs auf seinem Hoheitsgebiet tätig ist, den in seinen nationalen Rechtsvorschriften verankerten Sorgfaltspflichten zu unterwerfen.

4 Sofern solche Rechtsvorschriften jedoch im Zusammenhang mit Tätigkeiten im Rahmen der Vorschriften über den freien Dienstleistungsverkehr Schwierigkeiten und Zusatzkosten verursachen und zu den bereits im EWR-Herkunftsstaat des

company service provider, thus dissuading the latter from carrying out such activities, it constitutes a restriction on the freedom to provide services. Article 36 EEA must be interpreted as not precluding such legislation provided that it is applied in a non-discriminatory manner, justified by the objective of combating money laundering and terrorist financing, suitable for securing the attainment of that aim and does not go beyond what is necessary in order to attain it. In particular, for national supervisory measures of the host EEA State to be considered proportionate, there should be no general presumption of fraud, leading to full, systematic checks of all those who are established in other EEA States and provide services on a temporary basis in the host EEA State.

5 Furthermore, the host EEA State must, when requesting information, such as documents, located in the EEA State of establishment, grant the service provider a reasonable period of time to provide that information, e.g. by handing over copies of documents. In this regard, the appropriate length of the notice will depend on the volume of documents requested and the medium on which they are stored.

6 The findings of the Court do not differ where the company to which administrative services are provided is not incorporated in an EEA State.

Dienstleisters für Trusts und Gesellschaften durchgeführten Kontrollen hinzukommen, wodurch sie diesen von der Ausführung derartiger Tätigkeiten abbringen, stellen sie eine Beschränkung des freien Dienstleistungsverkehrs dar. Artikel 36 des EWR-Abkommens ist so auszulegen, dass er solchen Rechtsvorschriften nicht entgegensteht, wenn sie diskriminierungsfrei angewendet werden, durch das Ziel der Bekämpfung von Geldwäsche und Terrorismusfinanzierung gerechtfertigt sind und zur Erreichung dieses Ziels geeignet sind, ohne über das hinauszugehen, was dazu erforderlich ist. Insbesondere sollte, damit nationale Überwachungsmassnahmen des Aufnahme-EWR-Staats als verhältnismässig angesehen werden, nicht von einem allgemeinen Betrugsverdacht ausgegangen werden, der zu vollständigen, systematischen Kontrollen aller Dienstleister mit Sitz in anderen EWR-Staaten, die im Aufnahme-EWR-Staat vorübergehend Dienstleistungen erbringen, führt.

5 Überdies muss der Aufnahme-EWR-Staat in Fällen, in denen er Informationen verlangt, wie Dokumente, die sich im EWR-Staat des rechtlichen Sitzes befinden, dem Dienstleister eine angemessene Frist zur Bereitstellung dieser Informationen, z. B. durch die Vorlage von Kopien der Dokumente, gewähren. Diesbezüglich ist die angemessene Frist für die Bereitstellung abhängig von der Menge der geforderten Dokumente und dem Medium, auf dem diese gespeichert sind.

6 Die Entscheidung des Gerichtshofs fällt nicht anders aus, wenn die verwaltete Gesellschaft nicht in einem EWR-Staat inkorporiert ist.

Judgment of the Court

3 August 2016[1]

(Freedom to provide services – Article 36 EEA – Directive 2005/60/EC – Proportionality)

In Joined Cases E-26/15 and E-27/15,

REQUESTS 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 Princely Court of Appeal of the Principality of Liechtenstein (*Fürstliches Obergericht*) and the Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*), in cases pending before them, respectively, in

Criminal proceedings against B

=and=

B

=V=

Finanzmarktaufsicht

concerning the interpretation of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,

1 Language of the request: German. Translations of national provisions are unofficial and based on those contained in the documents of the case.

Urteil des Gerichtshofs

3. August 2016[1]

(Freier Dienstleistungsverkehr – Artikel 36 des EWR-Abkommens – Richtlinie 2005/60/EG – Verhältnismässigkeit)

In den verbundenen Rechtssachen E-26/15 und E-27/15,

ANTRÄGE des Fürstlichen Obergerichts und der Beschwerdekommission der Finanzmarktaufsicht an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs in den jeweiligen vor ihnen anhängigen Rechtssachen

Strafsache gegen B

sowie

B

gegen

Finanzmarktaufsicht

betreffend die Auslegung der Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung, erlässt

1 Sprache des Antrags: Deutsch. [Betrifft nur die englische Sprachfassung.]

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:

– the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, and Christoph Büchel, attorney at law, acting as Agents;

– the Government of the Kingdom of Spain, represented by Alejandro Rubio González, Abogado del Estado, member of the Spanish Legal Service before the Court of Justice of the European Union, acting as Agent;

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Clémence Perrin and Lillian Biørnstad, members of its Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Ion Rogalski 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 B ("the defendant"), appearing in person; the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch and Christoph Büchel; ESA, represented by Carsten Zatschler and Lillian Biørnstad; and the Commission, represented by Ion Rogalski, at the hearing on 10 May 2016,

gives the following

Der Gerichtshof

bestehend aus Carl Baudenbacher, Präsident, Per Christiansen und Páll Hreinsson (Berichterstatter), Richter,

Kanzler: Gunnar Selvik,

unter Berücksichtigung der schriftlichen Erklärungen

– der Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch, Leiterin der Stabstelle EWR, und Christoph Büchel, Rechtsanwalt, als Bevollmächtigte;

– der Regierung des Königreichs Spanien, vertreten durch Alejandro Rubio González, Abogado del Estado, Mitglied des spanischen Juristischen Diensts vor dem Gerichtshof der Europäischen Union, als Bevollmächtigter;

– der EFTA-Überwachungsbehörde, vertreten durch Carsten Zatschler, Clémence Perrin und Lillian Biørnstad, Mitarbeiter der Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte, und

– der Europäischen Kommission (im Folgenden: Kommission), vertreten durch Ion Rogalski und Karl-Philipp Wojcik, Mitarbeiter des Juristischen Diensts der Kommission, als Bevollmächtigte,

unter Berücksichtigung des Sitzungsberichts,

nach Anhörung der mündlichen Ausführungen von B (im Folgenden: Beschuldigter), persönlich erschienen; der Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch und Christoph Büchel; der EFTA-Überwachungsbehörde, vertreten durch Carsten Zatschler und Lillian Biørnstad, und der Kommission, vertreten durch Ion Rogalski, in der Sitzung vom 10. Mai 2016,

folgendes

Judgment

I LEGAL BACKGROUND

EEA LAW

1 Article 31(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") provides 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 36(1) EEA provides as follows:

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

3 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial

Urteil

I RECHTLICHER HINTERGRUND

EWR-RECHT

1 Artikel 31 Absatz 1 des Abkommens über den Europäischen Wirtschaftsraum (im Folgenden: EWR-Abkommen) lautet:

Im Rahmen dieses Abkommens unterliegt die freie Niederlassung von Staatsangehörigen eines EG-Mitgliedstaats oder eines EFTA-Staates im Hoheitsgebiet eines dieser Staaten keinen Beschränkungen. Das gilt gleichermaßen für die Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften durch Angehörige eines EG-Mitgliedstaats oder eines EFTA-Staates, die im Hoheitsgebiet eines dieser Staaten ansässig sind.

Vorbehaltlich des Kapitels 4 umfasst die Niederlassungsfreiheit die Aufnahme und Ausübung selbständiger Erwerbstätigkeiten sowie die Gründung und Leitung von Unternehmen, insbesondere von Gesellschaften im Sinne des Artikels 34 Absatz 2, nach den Bestimmungen des Aufnahmestaats für seine eigenen Angehörigen.

2 Artikel 36 Absatz 1 des EWR-Abkommens lautet:

Im Rahmen dieses Abkommens unterliegt der freie Dienstleistungsverkehr im Gebiet der Vertragsparteien für Angehörige der EG-Mitgliedstaaten und der EFTA-Staaten, die in einem anderen EG-Mitgliedstaat beziehungsweise in einem anderen EFTA-Staat als demjenigen des Leistungsempfängers ansässig sind, keinen Beschränkungen.

3 Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des

system for the purpose of money laundering and terrorist financing ("the Directive") (OJ 2005 L 309, p. 15) was incorporated into the EEA Agreement at point 23b of Annex IX to the Agreement by EEA Joint Committee Decision No 87/2006 of 7 July 2006 (OJ 2006 L 289, p. 23, and EEA Supplement 2006 No 52, p. 19). The decision entered into force on 1 April 2007.

4 Recital 1 in the preamble to the Directive reads as follows:

Massive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market, and terrorism shakes the very foundations of our society. In addition to the criminal law approach, a preventive effort via the financial system can produce results.

5 Recital 3 in the preamble to the Directive reads as follows:

In order to facilitate their criminal activities, money launderers and terrorist financers could try to take advantage of the freedom of capital movements and the freedom to supply financial services which the integrated financial area entails, if certain coordinating measures are not adopted at Community level.

6 Recital 5 in the preamble to the Directive reads as follows:

Money laundering and terrorist financing are frequently carried out in an international context. ...

7 Recital 15 in the preamble to the Directive reads as follows:

As the tightening of controls in the financial sector has prompted money launderers and terrorist financers to seek alternative methods for concealing the origin of the proceeds of crime and as such channels can be used for terrorist financing, the anti-money laundering and

Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung (im Folgenden: Richtlinie) (ABl. 2005 L 309, S. 15) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 87/2006 vom 7. Juli 2006 unter Nummer 23b des Anhangs IX in das EWR-Abkommen aufgenommen (ABl. 2006 L 289, S. 23, und EWR-Beilage 2006, Nr. 52, S. 19). Der Beschluss trat am 1. April 2007 in Kraft.

4 Erwägungsgrund 1 der Präambel der Richtlinie lautet:

Massive Schwarzgeldströme können die Stabilität und das Ansehen des Finanzsektors schädigen und sind eine Bedrohung für den Binnenmarkt; der Terrorismus greift die Grundfesten unserer Gesellschaft an. Neben strafrechtlichen Maßnahmen können Präventivmaßnahmen über das Finanzsystem Ergebnisse bringen.

5 Erwägungsgrund 3 der Präambel der Richtlinie lautet:

Ohne eine Koordinierung auf Gemeinschaftsebene könnten Geldwäscher und Geldgeber des Terrorismus versuchen, Vorteile aus der Freiheit des Kapitalverkehrs und der damit verbundenen finanziellen Dienstleistungen, die ein einheitlicher Finanzraum mit sich bringt, zu ziehen, um ihren kriminellen Tätigkeiten leichter nachgehen zu können.

6 Erwägungsgrund 5 der Präambel der Richtlinie lautet:

Geldwäsche und Terrorismusfinanzierung erfolgen häufig grenzübergreifend. ...

7 Erwägungsgrund 15 der Präambel der Richtlinie lautet:

Da Geldwäscher und Geldgeber des Terrorismus wegen der verschärften Kontrollen im Finanzsektor nach alternativen Möglichkeiten zur Verschleierung des Ursprungs von aus Straftaten stammenden Erlösen suchen und da derartige Kanäle zur Terrorismusfinanzierung genutzt werden können, sollten die in Bezug auf die Bekämpfung der Geldwäsche und der Terrorismusfinanzierung bestehenden Pflichten auf

anti-terrorist financing obligations should cover life insurance intermediaries and trust and company service providers.

8 Recital 17 in the preamble to the Directive reads as follows:

Acting as a company director or secretary does not of itself make someone a trust and company service provider. For that reason, the definition covers only those persons that act as a company director or secretary for a third party and by way of business.

9 Recital 28 in the preamble to the Directive reads as follows:

In the case of agency or outsourcing relationships on a contractual basis between institutions or persons covered by this Directive and external natural or legal persons not covered hereby, any anti-money laundering and anti-terrorist financing obligations for those agents or outsourcing service providers as part of the institutions or persons covered by this Directive, may only arise from contract and not from this Directive. The responsibility for complying with this Directive should remain with the institution or person covered hereby.

10 Recital 39 in the preamble to the Directive reads as follows:

When registering or licensing a currency exchange office, a trust and company service provider or a casino nationally, competent authorities should ensure that the persons who effectively direct or will direct the business of such entities and the beneficial owners of such entities are fit and proper persons. The criteria for determining whether or not a person is fit and proper should be established in conformity with national law.

Lebensversicherungsvermittler sowie auf Dienstleister für Trusts und Gesellschaften angewandt werden.

8 Erwägungsgrund 17 der Präambel der Richtlinie lautet:

Die Ausübung der Funktion eines Leiters oder eines Geschäftsführers einer Gesellschaft macht die betreffende Person nicht automatisch zum Dienstleister für Trusts und Gesellschaften. Daher fallen unter diese Begriffsbestimmung lediglich Personen, die geschäftsmäßig für einen Dritten die Funktion eines Leiters oder Geschäftsführers einer Gesellschaft ausüben.

9 Erwägungsgrund 28 der Präambel der Richtlinie lautet:

Im Falle von Vertretungs- oder „Outsourcing"-Verhältnissen auf Vertragsbasis zwischen Instituten oder Personen, die dieser Richtlinie unterliegen, und externen natürlichen oder juristischen Personen, die dieser Richtlinie nicht unterliegen, erwachsen diesen Vertretern oder „Outsourcing"-Dienstleistern als Teil der dieser Richtlinie unterliegenden Institute oder Personen Pflichten zur Bekämpfung der Geldwäsche und der Terrorismusfinanzierung nur aufgrund des Vertrags und nicht aufgrund dieser Richtlinie. Die Verantwortung für die Einhaltung dieser Richtlinie sollte weiterhin bei dem dieser Richtlinie unterliegenden Institut oder der dieser Richtlinie unterliegenden Person liegen.

10 Erwägungsgrund 39 der Präambel der Richtlinie lautet:

Bei der Eintragung oder Zulassung einer Wechselstube, eines Dienstleisters für Trusts und Gesellschaften oder eines Kasinos auf nationaler Ebene sollten die zuständigen Behörden sicherstellen, dass die Personen, die die Geschäfte solcher Einrichtungen faktisch führen oder führen werden, und die wirtschaftlichen Eigentümer solcher Einrichtungen über die notwendige Zuverlässigkeit und fachliche Eignung verfügen. Die Kriterien, nach denen bestimmt wird, ob eine Person über die notwendige Zuverlässigkeit und fachliche Eignung verfügt, sollten gemäß den einzelstaatlichen Rechtsvorschriften

As a minimum, such criteria should reflect the need to protect such entities from being misused by their managers or beneficial owners for criminal purposes.

11 Article 1(1) of the Directive reads as follows:

Member States shall ensure that money laundering and terrorist financing are prohibited.

12 Article 2 of the Directive reads as follows:

1. This Directive shall apply to:

...

(3) the following legal or natural persons acting in the exercise of their professional activities:

(a) auditors, external accountants and tax advisors;

(b) notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the:

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets;

(iii) opening or management of bank, savings or securities accounts;

festgelegt werden. Diese Kriterien sollten zumindest die Notwendigkeit widerspiegeln, solche Einrichtungen vor Missbrauch zu kriminellen Zwecken durch ihre Leiter oder wirtschaftlichen Eigentümer zu schützen.

11 Artikel 1 Absatz 1 der Richtlinie lautet:

Die Mitgliedstaaten sorgen dafür, dass Geldwäsche und Terrorismusfinanzierung untersagt werden.

12 Artikel 2 der Richtlinie lautet:

(1) Diese Richtlinie gilt für:

...

3. die folgenden juristischen oder natürlichen Personen bei der Ausübung ihrer beruflichen Tätigkeit:

a) Abschlussprüfer, externe Buchprüfer und Steuerberater;

b) Notare und andere selbstständige Angehörige von Rechtsberufen, wenn sie im Namen und auf Rechnung ihres Klienten Finanz- oder Immobilientransaktionen erledigen oder für ihren Klienten an der Planung oder Durchführung von Transaktionen mitwirken, die Folgendes betreffen:

i) Kauf und Verkauf von Immobilien oder Gewerbebetrieben,

ii) Verwaltung von Geld, Wertpapieren oder sonstigen Vermögenswerten ihres Klienten,

iii) Eröffnung oder Verwaltung von Bank-, Spar- oder Wertpapierkonten,

(iv) organisation of contributions necessary for the creation, operation or management of companies;

(v) creation, operation or management of trusts, companies or similar structures;

(c) trust or company service providers not already covered under points (a) or (b);

...

13 Article 3 of the Directive reads as follows:

For the purposes of this Directive the following definitions shall apply:

...

(7) 'trust and company service providers' means any natural or legal person which by way of business provides any of the following services to third parties:

(a) forming companies or other legal persons;

(b) acting as or arranging for another person to act as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;

(c) providing a registered office, business address, correspondence or administrative address and other related services for a company, a partnership or any other legal person or arrangement;

iv) Beschaffung der zur Gründung, zum Betrieb oder zur Verwaltung von Gesellschaften erforderlichen Mittel,

v) Gründung, Betrieb oder Verwaltung von Treuhandgesellschaften, Gesellschaften oder ähnlichen Strukturen;

c) Dienstleister für Trusts und Gesellschaften, die nicht unter die Buchstaben a oder b fallen;

...

13 Artikel 3 der Richtlinie lautet:

Im Sinne dieser Richtlinie bedeutet:

...

7. „Dienstleister für Trusts und Gesellschaften" jede natürliche oder juristische Person, die geschäftsmäßig eine der folgenden Dienstleistungen für Dritte erbringt:

a) Gründung von Gesellschaften oder anderen juristischen Personen;

b) Ausübung der Funktion eines Leiters oder eines Geschäftsführers einer Gesellschaft, eines Gesellschafters einer Personengesellschaft oder Wahrnehmung einer vergleichbaren Position gegenüber anderen juristischen Personen oder Arrangement für eine andere Person, sodass sie die zuvor genannten Funktionen ausüben kann;

c) Bereitstellung eines Gesellschaftssitzes, einer Geschäfts-, Verwaltungs- oder Postadresse und anderer damit zusammenhängender Dienstleistungen für eine Gesellschaft, eine Personengesellschaft oder eine andere juristische Person oder Rechtsvereinbarung;

(d) acting as or arranging for another person to act as a trustee of an express trust or a similar legal arrangement;

(e) acting as or arranging for another person to act as a nominee shareholder for another person other than a company listed on a regulated market that is subject to disclosure requirements in conformity with Community legislation or subject to equivalent international standards;

...

(9) 'business relationship' means a business, professional or commercial relationship which is connected with the professional activities of the institutions and persons covered by this Directive and which is expected, at the time when the contact is established, to have an element of duration;

...

14 Article 5 of the Directive reads as follows:

The Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing.

15 Article 7 of the Directive reads as follows:

The institutions and persons covered by this Directive shall apply customer due diligence measures in the following cases:

(a) when establishing a business relationship;

...

d) Ausübung der Funktion eines Treuhänders eines Direkttrusts oder einer ähnlichen Rechtsvereinbarung oder Arrangement für eine andere Person, sodass sie die zuvor genannten Funktionen ausüben kann;

e) Ausübung der Funktion eines nominellen Anteilseigners für eine andere Person, bei der es sich nicht um eine auf einem geregelten Markt notierte Gesellschaft handelt, die dem Gemeinschaftsrecht entsprechenden Offenlegungsanforderungen bzw. gleichwertigen internationalen Standards unterliegt, oder Arrangement für eine andere Person, sodass sie die zuvor genannten Funktionen ausüben kann;

...

9. „Geschäftsbeziehung" jede geschäftliche, berufliche oder kommerzielle Beziehung, die in Verbindung mit den gewerblichen Tätigkeiten der dieser Richtlinie unterliegenden Institute und Personen unterhalten wird und bei der bei Zustandekommen des Kontakts davon ausgegangen wird, dass sie von gewisser Dauer sein wird;

...

14 Artikel 5 der Richtlinie lautet:

Die Mitgliedstaaten können zur Verhinderung der Geldwäsche und der Terrorismusfinanzierung strengere Vorschriften auf dem unter diese Richtlinie fallenden Gebiet erlassen oder beibehalten.

15 Artikel 7 der Richtlinie lautet:

Die dieser Richtlinie unterliegenden Institute und Personen wenden Sorgfaltspflichten gegenüber Kunden in den nachfolgenden Fällen an:

a) Begründung einer Geschäftsbeziehung;

...

(d) when there are doubts about the veracity or adequacy of previously obtained customer identification data.

16 Article 8 of the Directive reads as follows:

1. Customer due diligence measures shall comprise:

(a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;

(b) identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this Directive is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer;

(c) obtaining information on the purpose and intended nature of the business relationship;

(d) conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date.

d) Zweifel an der Echtheit oder der Angemessenheit zuvor erhaltener Kundenidentifikationsdaten.

16 Artikel 8 der Richtlinie lautet:

(1) Die Sorgfaltspflichten gegenüber Kunden umfassen:

a) Feststellung der Identität des Kunden und Überprüfung der Kundenidentität auf der Grundlage von Dokumenten, Daten oder Informationen, die von einer glaubwürdigen und unabhängigen Quelle stammen;

b) gegebenenfalls Feststellung der Identität des wirtschaftlichen Eigentümers und Ergreifung risikobasierter und angemessener Maßnahmen zur Überprüfung von dessen Identität, sodass das dieser Richtlinie unterliegende Institut oder die dieser Richtlinie unterliegende Person davon überzeugt ist, dass es bzw. sie weiß, wer der wirtschaftliche Eigentümer ist; im Falle von juristischen Personen, Trusts und ähnlichen Rechtsvereinbarungen schließt dies risikobasierte und angemessene Maßnahmen ein, um die Eigentums- und die Kontrollstruktur des Kunden zu verstehen;

c) Einholung von Informationen über Zweck und angestrebte Art der Geschäftsbeziehung;

d) Durchführung einer kontinuierlichen Überwachung der Geschäftsbeziehung, einschließlich einer Überprüfung der im Verlauf der Geschäftsbeziehung abgewickelten Transaktionen, um sicherzustellen, dass diese mit den Kenntnissen des Instituts oder der Person über den Kunden, seine Geschäftstätigkeit und sein Risikoprofil, einschließlich erforderlichenfalls der Quelle der Mittel, kohärent sind, und Gewährleistung, dass die jeweiligen Dokumente, Daten oder Informationen stets aktualisiert werden.

2 The institutions and persons covered by this Directive shall apply each of the customer due diligence requirements set out in paragraph 1, but may determine the extent of such measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction. The institutions and persons covered by this Directive shall be able to demonstrate to the competent authorities mentioned in Article 37, including self-regulatory bodies, that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.

17 Article 9 of the Directive reads as follows:

1. Member States shall require that the verification of the identity of the customer and the beneficial owner takes place before the establishment of a business relationship or the carrying-out of the transaction.

...

6. Member States shall require that institutions and persons covered by this Directive apply the customer due diligence procedures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis.

18 Article 21(1) of the Directive reads as follows:

Each Member State shall establish a FIU [financial intelligence unit] in order effectively to combat money laundering and terrorist financing.

19 Article 22 of the Directive reads as follows:

1. Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully:

(2) Die dieser Richtlinie unterliegenden Institute und Personen wenden alle in Absatz 1 genannten Sorgfaltspflichten gegenüber Kunden an, können dabei aber den Umfang dieser Maßnahmen auf risikoorientierter Grundlage je nach Art des Kunden, der Geschäftsbeziehung, des Produkts oder der Transaktion bestimmen. Die dieser Richtlinie unterliegenden Institute und Personen müssen gegenüber den in Artikel 37 genannten zuständigen Behörden, einschließlich der Selbstverwaltungseinrichtungen, nachweisen können, dass der Umfang der Maßnahmen im Hinblick auf die Risiken der Geldwäsche und der Terrorismusfinanzierung als angemessen anzusehen ist.

17 Artikel 9 der Richtlinie lautet:

(1) Die Mitgliedstaaten schreiben vor, dass die Überprüfung der Identität des Kunden und des wirtschaftlichen Eigentümers vor der Begründung einer Geschäftsbeziehung oder der Abwicklung der Transaktion erfolgt.

...

(6) Die Mitgliedstaaten schreiben vor, dass die dieser Richtlinie unterliegenden Institute und Personen die Sorgfaltspflichten nicht nur auf alle neuen Kunden, sondern zu geeigneter Zeit auch auf die bestehende Kundschaft auf risikoorientierter Grundlage anwenden.

18 *Artikel 21 Absatz 1 der Richtlinie lautet:*

Jeder Mitgliedstaat richtet eine zentrale Meldestelle zur wirksamen Bekämpfung der Geldwäsche und der Terrorismusfinanzierung ein.

19 Artikel 22 der Richtlinie lautet:

(1) Die Mitgliedstaaten schreiben vor, dass die dieser Richtlinie unterliegenden Institute und Personen sowie gegebenenfalls deren leitendes Personal und deren Angestellte in vollem Umfang zusammenarbeiten, indem sie

(a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted;

(b) by promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the FIU of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated in accordance with the procedures provided for in Article 34 shall normally forward the information.

20 Article 30 of the Directive reads as follows:

Member States shall require the institutions and persons covered by this Directive to keep the following documents and information for use in any investigation into, or analysis of, possible money laundering or terrorist financing by the FIU or by other competent authorities in accordance with national law:

(a) in the case of the customer due diligence, a copy or the references of the evidence required, for a period of at least five years after the business relationship with their customer has ended;

(b) in the case of business relationships and transactions, the supporting evidence and records, consisting of the original documents or copies admissible in court proceedings under the

a) die zentrale Meldestelle von sich aus umgehend informieren, wenn sie wissen, den Verdacht oder berechtigten Grund zu der Annahme haben, dass eine Geldwäsche oder Terrorismusfinanzierung begangen oder zu begehen versucht wurde oder wird,

b) der zentralen Meldestelle auf Verlangen umgehend alle erforderlichen Auskünfte im Einklang mit den Verfahren erteilen, die in den anzuwendenden Rechtsvorschriften festgelegt sind.

(2) Die in Absatz 1 genannten Informationen werden der zentralen Meldestelle des Mitgliedstaats übermittelt, in dessen Hoheitsgebiet sich das Institut oder die Person, von dem bzw. der diese Informationen stammen, befindet. Die Übermittlung erfolgt in der Regel durch die Person(en), die nach den in Artikel 34 genannten Verfahren benannt wurde(n).

20 Artikel 30 der Richtlinie lautet:

Die Mitgliedstaaten schreiben vor, dass die dieser Richtlinie unterliegenden Institute und Personen die nachstehenden Dokumente und Informationen im Hinblick auf die Verwendung in Ermittlungsverfahren wegen möglicher Geldwäsche oder Terrorismusfinanzierung oder im Hinblick auf die Durchführung entsprechender Analysen durch die zentrale Meldestelle oder andere zuständige Behörden gemäß dem nationalen Recht aufbewahren:

a) bei Kundendaten, die mit der gebührenden Sorgfalt ermittelt wurden, eine Kopie oder Referenzangaben der verlangten Dokumente für die Dauer von mindestens fünf Jahren nach Beendigung der Geschäftsbeziehung mit dem Kunden;

b) bei Geschäftsbeziehungen und Transaktionen die Belege und Aufzeichnungen, als Originale oder als Kopien, die nach den innerstaatlichen Rechtsvorschriften in Gerichtsverfahren anerkannt

applicable national legislation for a period of at least five years following the carrying-out of the transactions or the end of the business relationship.

21 Article 36(1) of the Directive reads as follows:

Member States shall provide that currency exchange offices and trust and company service providers shall be licensed or registered and casinos be licensed in order to operate their business legally. Without prejudice to future Community legislation, Member States shall provide that money transmission or remittance offices shall be licensed or registered in order to operate their business legally.

22 Article 37 of the Directive reads as follows:

1. Member States shall require the competent authorities at least to effectively monitor and to take the necessary measures with a view to ensuring compliance with the requirements of this Directive by all the institutions and persons covered by this Directive.

2. Member States shall ensure that the competent authorities have adequate powers, including the power to compel the production of any information that is relevant to monitoring compliance and perform checks, and have adequate resources to perform their functions.

...

23 Article 38 of the Directive reads as follows:

The Commission shall lend such assistance as may be needed to facilitate coordination, including the exchange of information between FIUs within the Community.

werden, für die Dauer von mindestens fünf Jahren nach Durchführung der Transaktion oder nach Beendigung der Geschäftsbeziehung.

21 Artikel 36 Absatz 1 der Richtlinie lautet:

Die Mitgliedstaaten sehen vor, dass Wechselstuben und Dienstleister für Trusts und Gesellschaften zugelassen oder eingetragen und dass Kasinos zugelassen sein müssen, um ihr Gewerbe legal betreiben zu können. Unbeschadet künftiger Rechtsvorschriften der Gemeinschaft sehen die Mitgliedstaaten vor, dass Unternehmen, die das Finanztransfergeschäft betreiben, zugelassen oder eingetragen sein müssen, um ihr Gewerbe legal betreiben zu können.

22 Artikel 37 der Richtlinie lautet:

(1) Die Mitgliedstaaten schreiben vor, dass die zuständigen Behörden zumindest wirksam überwachen, ob alle dieser Richtlinie unterliegenden Institute und Personen die darin festgelegten Anforderungen einhalten, und dass sie die erforderlichen Maßnahmen treffen, um deren Einhaltung sicherzustellen.

(2) Die Mitgliedstaaten sorgen dafür, dass die zuständigen Behörden über angemessene Befugnisse, einschließlich der Möglichkeit, alle Auskünfte in Bezug auf die Überwachung der Einhaltung der einschlägigen Vorschriften zu verlangen und Kontrollen durchzuführen, sowie über die zur Wahrnehmung ihrer Aufgaben angemessenen Mittel verfügen.

...

23 Artikel 38 der Richtlinie lautet:

Die Kommission leistet die erforderliche Unterstützung, um die Koordinierung, einschließlich des Informationsaustauschs zwischen den zentralen Meldestellen innerhalb der Gemeinschaft, zu erleichtern.

24 Article 39(1) of the Directive reads as follows:

Member States shall ensure that natural and legal persons covered by this Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive.

NATIONAL LAW

25 Liechtenstein has implemented the Directive by way of the Law of 11 December 2008 on professional due diligence to combat money laundering, organised crime and terrorist financing (*Sorgfaltspflichtgesetz, LR 952.1*) ("SPG").

26 Article 2 of the SPG reads as follows:

1. For the purposes of this law, the following definitions apply:

...

(c) 'business relationship' means a business, professional or commercial relationship which is connected with the professional activities of the person under an obligation to apply due diligence measures and which is expected, at the time when the contact is established, to have an element of duration;

...

(f) 'legal entity' means a legal person, company, trust or other collective or asset entity, irrespective of its legal form;

...

24 Artikel 39 Absatz 1 der Richtlinie lautet:

Die Mitgliedstaaten stellen sicher, dass die dieser Richtlinie unterliegenden natürlichen und juristischen Personen für Verstöße gegen die nach dieser Richtlinie erlassenen nationalen Vorschriften verantwortlich gemacht werden können. Die Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein.

NATIONALES RECHT

25 Liechtenstein hat die Richtlinie im Wege des Gesetzes vom 11. Dezember 2008 über berufliche Sorgfaltspflichten zur Bekämpfung von Geldwäscherei, organisierter Kriminalität und Terrorismusfinanzierung (Sorgfaltspflichtgesetz, LR 952.1) (im Folgenden: SPG) umgesetzt.

26 Artikel 2 SPG lautet:

1) Im Sinne dieses Gesetzes gelten als:

...

c) „Geschäftsbeziehung“: jede geschäftliche, berufliche oder kommerzielle Beziehung, die in Verbindung mit den gewerblichen Tätigkeiten des Sorgfaltspflichtigen unterhalten wird und bei der bei Zustandekommen des Kontakts davon ausgegangen wird, dass sie von gewisser Dauer sein wird;

...

f) „Rechtsträger“: eine juristische Person, Gesellschaft, Treuhänderschaft oder sonstige Gemeinschaft oder Vermögenseinheit, unabhängig von ihrer rechtlichen Ausgestaltung;

...

27 Article 3 of the SPG reads as follows:

> *1. This law shall apply to persons under an obligation to apply due diligence measures. These are:*
>
> ...
>
> *(r) natural and legal persons to the extent that by way of a business they provide to a legal entity a registered office, business address, correspondence or administrative address or other related services;*
>
> ...
>
> *(t) natural and legal persons who, by way of a business and on the account of a third party, act as a partner of a partnership or on behalf of the board or as managing director of a legal entity or carry out a comparable function on the account of a third party;*
>
> ...
>
> *2. To the extent that such branches are permitted, Liechtenstein branches of foreign undertakings referred to in paragraph 1 shall also be deemed subject to an obligation to apply due diligence measures.*
>
> ...

28 Article 5 of the SPG reads as follows:

> *1. In the cases specified in paragraph 2, persons under an obligation to apply due diligence measures shall satisfy the following requirements:*
>
> *(a) identification and verification of the identity of the contracting party (Article 6);*
>
> ...

27 Artikel 3 SPG lautet:

1) Dieses Gesetz gilt für Sorgfaltspflichtige. Dies sind:

...

r) natürliche und juristische Personen, soweit sie berufsmässig für einen Rechtsträger einen Geschäftssitz, eine Geschäfts-, Verwaltungs- oder Postadresse und andere damit zusammenhängende Dienstleistungen bereitstellen;

...

t) natürliche und juristische Personen, die berufsmässig auf fremde Rechnung die Funktion eines Gesellschafters einer Personengesellschaft oder eines Organs oder Geschäftsführers eines Rechtsträgers auf fremde Rechnung ausüben oder eine vergleichbare Funktion auf fremde Rechnung wahrnehmen;

...

2) Sorgfaltspflichtige sind auch liechtensteinische Zweigstellen von ausländischen Unternehmen nach Abs. 1, soweit solche zulässig sind.

...

28 Artikel 5 SPG lautet:

1) Die Sorgfaltspflichtigen haben in den in Abs. 2 genannten Fällen folgende Pflichten wahrzunehmen:

a) Feststellung und Überprüfung der Identität des Vertragspartners (Art. 6);

...

(c) compilation of a business profile (Article 8);

...

2. Due diligence measures shall be applied in the following cases:

(a) when establishing a business relationship;

...

(c) when there are doubts about the veracity or adequacy of previously obtained data concerning the identity of the contracting party or the beneficial owner. ...;

...

29 Article 6 of the SPG reads as follows:

1. Persons subject to the obligation to apply due diligence measures shall identify the identity of their contracting party and verify that identity by means of documentary evidence.

2. If in the course of the business relationship doubts arise concerning the identity of the contracting partner, persons subject to the obligation to apply due diligence measures shall identify and verify afresh the identity of the contracting party.

...

30 Article 8 of the SPG reads as follows:

1. Persons under an obligation to apply due diligence measures must compile a profile concerning the business relationship including in particular information on the origin of the assets and on the purpose and intended nature of the business relationship (business profile).

c) Erstellung eines Geschäftsprofils (Art. 8);

...

2) Die Sorgfaltspflichten sind in folgenden Fällen wahrzunehmen:

a) bei Aufnahme einer Geschäftsbeziehung;

...

c) bei Zweifel an der Echtheit oder Angemessenheit zuvor erhaltener Daten zur Identität des Vertragspartners oder der wirtschaftlich berechtigten Person. ...;

...

29 Artikel 6 SPG lautet:

1) Die Sorgfaltspflichtigen haben die Identität ihres Vertragspartners festzustellen und durch beweiskräftige Dokumente zu überprüfen.

2) Entstehen im Laufe der Geschäftsbeziehung Zweifel über die Identität des Vertragspartners, so müssen die Sorgfaltspflichtigen die Feststellung und Überprüfung der Identität des Vertragspartners wiederholen.

...

30 Artikel 8 SPG lautet:

1) Die Sorgfaltspflichtigen müssen ein Profil über die Geschäftsbeziehung erstellen, das insbesondere Informationen über Herkunft der Vermögenswerte sowie über Zweck und angestrebte Art der Geschäftsbeziehung enthält (Geschäftsprofil).

2. They shall ensure that the data and information contained in the business profile are kept up-to-date.

...

31 Article 30 of the SPG reads as follows:

1. The Princely Court of Justice shall punish with a sentence of imprisonment for a period not exceeding six months or a fine not exceeding 360 daily units for a misdemeanour any person who wilfully:

(a) does not carry out or repeat the identification and verification of the identity of the contracting party as specified in Article 6;

...

32 Article 31 of the SPG reads as follows:

1. The FMA shall punish for an administrative offence by a fine not exceeding SFR 100 000 any person who:

...

(e) does not compile and maintain up-to-date the profile concerning the business relationship as specified in Article 8;

...

II FACTS AND PROCEDURE

33 The defendant is an Austrian national who lives in the United Kingdom. He acts as a director for three companies, which are A Ltd and B Ltd, both registered in the United Kingdom, and CA Inc., registered in the British Virgin Islands. The defendant acts as the sole director, on behalf of third parties, in relation to all the companies in return for remuneration.

2) Sie haben sicherzustellen, dass die im Geschäftsprofil enthaltenen Daten und Informationen aktualisiert werden.

...

31 Artikel 30 SPG lautet:

1) Vom Landgericht wird wegen Vergehens mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu 360 Tagessätzen bestraft, wer vorsätzlich:

a) die Feststellung oder Überprüfung der Identität des Vertragspartners nicht gemäss Art. 6 vornimmt oder wiederholt;

...

32 Artikel 31 SPG lautet:

1) Von der FMA wird wegen Übertretung mit Busse bis zu 100 000 Franken bestraft, wer:

...

e) das Profil über die Geschäftsbeziehung nicht gemäss Art. 8 erstellt und aktualisiert;

...

II SACHVERHALT UND VERFAHREN

33 Der Beschuldigte ist österreichischer Staatsangehöriger und lebt im Vereinigten Königreich. Er ist „Director" dreier Gesellschaften – A Ltd und B Ltd, beide im Vereinigten Königreich eingetragen, sowie CA Inc., die auf den British Virgin Islands eingetragen ist. Der Beschuldigte übt bei allen Gesellschaften die Funktion als einziger „Director" gegen Entgelt für dritte Personen aus.

34 The defendant carried out individual administrative activities on behalf of these three companies in Liechtenstein.

35 In Case E-26/15, following an appeal by the defendant, the referring court has to review a judgment by the Princely Court of Justice (*Fürstliches Landgericht*) handed down on 13 July 2015. In that judgment, the defendant was convicted pursuant to Article 30(1)(a) of the SPG and sentenced to a suspended fine. That court found that the defendant had failed wilfully to identify and verify the identity of the contracting party and to carry out afresh such identification and verification in Liechtenstein, in particular in relation to the three companies, on the establishment of the business relationship, with regard to A Ltd in 2004, B Ltd in 2008 and CA Inc. in 2008, and on a continuing basis from 1 September 2009 to 10 February 2014.

36 The finding of the Princely Court of Justice was based on the lack of any statement or clear information documenting that the defendant had identified and verified the identity of the contracting party. Likewise, there was nothing on file or no clear documentation to show when and on what grounds a renewed verification of the identity of the contracting party had been carried out, even though, according to the court, clearly contradictory information existed. Consequently, when the Financial Market Authority (*Finanzmarktaufsicht*) ("the FMA") carried out checks on the defendant in Liechtenstein, it had not been possible to establish an unambiguous identification of which person, at what time, and on which contractual basis had in fact been the contracting party under each of these mandates.

37 The Princely Court of Justice concluded that the obligation to apply due diligence measures resulted from the existence of a person subject to a duty to apply due diligence measures and the activities

34 Der Beschuldigte nahm für diese drei Gesellschaften in Liechtenstein einzelne Verwaltungshandlungen vor.

35 In der Rechtssache E-26/15 überprüft das vorlegende Gericht ein Urteil des Fürstlichen Landgerichts vom 13. Juli 2015, gegen das der Beschuldigte Berufung erhoben hat. Mit diesem Urteil wurde der Beschuldigte nach Artikel 30 Absatz 1 Buchstabe a SPG schuldig erkannt und zu einer bedingt nachgesehenen Geldstrafe verurteilt. Diesem Urteil zufolge hat er vorsätzlich die Feststellung und Überprüfung der Identität des Vertragspartners nicht vorgenommen und dies auch nicht später in Liechtenstein wiederholt bzw. nachgeholt, und zwar insbesondere weder hinsichtlich der drei Gesellschaften anlässlich der Aufnahme der Geschäftsbeziehung, d. h. für die A Ltd im Jahr 2004, für die B Ltd im Jahr 2008 und für die CA Inc. im Jahr 2008, noch fortlaufend vom 1. September 2009 bis zum 10. Februar 2014.

36 Das Fürstliche Landgericht begründete dieses Urteil damit, dass keine Erklärung oder eindeutige Information zu einer durch den Beschuldigten erfolgten Überprüfung und Feststellung der Identität des Vertragspartners vorhanden gewesen sei. Ebenso wenig sei aktenkundig bzw. nachvollziehbar dokumentiert gewesen, wann und aus welchen Gründen eine Überprüfung des Vertragspartners wiederholt wurde, obwohl – so das Landgericht – offensichtlich gleichzeitig sich widersprechende Angaben vorlagen. Eine zweifelsfreie Identifikation, welche Person zu welchem Zeitpunkt und basierend auf welchem Vertragsverhältnis tatsächlich Vertragspartner war, sei daher in keinem dieser Mandate anlässlich einer seitens der Finanzmarktaufsicht (im Folgenden: FMA) beim Beschuldigten in Liechtenstein durchgeführten Kontrolle möglich gewesen.

37 Das Fürstliche Landgericht stellte fest, dass die Sorgfaltspflicht an den Sorgfaltspflichtigen und dessen Tätigkeit anknüpfe. Der

of that person. The registered office of the legal entity administered was not considered decisive in determining the existence of an obligation to apply due diligence measures. Consequently, it held that the defendant was under an obligation to apply due diligence measures when he acted in Liechtenstein, on behalf of third parties, as a governing body ("director") of a foreign legal entity. For the purposes of exercising that function, the Princely Court of Justice found it to suffice that telephone calls are made, resolutions are signed or other administrative activities are carried out on behalf of the foreign legal entities. As a result, the court held that the defendant had violated Article 30(1)(a) of the SPG.

38 The defendant has appealed against that conviction to the referring court, arguing, *inter alia*, that all three companies were, without exception, established from London and that it is inconceivable that all his English and Austrian clients could now also be subject to the requirements of the Liechtenstein SPG.

39 In Case E-27/15, the defendant has brought a complaint to the Appeals Board of the Financial Market Authority ("the Appeals Board") challenging the FMA's order of 31 July 2015. The order concerns the defendant's duties as director of the three companies mentioned above.

40 Pursuant to the contested order the defendant was found guilty of an administrative offence under Article 31(1)(e) of the SPG and ordered to pay a fine. According to that order, the defendant, as a person under an obligation to carry out due diligence measures in relation to the business relationships with the three companies concerned, had failed in the period 1 February 2013 until at least 14 February 2014 in a total of three separate cases to compile the profile of the business relationship as required under Article 8 of the SPG.

satzungsmässige Sitz des verwalteten Rechtsträgers sei bei der Beurteilung der Sorgfaltspflicht nicht ausschlaggebend. Eine Sorgfaltspflicht des Beschuldigten sei dann gegeben, wenn er seine Funktion als Organ („Director“) eines ausländischen Rechtsträgers auf fremde Rechnung in Liechtenstein ausübt. Zum Zwecke eines Ausübens genügt beispielsweise, so das Fürstliche Landgericht, dass Telefonate geführt, Beschlüsse unterzeichnet oder sonstige administrative Handlungen für die ausländischen Rechtsträger gesetzt werden. Infolgedessen hat der Beschuldigte dem Gericht zufolge gegen Artikel 30 Absatz 1 Buchstabe a SPG verstossen.

38 Der Beschuldigte hat gegen dieses Urteil vor dem vorlegenden Gericht Berufung erhoben, in welcher er u. a. geltend macht, dass die drei Gesellschaften ausnahmslos von London aus gegründet worden seien und unmöglich alle seine englischen und österreichischen Mandate nun auch dem liechtensteinischen SPG unterstehen könnten.

39 In der Rechtssache E-27/15 hat der Beschuldigte vor der Beschwerdekommission der Finanzmarktaufsicht (im Folgenden: Beschwerdekommission) Beschwerde über die Verfügung der FMA vom 31. Juli 2015 erhoben. Die Verfügung betrifft die Pflichten des Beschuldigten als „Director“ der drei oben genannten Gesellschaften.

40 Der angefochtenen Verfügung zufolge wurde der Beschuldigte der Übertretung nach Artikel 31 Absatz 1 Buchstabe e SPG schuldig erkannt und mit einer Geldbusse bestraft. Gemäss Verfügung hat es der Beschuldigte als Sorgfaltspflichtiger betreffend die Geschäftsbeziehungen mit den drei betroffenen Gesellschaften im Zeitraum vom 1. Februar 2013 bis zumindest zum 14. Februar 2014 in insgesamt drei Fällen unterlassen, das Profil der Geschäftsbeziehung gemäss Artikel 8 SPG zu erstellen.

41 The FMA's order resulted from its finding, when checks were carried out on the defendant in Vaduz concerning his business relationships with the three companies, that the profiles compiled on those business relationships were unsigned and undated. According to the FMA, the obligation to apply due diligence measures resulted from the existence of a person subject to a duty to apply due diligence measures and the activities of that person. Consequently, it held the defendant to be under an obligation to apply due diligence measures when he acts in Liechtenstein as a company director on behalf of third parties.

42 For the purposes of exercising that function, the FMA considered it to suffice that telephone calls are made, resolutions are signed or other administrative activities are carried out. The registered office of the legal entity administered was not considered decisive in determining the existence of an obligation to apply due diligence measures. As the profiles of the business relationships concerning the three companies did not meet the formal requirements, the FMA found that the defendant had failed to compile in full the business profiles required under Article 8 of the SPG and as a result he had committed an administrative offence pursuant to Article 31(1)(e) of the SPG in the period 1 February 2013 until at least 14 February 2014.

43 In challenging this order, the defendant contends, *inter alia*, that all three companies were, without exception, established and operated from London.

44 By an order of 4 November 2015, received at the Court Registry on 9 November 2015, the referring court sought an Advisory Opinion in Case E26/15. By an order of 30 October 2015, received at the Court Registry on 16 November 2015, the Appeals Board sought an Advisory Opinion in Case E27/15.

41 Die Verfügung der FMA wurde erlassen, weil anlässlich einer beim Beschuldigten in Vaduz durchgeführten Kontrolle betreffend seine Geschäftsbeziehungen zu den drei Gesellschaften festgestellt wurde, dass die Profile betreffend diese Geschäftsbeziehungen nicht unterzeichnet und nicht datiert waren. Der FMA zufolge knüpft die Sorgfaltspflicht am Sorgfaltspflichtigen und seiner Tätigkeit an. Eine Sorgfaltspflicht des Beschuldigten sei dann gegeben, so die FMA, wenn er seine Funktion als „Director" einer Gesellschaft auf fremde Rechnung in Liechtenstein ausübt.

42 Zum Zwecke eines Ausübens genügt laut FMA beispielsweise, dass Telefonate geführt, Beschlüsse unterzeichnet oder sonstige administrative Handlungen gesetzt werden. Der satzungsmässige Sitz des verwalteten Rechtsträgers sei bei der Beurteilung der Sorgfaltspflicht nicht ausschlaggebend. Da die Profile der Geschäftsbeziehungen betreffend die drei Gesellschaften nicht den formellen Anforderungen Rechnung tragen, gelangte die FMA zu der Schlussfolgerung, der Beschuldigte habe es unterlassen, die Geschäftsprofile vollständig gemäss Artikel 8 SPG zu erstellen, wodurch er die Übertretung nach Artikel 31 Absatz 1 Buchstabe e SPG im Zeitraum vom 1. Februar 2013 bis zumindest zum 14. Februar 2014 begangen habe.

43 In seiner Beschwerde gegen diese Verfügung macht der Beschuldigte u. a. geltend, dass die drei Gesellschaften ausnahmslos von London aus gegründet und betrieben worden seien.

44 Mit Beschluss vom 4. November 2015, beim Gerichtshof eingegangen am 9. November 2015, stellte das vorlegende Gericht einen Antrag auf Vorabentscheidung in der Rechtssache E-26/15. Mit Beschluss vom 30. Oktober 2015, beim Gerichtshof eingegangen am 16. November 2015, stellte die Beschwerdekommission einen Antrag auf Vorabentscheidung in der Rechtssache E-27/15.

45 By a decision of 21 December 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 written and oral procedure and final judgment.

46 The following questions were submitted to the Court in Case E-26/15:

1. *Must Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing be interpreted as meaning that 'trust and company service providers', within the meaning of Article 2(1)(3)(c) and point (7)(b) of Article 3 of that Directive, are subject to the obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive solely in accordance with the legislation of the Member State in which they are established (in welchem [der Dienstleister für Trusts und Gesellschaften] seinen rechtlichen Sitz hat)?*

2. *If Question 1 is answered in the negative: what criteria must be used to determine whether 'trust and company services providers' are under the obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive in accordance with the legislation of another Member State?*

3. *Do the answers to Questions 1 and 2 also apply where the company for which administrative services are provided is a company not incorporated in a Member State?*

47 In Case E-27/15, the first two questions referred are substantively similar to the first two questions in Case E-26/15, with the only difference being that instead of writing "obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive", the Appeals Board writes "obligation to obtain

45 Mittels Beschluss vom 21. Dezember 2015 hat der Gerichtshof die beiden Rechtssachen gemäss Artikel 39 der Verfahrensordnung nach Eingang der schriftlichen Erklärungen der Parteien zur Durchführung des schriftlichen sowie des mündlichen Verfahrens und zum Erlass eines rechtskräftigen Urteils verbunden.

46 In der Rechtssache E-26/15 wurden dem Gerichtshof die folgenden Fragen vorgelegt:

1. *Ist die Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26.10.2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung dahingehend auszulegen, dass einen „Dienstleister für Trusts und Gesellschaften" im Sinne der Art. 2 Abs. 1 Z 3 lit c und Art. 3 Z 7 lit b dieser Richtlinie die Pflicht zur Identifizierung des Kunden im Sinne der Art. 8 Abs. 1 lit a und Art. 9 Abs. 1 und Abs. 6 der Richtlinie ausschliesslich nach den Bestimmungen desjenigen Mitgliedstaates trifft, in welchem er seinen rechtlichen Sitz hat?*

2. *Für den Fall der Verneinung der Frage 1: Anhand welcher Kriterien ist festzustellen, ob den „Dienstleister für Trusts und Gesellschaften" die Pflicht zur Identifizierung des Kunden im Sinne der Art. 8 Abs. 1 lit a und Art. 9 Abs. 1 und Abs. 6 der Richtlinie nach den Bestimmungen eines anderen Mitgliedstaates trifft?*

3. *Gelten die zu vorstehenden Fragen 1 und 2 gegebenen Antworten auch dann, wenn es sich bei der verwalteten Gesellschaft nicht um eine in einem Mitgliedstaat inkorporierte Gesellschaft handelt?*

47 Die ersten beiden vorgelegten Fragen in der Rechtssache E-27/15 sind im Grunde identisch mit den ersten beiden Fragen in der Rechtssache E-26/15. Der einzige Unterschied besteht darin, dass die Beschwerdekommission anstelle des Wortlauts „Pflicht zur Identifizierung des Kunden im Sinne der Art. 8 Abs. 1 lit a und Art. 9

information on the purpose and intended nature of the business relationship as specified in Article 8(1)(c) and Article 9(6) of the Directive". The third question in Case E27/15 is identical to the third question in Case E-26/15.

48 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 ADMISSIBILITY

ARGUMENTS SUBMITTED TO THE COURT

49 The Liechtenstein Government contends that the referring court and the Appeals Board base their questions on the understanding that the defendant was a provider of services in Liechtenstein under Article 36 EEA. In contrast, the Liechtenstein Government argues, subject to the caveat that the facts of the cases have not yet been fully determined, that the defendant performed his services in Liechtenstein by way of establishment in accordance with Article 31 EEA. If the Court accepts this view, this renders the requests for Advisory Opinions to a considerable extent redundant or hypothetical with the result that the Court might consider the requests inadmissible.

Abs. 1 und Abs. 6 der Richtlinie“ die Formulierung „Pflicht zur Einholung von Informationen über Zweck und angestrebte Art der Geschäftsbeziehung im Sinne der Art. 8 Abs. 1 lit c und Art. 9 Abs. 6 der Richtlinie“ gewählt hat. Die dritte Frage in der Rechtssache E-27/15 ist identisch mit der dritten Frage in der Rechtssache E-26/15.

48 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 ZULÄSSIGKEIT

DEM GERICHTSHOF VORGELEGTE AUSFÜHRUNGEN

49 Die Regierung des Fürstentums Liechtenstein bringt vor, dass die Fragen des vorlegenden Gerichts und der Beschwerdekommission voraussetzen, dass der Beschuldigte in Liechtenstein ein Dienstleistungserbringer im Sinne von Artikel 36 des EWR-Abkommens ist. Vorbehaltlich der vollständigen Klärung des Sachverhalts vertritt die Regierung des Fürstentums Liechtenstein hingegen die Ansicht, dass der Beschuldigte seine Dienstleistungen in Liechtenstein im Rahmen der Niederlassung gemäss Artikel 31 des EWR-Abkommens erbracht hat. Schliesst sich der Gerichtshof dieser Auffassung an, würden sich die Anträge auf Vorabentscheidung dadurch in weiten Teilen als überflüssig oder hypothetisch erweisen, sodass sie der Gerichtshof möglicherweise als unzulässig betrachten könnte.

FINDINGS OF THE COURT

50 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.

51 The request in Case E-27/15 is made by the Appeals Board of the Financial Market Authority. The Court has already held that body to constitute a court or tribunal for the purposes of Article 34 SCA (see Case E-4/09 *Inconsult* [2009-2010] EFTA Ct. Rep. 86, paragraphs 22 to 24).

52 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 Joined Cases E-15/15 and E-16/15 *Hagedorn and Armbruster*, judgment of 10 May 2016, not yet reported, paragraph 25 and case law cited).

53 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

ENTSCHEIDUNG DES GERICHTSHOFS

50 Nach Artikel 34 des Abkommens zwischen den EFTA-Staaten zur Errichtung einer Überwachungsbehörde und eines Gerichtshofs (im Folgenden: ÜGA) kann jedes Gericht eines EFTA-Staats Fragen hinsichtlich der Auslegung des EWR-Abkommens an den Gerichtshof richten, sofern es eine Vorabentscheidung zum Erlass eines Urteils für erforderlich hält.

51 Der Antrag in der Rechtssache E-27/15 wurde von der Beschwerdekommission der Finanzmarktaufsicht gestellt. Der Gerichtshof hat bereits festgehalten, dass dieses Organ ein Gericht im Sinne von Artikel 34 ÜGA darstellt (vgl. Rechtssache E-4/09 *Inconsult*, EFTA Court Report 2009-2010, S. 86, Randnrn. 22 bis 24).

52 Zweck von Artikel 34 ÜGA ist die 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 Rechtssachen, in denen die Anwendung von Bestimmungen des EWR-Rechts erforderlich ist, dar (vgl. verbundene Rechtssachen E-15/15 und E-16/15 *Hagedorn und Armbruster*, Urteil vom 10. Mai 2016, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 25, und die zitierte Rechtsprechung).

53 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

before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Hagedorn and Armbruster*, cited above, paragraph 26 and case law cited).

54 The Court does not find that such exceptional circumstances are applicable to the questions in the case at hand. On the basis that the trust and company service provider operated in Liechtenstein under the freedom to provide services, the questions referred are admissible. Whether the trust and company service provider operated instead under the freedom of establishment is for the referring court and the Appeals Board to determine.

55 It follows that the questions referred are admissible.

IV ANSWERS OF THE COURT

THE FIRST TWO QUESTIONS

56 By the first two questions in each case, which it is appropriate to consider jointly, the referring court and the Appeals Board seek in essence to establish whether, and, if so, to what extent, the Directive precludes EEA States from applying their national legislation to trust and company service providers that operate in their territory by means of the freedom to provide services while being established in other EEA States with regard to the obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive and the obligation to obtain information on the

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. *Hagedorn und Armbruster*, oben erwähnt, Randnr. 26, und die zitierte Rechtsprechung).

54 Der Gerichtshof ist nicht der Auffassung, dass in der gegenständlichen Rechtssache derartige ausserordentliche Umstände vorliegen. Unter der Voraussetzung, dass der Dienstleister für Trusts und Gesellschaften im Rahmen des freien Dienstleistungsverkehrs in Liechtenstein tätig war, sind die vorgelegten Fragen zulässig. Ob der Dienstleister für Trusts und Gesellschaften stattdessen auf der Basis der Niederlassungsfreiheit tätig war, ist durch das vorlegende Gericht und die Beschwerdekommission festzustellen.

55 Folglich sind die vorgelegten Fragen zulässig.

IV ANTWORTEN DES GERICHTSHOFS

ZU DEN ERSTEN BEIDEN FRAGEN

56 Mit den ersten beiden Fragen in den jeweiligen Rechtssachen, die gemeinsam behandelt werden sollten, ersuchen das vorlegende Gericht und die Beschwerdekommission im Wesentlichen um Klärung, ob bzw. inwieweit die Richtlinie es EWR-Staaten untersagt, ihre nationalen Rechtsvorschriften betreffend die Pflicht zur Identifizierung des Kunden im Sinne der Artikel 8 Absatz 1 Buchstabe a und Artikel 9 Absätze 1 und 6 der Richtlinie sowie die Pflicht zur Einholung von Informationen über Zweck und angestrebte Art der Geschäftsbeziehung im Sinne der Artikel 8 Absatz 1 Buchstabe c und Artikel 9 Absatz 6 der Richtlinie auf Dienstleister für Trusts und Gesellschaften anzuwenden, die in

purpose and intended nature of the business relationship as specified in Article 8(1)(c) and Article 9(6) of the Directive.

OBSERVATIONS SUBMITTED TO THE COURT

57 The Liechtenstein Government deduces from the facts provided to the Court that the defendant performed his services in Liechtenstein by way of establishment and for that reason the SPG fully applies to him. Moreover, for the purposes of Article 31 EEA, the decisive factor is not the place of the registered office, but the character of economic activity performed in the territory of an EEA State (reference is made to the judgments of the Court of Justice of the European Union ("ECJ") in *Gebhard*, C-55/94, EU:C:1995:411, paragraphs 25 and 27, and *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 46).

58 Turning to the first question in each case, the Liechtenstein Government submits that the Directive does not include the term "legal seat". Consequently, that term cannot be decisive for the outcome of the cases. Rather, it is the activity of a person falling under the Directive which triggers its applicability. The reference in Article 22(2) of the Directive to "the Member State in whose territory the institution or person forwarding the information is situated" does not alter this conclusion since the case law of ECJ demonstrates that these words must be understood in accordance with their ordinary meaning (reference is made to the judgment in *Jyske Bank*, C212/11, EU:C:2013:270, paragraph 42). According to the Liechtenstein Government, the ordinary meaning of "situated" corresponds neither to the notion of a legal seat nor to the place of establishment.

ihrem Hoheitsgebiet im Rahmen des freien Dienstleistungsverkehrs tätig sind, aber in anderen EWR-Staaten ihren rechtlichen Sitz haben.

DEM GERICHTSHOF VORGELEGTE STELLUNGNAHMEN

57 Aus dem geschilderten Sachverhalt leitet die Regierung des Fürstentums Liechtenstein ab, dass der Beschuldigte seine Dienstleistungen in Liechtenstein im Rahmen der Niederlassung erbracht hat und das SPG aus diesem Grund uneingeschränkt Anwendung auf ihn findet. Darüber hinaus ist der entscheidende Faktor für die Zwecke von Artikel 31 des EWR-Abkommens nicht der Geschäftssitz, sondern die Art der Geschäftstätigkeit, der im Hoheitsgebiet eines EWR-Staats nachgegangen wird (es wird auf die Urteile des Gerichtshofs der Europäischen Union (im Folgenden: EuGH) in *Gebhard*, C-55/94, EU:C:1995:411, Randnrn. 25 und 27, und *Winner Wetten*, C-409/06, EU:C:2010:503, Randnr. 46, verwiesen).

58 Bezugnehmend auf die erste Frage in den beiden Rechtssachen führt die Regierung des Fürstentums Liechtenstein aus, dass der Begriff „rechtlicher Sitz“ in der Richtlinie nicht vorkommt. Dementsprechend kann dieser Begriff auch nicht ausschlaggebend für die Entscheidung in diesen Rechtssachen sein. Die Anwendbarkeit ist vielmehr von der Tätigkeit einer der Richtlinie unterliegenden Person abhängig. Der Hinweis in Artikel 22 Absatz 2 der Richtlinie auf den Mitgliedstaat, „in dessen Hoheitsgebiet sich das Institut oder die Person, von dem bzw. der diese Informationen stammen, befindet” ändert nichts an dieser Schlussfolgerung, da aus der Rechtsprechung des EuGH hervorgeht, dass diese Wendung ihrem gewöhnlichen Sinn nach zu verstehen ist (es wird auf das Urteil in *Jyske Bank*, C-212/11, EU:C:2013:270, Randnr. 42, verwiesen). Der Regierung des Fürstentums Liechtenstein zufolge entspricht der gewöhnliche Sinn des Wortes „befindet“ weder dem Begriff eines rechtlichen Sitzes noch eines Ortes der Niederlassung.

59 The Liechtenstein Government argues that national supervisory authorities must have the competence, without exception, to supervise any activity covered by the Directive that is carried out in their territory.

60 With regard to the second question in each case, the Liechtenstein Government reiterates that a trust and company service provider, such as the defendant, has to comply with the national legislation of the EEA State in the territory of which he is active, or more precisely, where he performs the services covered by the Directive.

61 Furthermore, the Liechtenstein Government rejects the notion that Article 48(4) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73) ("Directive 2015/849") can be relied upon in interpreting the Directive.

62 According to the Liechtenstein Government, Article 37 of the Directive does not contain any specific rules on cooperation between national supervisory authorities. Therefore, each national supervisory authority operates more or less independently. Due to the absence of comprehensive cooperation and information exchange between national supervisory authorities, the FMA cannot have recourse to the equivalent authority in the United Kingdom and ascertain whether, and, if so, to what extent, the activities carried out by the defendant are being supervised there. In the absence of such cooperation, effective supervision of the defendant's compliance would not be ensured, as required by the Directive, if

59 Die Regierung des Fürstentums Liechtenstein trägt vor, dass nationale Aufsichtsbehörden ausnahmslos mit der erforderlichen Kompetenz ausgestattet sein müssen, alle Tätigkeiten, die der Richtlinie unterliegen und in ihrem Hoheitsgebiet ausgeführt werden, zu überwachen.

60 In Bezug auf die zweite Frage in den beiden Rechtssachen weist die Regierung des Fürstentums Liechtenstein darauf hin, dass ein Dienstleister für Trusts und Gesellschaften wie der Beschuldigte die nationalen Rechtsvorschriften des EWR-Staats einzuhalten hat, in dem er tätig ist bzw. – genauer gesagt – in dem er die der Richtlinie unterliegenden Dienstleistungen erbringt.

61 Überdies lehnt es die Regierung des Fürstentums Liechtenstein ab, Artikel 48 Absatz 4 der Richtlinie (EU) 2015/849 des Europäischen Parlaments und des Rates vom 20. Mai 2015 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung, zur Änderung der Verordnung (EU) Nr. 648/2012 des Europäischen Parlaments und des Rates und zur Aufhebung der Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates und der Richtlinie 2006/70/EG der Kommission (ABl. 2015 L 141, S. 73) (im Folgenden: Richtlinie 2015/849) zur Auslegung der Richtlinie heranzuziehen.

62 Laut der Regierung des Fürstentums Liechtenstein enthält Artikel 37 der Richtlinie keine speziellen Vorschriften über die Zusammenarbeit zwischen den nationalen Aufsichtsbehörden. Das bedeutet, dass die jeweiligen nationalen Aufsichtsbehörden mehr oder minder unabhängig voneinander tätig sind. Da zwischen den nationalen Aufsichtsbehörden keine umfassende Zusammenarbeit und kein Informationsaustausch stattfindet, kann die FMA nicht auf ihr Gegenstück im Vereinigten Königreich zurückgreifen, um zu ermitteln, ob bzw. inwieweit die Tätigkeit des Beschuldigten dort überwacht wird. In Ermangelung einer solchen Zusammenarbeit könnte keine wirksame Überwachung der Einhaltung der

supervisory authorities were competent only to supervise service providers established in their territory.

63 With regard to the issue of whether double supervision might be a restriction on the defendant's freedom to provide services under Article 36 EEA, the Liechtenstein Government submits that, in adhering to what is specified in the Directive, the application of the SPG cannot constitute a restriction on the freedom to provide services. Even if such a restriction were found to exist, it would certainly be justified.

64 Elaborating on the issue of justification, the Liechtenstein Government states that the requirements under national law for the defendant to identify customers and compile a business or risk profile must be regarded as serving the aim of preventing and combating money laundering. Those obligations are based on Article 8(1)(a) and (c) of the Directive and must therefore be considered suitable for attaining the aims which they pursue.

65 As for the issue of proportionality, the Liechtenstein Government emphasises that Article 37(1) of the Directive requires effective supervision of service providers such as the defendant. Noting the lack of comprehensive cooperation with other supervisory authorities in the EEA States, the Liechtenstein Government argues that an absence of the possibility for the FMA to verify information could create weaknesses or even loopholes in the supervision of service providers. Furthermore, even if the defendant were required to comply with two or more national regimes regarding one and the same business relationship, that could not constitute a serious burden on him. Namely, this does not entail having to identify the

Vorschriften durch den Beschuldigten, wie in der Richtlinie vorgesehen, gewährleistet werden, sofern die Aufsichtsbehörden nur für die Überwachung von Dienstleistern mit einem rechtlichen Sitz in ihrem Hoheitsgebiet zuständig sind.

63 Im Hinblick auf die Frage, ob eine doppelte Überwachung für den Beschuldigten eine Beschränkung des freien Dienstleistungsverkehrs gemäss Artikel 36 des EWR-Abkommens darstellen könnte, bringt die Regierung des Fürstentums Liechtenstein vor, dass angesichts des Inhalts der Richtlinie die Anwendung des SPG keine Beschränkung des freien Dienstleistungsverkehrs darstellen kann. Selbst wenn eine solche Beschränkung festgestellt würde, wäre sie mit Sicherheit gerechtfertigt.

64 Bezugnehmend auf die Frage der Rechtfertigung legt die Regierung des Fürstentums Liechtenstein dar, dass die Anforderung an den Beschuldigten im nationalen Recht, die Identität der Kunden festzustellen und ein Geschäfts- oder Risikoprofil zu erstellen, dem Ziel der Verhinderung und Bekämpfung von Geldwäsche dient. Diese Verpflichtungen gehen auf Artikel 8 Absatz 1 Buchstaben a und c der Richtlinie zurück und müssen daher als für die mit ihnen verfolgten Ziele geeignet angesehen werden.

65 Mit Blick auf die Frage der Verhältnismässigkeit betont die Regierung des Fürstentums Liechtenstein, dass Artikel 37 Absatz 1 der Richtlinie die wirksame Überwachung von Dienstleistern wie dem Beschuldigten vorsieht. In Ermangelung einer umfassenden Zusammenarbeit mit anderen Aufsichtsbehörden in den EWR-Staaten, so die Regierung des Fürstentums Liechtenstein, könnte das Fehlen einer Kontrollmöglichkeit durch die FMA die Überwachung der Dienstleister schwächen und gegebenenfalls Schlupflöcher schaffen. Selbst wenn der Beschuldigte hinsichtlich ein und derselben Geschäftsbeziehung die nationalen Vorschriften zweier oder mehrerer Staaten einhalten müsste, könnte dies noch immer

customers or beneficial owners twice. Rather, the defendant would only have to keep two or more sets of due diligence files.

66 At the hearing, the defendant argued that he had in fact complied with the relevant due diligence requirements with regard to his clients, verifying their identity by means of, *inter alia*, copies of passports, obtaining information on their residence and utility bills. He also maintained that he had already provided the FMA with such documents regarding the persons connected to his clients, but that such documents must have had been overlooked by the FMA. Furthermore, he stated that he had offices both in the United Kingdom and in Liechtenstein.

67 With regard to the first question in each case, the Government of Spain argues, focusing mainly on the first question in Case E-26/15, that this legal issue requires an assessment of whether the Directive forbids host State authorities to check if an operator has duly verified customer identities.

68 Referring to the objective of the Directive and the context in which it was adopted, the Government of Spain submits that the combating of money laundering and terrorist financing are legitimate aims which the Member States have endorsed both at international and European level (reference is made to the ECJ´s judgment in *Jyske Bank*, cited above, paragraphs 46 and 62, and to the Opinion of Advocate General Bot in the same case, EU:C:2012:607, points 48 to

keine ernsthafte Belastung darstellen, da dies nicht bedeutet, dass die Identität der Kunden oder wirtschaftlichen Eigentümer zweimal festgestellt werden muss. Der Beschuldigte müsste die Erfüllung seiner Sorgfaltspflicht lediglich in doppelter bzw. mehrfacher Ausfertigung dokumentieren.

66 Im Rahmen der Sitzung brachte der Beschuldigte vor, er habe die entsprechende Sorgfaltspflicht in Bezug auf seine Klienten erfüllt und deren Identität u. a. anhand von Passkopien, Angaben über ihren Wohnsitz und Rechnungen von Versorgungsunternehmen überprüft. Er äusserte zudem, er habe der FMA bereits derartige Dokumente in Bezug auf die Personen, die im Zusammenhang mit seinen Klienten stehen, übergeben, die FMA müsse diese Unterlagen jedoch übersehen haben. Darüber hinaus gab er an, über Büros sowohl im Vereinigten Königreich als auch in Liechtenstein zu verfügen.

67 Zur ersten Frage in den beiden Rechtssachen bringt die Regierung des Königreichs Spanien – vor allem mit Blick auf die erste Frage in der Rechtssache E-26/15 – vor, dass diese rechtliche Fragestellung eine Beurteilung erfordert, ob es die Richtlinie den Behörden des Aufnahmemitgliedstaats untersagt zu untersuchen, ob ein Anbieter die Identität seiner Kunden ordnungsgemäss überprüft hat.

68 Hinsichtlich der Zielsetzung der Richtlinie und des Hintergrunds, vor dem sie verabschiedet wurde, vertritt die Regierung des Königreichs Spanien die Auffassung, dass die Bekämpfung der Geldwäsche und der Terrorismusfinanzierung legitime Ziele darstellen, zu deren Erreichung sich die Mitgliedstaaten sowohl auf internationaler als auch auf europäischer Ebene verpflichtet haben (es wird auf das Urteil des EuGH in *Jyske Bank*, oben erwähnt, Randnrn. 46 und 62, und auf die Schlussanträge des Generalanwalts Bot in derselben Rechtssache, EU:C:2012:607, Nrn. 48 bis 50, 55, 56 und 63, verwiesen). Die Richtlinie führt jedoch, so die Regierung des

50, 55 to 56 and 63). It adds that the Directive does not constitute full harmonisation of this field.

69 The Government of Spain contends that the ECJ has accepted that Article 22(2) of the Directive does not preclude the host State from requiring an institution carrying out activities in its territory under the rules on the freedom to provide services to forward the required information directly to its own financial intelligence unit (reference is made to the judgment in *Jyske Bank*, cited above, paragraph 56).

70 Furthermore, the Government of Spain argues that the ECJ's case law demonstrates that the combating of money laundering constitutes a legitimate aim capable of justifying a barrier to the freedom to provide services (reference is made to the judgments in *Jyske Bank*, cited above, paragraph 64, and *Zeturf*, C212/08, EU:C:2011:437, paragraphs 45 to 46).

71 The Government of Spain concludes that authorities of the host State should be entitled to monitor compliance with their domestic law obligations in accordance with the procedures established in their national legislation on anti-money laundering.

72 Turning to the second question in each case, the Government of Spain submits that in order to answer these questions, the Court will need to ascertain whether the obligations under national law are compatible with Article 36 EEA. In that regard, the Government of Spain stresses that, at the relevant time, there was no mechanism for cooperation and exchange of information that could have enabled host EEA States in all circumstances to effectively combat money laundering and terrorist financing. It adds that, although a due diligence requirement by the host EEA State may give rise to additional expense and administrative burdens, these would be

Königreichs Spanien, keine vollständige Harmonisierung in diesem Bereich herbei.

69 Die Regierung des Königreichs Spanien erläutert, dass der EuGH akzeptiert hat, dass es Artikel 22 Absatz 2 der Richtlinie dem Aufnahmemitgliedstaat nicht untersagt, von einem im Rahmen des freien Dienstleistungsverkehrs in seinem Hoheitsgebiet tätigen Institut die Weiterleitung der erforderlichen Angaben direkt an seine eigene zentrale Meldestelle zu verlangen (es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnr. 56, verwiesen).

70 Darüber hinaus argumentiert die Regierung des Königreichs Spanien, dass nach der Rechtsprechung des EuGH die Bekämpfung der Geldwäsche ein legitimes Ziel darstellt, das eine Beschränkung des freien Dienstleistungsverkehrs rechtfertigen kann (es wird auf die Urteile in *Jyske Bank*, oben erwähnt, Randnr. 64, und *Zeturf*, C-212/08, EU:C:2011:437, Randnrn. 45 und 46, verwiesen).

71 Die Regierung des Königreichs Spanien gelangt zu der Schlussfolgerung, dass die Behörden des Aufnahmemitgliedstaats das Recht haben sollten, die Einhaltung ihrer einzelstaatlichen Bestimmungen in Übereinstimmung mit den in ihrem nationalen Recht verankerten Verfahren zur Verhinderung von Geldwäsche zu überwachen.

72 Zur zweiten Frage in den beiden Rechtssachen führt die Regierung des Königreichs Spanien aus, dass der Gerichtshof zur Beantwortung dieser Fragen klären muss, ob die im nationalen Recht vorgesehenen Verpflichtungen mit Artikel 36 des EWR-Abkommens vereinbar sind. Die Regierung des Königreichs Spanien weist diesbezüglich darauf hin, dass zum entsprechenden Zeitpunkt kein Mechanismus zur Zusammenarbeit und zum Informationsaustausch existierte, der es den Aufnahme-EWR-Staaten ermöglicht hätte, Geldwäsche und Terrorismusfinanzierung unter allen Umständen wirksam zu bekämpfen. Zudem können die Anforderungen des Aufnahme-EWR-

relatively limited, particularly since trust and company service providers should already have identified the customer and verified its identity in the EEA State where they are situated.

73 At the outset, ESA argues that the cases require a balance to be struck between, on the one hand, the important aims of preventing money laundering and terrorist financing pursued by the Directive and, on the other, ensuring that the freedom to provide services of institutions and persons covered by the Directive is not unnecessarily restricted. ESA contends that the case law of the ECJ provides valuable guidance in this respect (reference is made to the judgment in *Jyske Bank*, cited above, paragraphs 59 and 62 and onwards).

74 Dealing with the first and second questions together, ESA submits that, although the Directive lacks some precision, it is in effect based on a home country control system. This is the case because whenever a specific reporting obligation is imposed, the reporting is to be done to the competent authorities of the EEA State where the institution or person is situated, i.e. the State of origin (reference is made to the judgment in *Jyske Bank*, cited above, paragraph 43). ESA adds that the competent authorities of the EEA State of establishment are best placed to supervise compliance with the Directive. Moreover, the requirement under Article 36(1) of the Directive for EEA States to provide for trust and company service providers to be registered must entail that they only need register once, as any other interpretation would constitute a serious restriction on the fundamental freedoms.

Staats hinsichtlich der Sorgfaltspflicht zwar zu zusätzlichem finanziellem und verwaltungstechnischem Aufwand führen, dieser wäre jedoch vergleichsweise begrenzt – insbesondere, da Dienstleister für Trusts und Gesellschaften die Identität des Kunden in dem EWR-Staat, in dem sie sich befinden, bereits festgestellt und überprüft haben sollten.

73 Einleitend hält die EFTA-Überwachungsbehörde fest, dass die Rechtssachen eine Abwägung zwischen den wichtigen Zielsetzungen der Richtlinie zur Verhinderung von Geldwäsche und Terrorismusfinanzierung einerseits und der Vermeidung unnötiger Beschränkungen der Dienstleistungsfreiheit von Instituten und Personen, die der Richtlinie unterliegen, andererseits, erfordern. Die EFTA-Überwachungsbehörde weist darauf hin, dass die Rechtsprechung des EuGH in diesem Zusammenhang wertvolle Hilfestellungen bietet (es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnrn. 59 und 62 ff., verwiesen).

74 Zur gemeinsamen Beantwortung der ersten und zweiten Frage erläutert die EFTA-Überwachungsbehörde, dass die Richtlinie – obschon es ihr an einer gewissen Präzision mangelt – im Grunde auf ein System der Herkunftslandkontrolle zurückgreift. Dies ist der Fall, da immer dann, wenn eine bestimmte Meldepflicht auferlegt wird, die Meldung an die zuständigen Behörden des EWR-Staats, in dem sich das Institut oder die Person befindet, also des Herkunftsmitgliedstaats, zu übermitteln ist (es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnr. 43, verwiesen). Die EFTA-Überwachungsbehörde fügt hinzu, dass die zuständigen Behörden des EWR-Staats des rechtlichen Sitzes am besten geeignet sind, um die Einhaltung der Richtlinie zu überwachen. Zudem bedingt die Anforderung laut Artikel 36 Absatz 1 der Richtlinie, dass die EWR-Staaten vorsehen, dass Dienstleister für Trusts und Gesellschaften eingetragen sein müssen, lediglich eine einmalige Eintragung, da jede andere Auslegung eine ernsthafte Beschränkung der Grundfreiheiten darstellen würde.

75 ESA maintains that, consequently, the defendant was clearly bound by the due diligence requirements established in United Kingdom legislation. Nonetheless, the Directive, as a minimum harmonisation measure, does not preclude other EEA States from imposing due diligence requirements, as long as they seek to strengthen the effectiveness of the fight against money laundering and terrorist financing.

76 ESA is of the opinion that, in order to provide a satisfactory answer to the questions referred, the Court should also consider provisions of EEA law not mentioned in the questions. In this regard, ESA notes that the assumption underlying the references seems to be that the defendant provided services in Liechtenstein in accordance with Article 36 EEA and was not established there within the meaning of Article 31 EEA. ESA stresses that this is an issue for the referring court and the Appeals Board to assess in light of the concrete factual circumstances in which the defendant pursued his activities.

77 Continuing on the basis that Article 36 EEA applies to the present case, ESA notes that the defendant is established in the United Kingdom and is subject to its legislation. Any imposition of administrative requirements or formalities by Liechtenstein is therefore in principle liable to restrict the defendant's fundamental freedom to provide services. Notwithstanding that fact, national measures reinforcing due diligence obligations are in principle capable of being justified by reference to the objective of preventing the use of the financial system for the purpose of money laundering and terrorist financing, an objective recognised in recitals 1 and 3 in the preamble to the Directive as an important public policy

75 Dementsprechend, so die EFTA-Überwachungsbehörde, unterlag der Beschuldigte eindeutig der in den Rechtsvorschriften des Vereinigten Königreichs verankerten Sorgfaltspflicht. Nichtsdestotrotz untersagt es die Richtlinie – als Massnahme der Mindestharmonisierung – anderen EWR-Staaten nicht, Sorgfaltspflichten vorzusehen, sofern dadurch eine Erhöhung der Wirksamkeit der Bekämpfung von Geldwäsche und Terrorismusfinanzierung angestrebt wird.

76 Nach Auffassung der EFTA-Überwachungsbehörde sollte der Gerichtshof zur sachdienlichen Beantwortung der vorgelegten Fragen auch Bestimmungen des EWR-Rechts berücksichtigen, auf die in den Fragen nicht Bezug genommen wird. Diesbezüglich stellt die EFTA-Überwachungsbehörde fest, dass die Anträge auf der Annahme zu beruhen scheinen, dass der Beschuldigte in Liechtenstein Dienstleistungen gemäss Artikel 36 des EWR-Abkommens erbracht hat und nicht im Sinne des Artikels 31 des EWR-Abkommens dort niedergelassen war. Die EFTA-Überwachungsbehörde betont, dass diese Frage durch das vorlegende Gericht und die Beschwerdekommission mit Blick auf die tatsächlichen Umstände, unter denen der Beschuldigte seine Tätigkeit ausgeübt hat, zu klären ist.

77 Geht man davon aus, dass Artikel 36 des EWR-Abkommens auf die gegenständliche Rechtssache anwendbar ist, so die EFTA-Überwachungsbehörde weiter, ist der Beschuldigte im Vereinigten Königreich ansässig und unterliegt den dortigen Rechtsvorschriften. Die Auferlegung von Verwaltungsanforderungen oder Formalitäten durch Liechtenstein kann daher grundsätzlich zu einer Beschränkung der Dienstleistungsfreiheit des Beschuldigten führen. Ungeachtet dessen können nationale Massnahmen zur Stärkung der Sorgfaltspflicht im Grunde unter Verweis auf das Ziel der Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung gerechtfertigt werden, wobei diese Zielsetzung im ersten und dritten Erwägungsgrund der

objective. Moreover, this objective has been accepted as a legitimate aim capable of justifying a barrier to a fundamental freedom (reference is made to the judgment in *Jyske Bank*, cited above, paragraph 64).

78 Moving on to the issue of proportionality, ESA notes that the referring court and the Appeals Board must examine whether the legitimate public interest is not already safeguarded by the rules of the State of establishment to which the service provider is subject. A duplication of requirements must be justified, for example, by rendering more effective the combating of money laundering and terrorist financing in the absence of any effective mechanism guaranteeing full and complete cooperation between EEA States (reference is made to the judgment in *Jyske Bank*, cited above).

79 ESA adds that it may be useful to distinguish between the application of national rules transposing the Directive to foreign service providers and procedures for verifying that such service providers have complied with the national implementing rules of the EEA State in which they are established. In the latter case such additional verifications would, in principle, appear proportionate granted that the additional verifications are not unnecessarily burdensome for trust and company service providers, and merely involve the presentation of documents which are already kept on file by virtue of the obligations imposed in the service provider's State of establishment, e.g. in light of Article 30(a) of the Directive.

Präambel der Richtlinie als Ziel der öffentlichen Ordnung genannt wird. Überdies wurde bereits anerkannt, dass es sich hierbei um ein legitimes Ziel handelt, welches eine Beschränkung einer Grundfreiheit rechtfertigen kann (es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnr. 64, verwiesen).

78 In Bezug auf die Frage der Verhältnismässigkeit trägt die EFTA-Überwachungsbehörde vor, dass das vorlegende Gericht und die Beschwerdekommission zu prüfen haben, ob dem legitimen öffentlichen Interesse nicht bereits durch die Rechtsvorschriften des Staats, in dem der Dienstleister seinen rechtlichen Sitz hat, Rechnung getragen wird. Eine Duplizierung der Anforderungen muss gerechtfertigt werden, beispielsweise, weil sie, in Ermangelung eines wirksamen Mechanismus zur Gewährleistung einer vollständigen und lückenlosen Zusammenarbeit zwischen den EWR-Staaten, zur wirksameren Bekämpfung der Geldwäsche und der Terrorismusfinanzierung beiträgt (es wird auf das Urteil in *Jyske Bank*, oben erwähnt, verwiesen).

79 Eine Differenzierung zwischen der Anwendung nationaler Vorschriften zur Umsetzung der Richtlinie auf ausländische Dienstleister und den Verfahren zur Überprüfung der Einhaltung der nationalen Umsetzungsvorschriften des EWR-Staats, in dem diese ausländischen Dienstleister ihren rechtlichen Sitz haben, durch diese Dienstleister könnte sich der EFTA-Überwachungsbehörde zufolge als zweckmässig erweisen. Im zweiten Fall erscheinen solche zusätzlichen Überprüfungen im Grunde verhältnismässig, soweit die zusätzlichen Überprüfungen für Dienstleister für Trusts und Gesellschaften nicht unnötig belastend sind und sich lediglich auf die Vorlage von Dokumenten beschränken, die auf der Grundlage der im Staat des rechtlichen Sitzes des Dienstleisters vorgesehenen Verpflichtungen, also beispielsweise gemäss Artikel 30 Buchstabe a der Richtlinie, ohnehin aufbewahrt werden müssen.

80 However, as regards the requirements to establish and verify the identity of the customer and renew such verification, those requirements seem substantially equivalent to the requirements under the implementing legislation of the United Kingdom. Therefore, the application of Liechtenstein legislation to the defendant would in that case constitute an unjustified duplication of the requirements. ESA argues that there are no provisions in the Directive expressly requiring documents to be either dated or signed. Furthermore, such requirements do not seem necessary in order to attain the objectives of the Directive.

81 Finally, ESA notes that an EEA State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom to provide services for the purpose of avoiding professional rules which would be applicable to him if he were established within that State (reference is made to the ECJ´s judgment in *van Binsbergen*, 33/74, EU:C:1974:131, paragraph 13).

82 The Commission's arguments are for the most part substantively the same as those of ESA. In addition, the Commission argues that further support for reading the Directive as including the home country principle can be found in Article 6, Article 22(2), and Articles 37 and 39 of the Directive.

83 With regard to proportionality, the Commission adds that it would tend to consider a requirement to keep in Liechtenstein all original records of the foreign trust and company service provider, such as certified copies of passports, transaction documents etc., as disproportionate, since less restrictive means can be envisaged in the

80 Was jedoch die Anforderungen zur Feststellung und Überprüfung der Identität des Kunden und zur Wiederholung dieser Überprüfung angeht, so erwecken diese im Wesentlichen den Eindruck der Gleichwertigkeit mit den Anforderungen der Rechtsvorschriften, mit denen das Vereinigte Königreich die Richtlinie umgesetzt hat. Somit würde die Anwendung der liechtensteinischen Rechtsvorschriften auf den Beschuldigten im gegenständlichen Fall eine ungerechtfertigte Duplizierung der Anforderungen darstellen. Laut der EFTA-Überwachungsbehörde enthält die Richtlinie keine Bestimmungen, aus denen ausdrücklich hervorgeht, dass Unterlagen zu datieren oder zu unterzeichnen sind. Zur Erreichung der Zielsetzungen der Richtlinie erscheinen derartige Anforderungen auch nicht erforderlich.

81 Abschliessend hält die EFTA-Überwachungsbehörde fest, dass einem EWR-Staat nicht das Recht zum Erlass von Vorschriften abgesprochen werden kann, die verhindern sollen, dass der Erbringer einer Leistung, dessen Tätigkeit ganz oder vorwiegend auf das Gebiet dieses Staates ausgerichtet ist, sich den freien Dienstleistungsverkehr zunutze macht, um sich den Berufsregelungen zu entziehen, die auf ihn Anwendung fänden, wenn er im Gebiet dieses Staates ansässig wäre (es wird auf das Urteil des EuGH in *van Binsbergen*, 33/74, EU:C:1974:131, Randnr. 13, verwiesen).

82 Die Argumente der Kommission entsprechen im Wesentlichen jenen der EFTA-Überwachungsbehörde. Des Weiteren bringt die Kommission vor, dass Artikel 6, Artikel 22 Absatz 2, Artikel 37 und Artikel 39 der Richtlinie eine Auslegung, nach der die Richtlinie das Herkunftslandprinzip beinhaltet, bestätigen.

83 Hinsichtlich der Verhältnismässigkeit äussert die Kommission, sie neige dazu, eine Forderung, alle Originaldokumente des ausländischen Dienstleisters für Trusts und Gesellschaften – wie beglaubigte Passkopien, Transaktionsunterlagen usw. – in Liechtenstein aufzubewahren, als unverhältnismässig anzusehen, da

case of cross-border provision of services, such as producing a copy of those records, upon request (reference is made, by analogy, to the ECJ´s judgment in *Arblade and Others*, C-369/96 and C-376/96, EU:C:1999:575, paragraph 65). According to the Commission, a similar conclusion appears to be warranted with regard to the requirements that the profiles of business relationships should be dated and signed. Finally, there should be no general presumption of fraud, leading to a full, systematic check on all entities established in other EEA States that provide services on a temporary basis in the host EEA State (reference is made to the ECJ´s judgment in *Commission* v *Belgium*, C577/10, EU:C:2012:814, paragraph 53).

FINDINGS OF THE COURT

84 The Court notes that the regulatory framework at issue has been revised and amended, particularly with the introduction of Directive 2015/849. However, the assessment in the present proceedings must be based on the Directive as it stood at the relevant time.

85 The supervision of trust and company service providers under the Directive is governed by Articles 36 and 37 thereof, while cooperation between the competent authorities of the EEA States is addressed in Article 38. These provisions, in particular the requirement of licensing or registration in Article 36, demonstrate that, with regard to the supervision of trust and company service providers operating across borders, the references to EEA States and their competent authorities in the Directive must, in principle, be understood, as referring to the home EEA State of the service provider, which is the EEA State of establishment, and its competent

für den Fall der grenzüberschreitenden Erbringung von Dienstleistungen auch weniger einschränkende Massnahmen, wie die Vorlage einer Kopie dieser Dokumente auf Anfrage, denkbar sind (es wird sinngemäss auf das Urteil des EuGH in *Arblade u. a.*, C-369/96 und C-376/96, EU:C:1999:575, Randnr. 65, verwiesen). Der Kommission zufolge bietet sich im Hinblick auf die Forderung, dass die Profile der Geschäftsbeziehungen datiert und unterzeichnet sein müssen, eine ähnliche Schlussfolgerung an. Schliesslich sollte nicht von einem allgemeinen Betrugsverdacht ausgegangen werden, der zu einer vollständigen, systematischen Kontrolle aller Einrichtungen mit Sitz in anderen EWR-Staaten, die im Aufnahme-EWR-Staat vorübergehend Dienstleistungen erbringen, führt (es wird auf das Urteil des EuGH in *Kommission ./. Belgien*, C-577/10, EU:C:2012:814, Randnr. 53, verwiesen).

ENTSCHEIDUNG DES GERICHTSHOFS

84 Der Gerichtshof hält fest, dass der gegenständliche Regelungsrahmen insbesondere durch die Verabschiedung der Richtlinie 2015/849 überarbeitet und geändert wurde. Die Beurteilung im gegenständlichen Verfahren muss jedoch auf der Grundlage des Inhalts der Richtlinie zum massgeblichen Zeitpunkt erfolgen.

85 Die Überwachung von Dienstleistern für Trusts und Gesellschaften im Rahmen der Richtlinie ist in deren Artikeln 36 und 37 geregelt, während in Artikel 38 auf die Zusammenarbeit zwischen den zuständigen Behörden der EWR-Staaten eingegangen wird. Diese Bestimmungen, insbesondere die Anforderung der Zulassung oder Eintragung laut Artikel 36, zeigen, dass die Verweise in der Richtlinie auf EWR-Staaten und ihre zuständigen Behörden hinsichtlich der Überwachung von grenzüberschreitend tätigen Dienstleistern für Trusts und Gesellschaften im Grunde so zu verstehen sind, dass sie sich auf den EWR-Herkunftsstaat des

authorities (see, for comparison, *Jyske Bank*, cited above, paragraphs 41 to 43). Consequently, the defendant, who resides in the United Kingdom, is already subject to due diligence requirements in the United Kingdom.

86 However, the Directive only provides for a minimum level of harmonisation and, in particular, Article 5 thereof allows EEA States to adopt stricter provisions, where those provisions seek to strengthen the combating of money laundering or terrorist financing (see, for comparison, *Jyske Bank*, cited above, paragraph 61).

87 Consequently, the Directive does not deprive host EEA States of their competence to adopt stricter measures with regard to the content and scope of customer due diligence obligations, and to apply those measures to trust and company service providers operating in their territory by means of the freedom to provide services (see, by analogy, *Jyske Bank*, cited above, paragraph 48). Therefore, the Directive must be interpreted as not precluding the host EEA State from laying down, in its national legislation, due diligence requirements for a trust and company service provider, established in another EEA State, who engages in activities such as those at issue in the present proceedings, in the territory of the host EEA State.

88 Beyond that, the Court recalls, that, according to established case law, it may, in order to provide a useful answer to national courts, extract, from all the factors provided by them and, in particular, from the statement of grounds in the order for reference, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute (see Case E-25/13 *Gunnar Engilbertsson* v Íslandsbanki hf. [2014] EFTA Ct. Rep. 524, paragraph 52).

Dienstleisters, also den EWR-Staat des rechtlichen Sitzes, und seine zuständigen Behörden beziehen (vgl. entsprechend *Jyske Bank*, oben erwähnt, Randnrn. 41 bis 43). Entsprechend unterliegt der Beschuldigte, der seinen Wohnsitz im Vereinigten Königreich hat, bereits den Sorgfaltspflichten des Vereinigten Königreichs.

86 Die Richtlinie sieht jedoch nur ein Mindestmass an Harmonisierung vor, und insbesondere ihr Artikel 5 erlaubt den EWR-Staaten den Erlass strengerer Vorschriften, sofern dadurch die Bekämpfung von Geldwäsche und Terrorismusfinanzierung gefördert wird (vgl. entsprechend *Jyske Bank*, oben erwähnt, Randnr. 61).

87 Demzufolge entzieht die Richtlinie den Aufnahme-EWR-Staaten nicht die Kompetenz zum Erlass strengerer Massnahmen hinsichtlich des Inhalts und Umfangs von Sorgfaltspflichten gegenüber Kunden und zur Anwendung dieser Massnahmen auf Dienstleister für Trusts und Gesellschaften, die im Rahmen des freien Dienstleistungsverkehrs in ihrem Hoheitsgebiet tätig sind (vgl. sinngemäss *Jyske Bank*, oben erwähnt, Randnr. 48). Die Richtlinie ist daher so auszulegen, dass sie es dem Aufnahme-EWR-Staat nicht untersagt, in seinen nationalen Rechtsvorschriften Sorgfaltspflichten für einen Dienstleister für Trusts und Gesellschaften mit Sitz in einem anderen EWR-Staat vorzusehen, der im Hoheitsgebiet des Aufnahme-EWR-Staats Tätigkeiten wie jene ausübt, die Gegenstand dieses Verfahrens sind.

88 Ausserdem erinnert der Gerichtshof daran, dass es ihm der ständigen Rechtsprechung zufolge obliegt, zur sachdienlichen Beantwortung der Frage der nationalen Gerichte aus dem gesamten vorgelegten Material, insbesondere der Begründung der Vorlageentscheidung, diejenigen Elemente des EWR-Rechts herauszuarbeiten, die angesichts des Gegenstands des Rechtsstreits einer Auslegung bedürfen (vgl. Rechtssache E-25/13 *Gunnar Engilbertsson ./.* Íslandsbanki hf., EFTA Court Report 2014, S. 524, Randnr. 52).

89 In order to provide a useful answer the Court notes that national legislation, adopted in order to achieve the objectives of the Directive by granting the host EEA State certain competences with regard to those who operate in their territory by means of the freedom to provide services, must be compatible with the fundamental freedoms guaranteed by the EEA Agreement, including Article 36 EEA which prohibits all restrictions on the freedom to provide services within the EEA.

90 National legislation that gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services, and liable to be additional to the controls already conducted in the home EEA State of the trust and company service provider, thus dissuading the latter from carrying out such activities, constitutes a restriction on the freedom to provide services. This appears to be the case in the present proceedings. However, this must, ultimately, be determined by the referring court and the Appeals Board.

91 The Court adds that national legislation constituting a restriction on the fundamental freedoms may be justified where it meets an overriding requirement relating to the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the EEA State in which he is established and in so far as it is appropriate for securing the attainment of the aim which it pursues and does not go beyond what is necessary in order to attain it (see, for comparison, *Jyske Bank*, cited above, paragraph 60 and case law cited).

92 Taking account of recitals 1 and 3 in the preamble to the Directive, the Court finds that the prevention and combating of money laundering and terrorist financing constitute legitimate aims,

89 Zur sachdienlichen Beantwortung der Fragen hält der Gerichtshof ausserdem fest, dass die nationale Gesetzgebung die zur Verwirklichung der Ziele der Richtlinie, durch Anerkennung bestimmter Kompetenzen des Aufnahme-EWR-Staat in Bezug auf im Rahmen des freien Dienstleistungsverkehrs auf seinem Hoheitsgebiet tätige Dienstleister, verabschiedet wurde, mit den im EWR-Abkommen garantierten Grundfreiheiten, einschliesslich Artikel 36 des EWR-Abkommens, der sämtliche Beschränkungen des freien Dienstleistungsverkehrs untersagt, vereinbar sein muss.

90 Nationale Rechtsvorschriften, die im Zusammenhang mit Tätigkeiten im Rahmen der Vorschriften über den freien Dienstleistungsverkehr Schwierigkeiten und Zusatzkosten verursachen und zu den bereits im EWR-Herkunftsstaat des Dienstleisters für Trusts und Gesellschaften durchgeführten Kontrollen hinzukommen, wodurch sie diesen von der Ausführung derartiger Tätigkeiten abbringen, stellen eine Beschränkung des freien Dienstleistungsverkehrs dar. Dies scheint im gegenständlichen Verfahren der Fall zu sein. Allerdings ist dies abschliessend durch das vorlegende Gericht und die Beschwerdekommission zu bestimmen.

91 Der Gerichtshof fügt hinzu, dass eine nationale Regelung, die eine Beschränkung der Grundfreiheiten darstellt, gerechtfertigt sein kann, wenn sie auf zwingenden Gründen des Allgemeininteresses beruht und dieses Interesse nicht schon durch Vorschriften geschützt wird, denen der Dienstleistende in dem EWR-Staat unterliegt, in dem er niedergelassen ist, und wenn sie geeignet ist, die Erreichung des mit ihr verfolgten Ziels zu gewährleisten, ohne über das hinauszugehen, was dazu erforderlich ist (vgl. entsprechend *Jyske Bank*, oben erwähnt, Randnr. 60, und die zitierte Rechtsprechung).

92 Unter Berücksichtigung der Erwägungsgründe 1 und 3 der Präambel der Richtlinie hält der Gerichtshof fest, dass die Verhinderung und Bekämpfung von Geldwäsche und Terrorismusfinanzierung legitime

capable of justifying a restriction on the fundamental freedoms (see, for comparison, *Jyske Bank*, cited above, paragraphs 62 to 64 and case law cited).

93 With regard to the issue whether the national legislation in question is suitable for attaining the aims it pursues, the Court recalls, having regard to recital 5 in the preamble to the Directive, that money laundering and terrorist financing are frequently carried out in an international context. Moreover, recital 15 in the preamble to the Directive states that anti-money laundering and anti-terrorist financing obligations should also cover trust and company service providers since the tightening of controls in the financial sector has prompted money launderers and terrorist financers to seek alternative methods for concealing the origin of the proceeds of crime and as such channels can be used for terrorist financing. In this regard, national legislation which enables supervision over trust and company service providers established in other EEA States, with regard to services provided in the territory of the host EEA State, appears to facilitate the gathering of information necessary for competent authorities of the host EEA State to combat money laundering and terrorist financing effectively within its territory. It follows that the legislation appears suitable for ensuring the public interests pursued. However, this is an issue that is, ultimately, for the referring court and the Appeals Board to assess.

Ziele darstellen, die eine Beschränkung der Grundfreiheiten rechtfertigen können (vgl. entsprechend *Jyske Bank*, oben erwähnt, Randnrn. 62 bis 64, und die zitierte Rechtsprechung).

93 Im Zusammenhang mit der Frage, ob die fraglichen nationalen Rechtsvorschriften zur Erreichung der mit ihnen verfolgten Ziele geeignet sind, weist der Gerichtshof mit Blick auf Erwägungsgrund 5 in der Präambel der Richtlinie darauf hin, das Geldwäsche und Terrorismusfinanzierung häufig grenzübergreifend erfolgen. In Erwägungsgrund 15 der Präambel der Richtlinie heisst es darüber hinaus, dass die in Bezug auf die Bekämpfung der Geldwäsche und der Terrorismusfinanzierung bestehenden Pflichten auf Dienstleister für Trusts und Gesellschaften angewandt werden sollten, da Geldwäscher und Geldgeber des Terrorismus wegen der verschärften Kontrollen im Finanzsektor nach alternativen Möglichkeiten zur Verschleierung des Ursprungs von aus Straftaten stammenden Erlösen suchen und da derartige Kanäle zur Terrorismusfinanzierung genutzt werden können. Vor diesem Hintergrund scheinen nationale Rechtsvorschriften, welche die Überwachung von Dienstleistern für Trusts und Gesellschaften mit rechtlichem Sitz in anderen EWR-Staaten mit Blick auf im Hoheitsgebiet des Aufnahme-EWR-Staats erbrachte Dienstleistungen erlauben, die Sammlung von Informationen zu ermöglichen, welche die zuständigen Behörden des Aufnahme-EWR-Staats zur wirksamen Bekämpfung der Geldwäsche und Terrorismusfinanzierung auf ihrem Hoheitsgebiet benötigen. Somit erscheinen die Rechtsvorschriften zur Erreichung der verfolgten öffentlichen Interessen geeignet. Diese Frage ist jedoch letztlich vom vorlegenden Gericht und der Beschwerdekommission zu beurteilen.

94 As for proportionality, a balance must be struck between, on the one hand, the aims pursued by the Directive, notably the prevention of money laundering and terrorist financing and, on the other, ensuring that the freedom to provide services of institutions and persons covered by the Directive is not unnecessarily restricted.

95 In order to effectively combat money laundering and terrorist financing, an EEA State must be able to obtain the information necessary to enable it to identify and pursue possible infringements in that regard which take place in its territory or which involve persons established on that territory (see, for comparison, *Jyske Bank*, cited above, paragraph 69). In cases where such information can be obtained through effective mechanisms of cooperation between the competent authorities of the EEA States, national legislation of a host EEA State imposing on a trust and company service provider operating in its territory an obligation to provide documents containing that same information, is, in principle, not justified.

96 However, the Court observes that the Directive does not lay down a framework for full cooperation between the competent authorities of the EEA States. Article 38 of the Directive provides only for limited cooperation, which appears not to have been put into effect. Furthermore, Council Decision 2000/642/JHA concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (OJ 2000 L 271, p. 4) does not extend to the EEA Agreement. Consequently, the mechanism for cooperation between the competent authorities of the EEA States under the Directive suffers from certain deficiencies (see, for comparison, *Jyske Bank*, cited above, paragraph 73).

94 Hinsichtlich der Verhältnismässigkeit muss eine Abwägung zwischen den Zielsetzungen der Richtlinie, nämlich der Verhinderung von Geldwäsche und Terrorismusfinanzierung einerseits und der Vermeidung unnötiger Beschränkungen der Dienstleistungsfreiheit von Instituten und Personen, die der Richtlinie unterliegen, andererseits, erfolgen.

95 Um die Geldwäsche und die Terrorismusfinanzierung wirksam bekämpfen zu können, muss ein EWR-Staat die notwendigen Informationen erhalten können, um etwaige diesbezügliche Verstösse, die in seinem Hoheitsgebiet stattgefunden haben oder an denen dort ansässige Personen beteiligt sind, aufdecken und verfolgen zu können (vgl. entsprechend *Jyske Bank*, oben erwähnt, Randnr. 69). In Fällen, in denen solche Informationen durch wirksame Mechanismen der Zusammenarbeit zwischen den zuständigen Behörden der EWR-Staaten eingeholt werden können, sind nationale Rechtsvorschriften eines Aufnahme-EWR-Staats, die einem auf ihrem Hoheitsgebiet tätigen Dienstleister für Trusts und Gesellschaften eine Verpflichtung zur Vorlage von Dokumenten auferlegen, die ebendiese Informationen enthalten, grundsätzlich nicht gerechtfertigt.

96 Der Gerichtshof merkt jedoch an, dass die Richtlinie keinen Rahmen für eine vollständige Zusammenarbeit zwischen den zuständigen Behörden der EWR-Staaten schafft. Artikel 38 der Richtlinie sieht nur eine beschränkte Zusammenarbeit vor, die dem Anschein nach nicht umgesetzt wurde. Des Weiteren erstreckt sich der Beschluss des Rates 2000/642/JI über Vereinbarungen für eine Zusammenarbeit zwischen den zentralen Meldestellen der Mitgliedstaaten beim Austausch von Informationen (ABl. 2000 L 271, S. 4) nicht auf das EWR-Abkommen. Folglich weist der Mechanismus der Zusammenarbeit zwischen den zuständigen Behörden der EWR-Staaten im Rahmen der Richtlinie gewisse Lücken auf (vgl. entsprechend *Jyske Bank*, oben erwähnt, Randnr. 73).

97 Accordingly, in the absence of an effective system of cooperation between the competent authorities of EEA States, a host EEA State is, in principle, not precluded from directly approaching a trust and company service provider in order to establish that its rules concerning the combating of money laundering and terrorist financing are respected. This should, however, be done in a proportionate manner. Therefore, host EEA States should not automatically subject all trust and company service providers, which operate in their territory by means of the freedom to provide services, to the full scope of application of national legislation. In particular, there should be no general presumption of fraud, leading to full, systematic checks of all those who are established in other EEA States and provide services on a temporary basis in the host EEA State (see, for comparison, *Commission* v *Belgium*, cited above, paragraph 53).

98 Furthermore, the Court finds that where the host EEA State requests information, such as documents, located in the EEA State of establishment, the host EEA State must grant the trust and company service provider a reasonable period of time to provide that information, e.g. by handing over copies of documents. In this regard, the appropriate length of the notice will depend on the volume of documents requested and the medium on which they are stored.

99 However, the assessment of proportionality in the present proceedings is ultimately a matter for the referring court and the Appeals Board to determine, having regard to all the facts and circumstances before them and the guidance provided by the Court.

97 Somit ist es einem Aufnahme-EWR-Staat in Ermangelung eines wirksamen Systems zur Zusammenarbeit zwischen den zuständigen Behörden der EWR-Staaten grundsätzlich nicht untersagt, sich direkt an den Dienstleister für Trusts und Gesellschaften zu wenden um nachzuprüfen, dass seine Vorschriften über die Bekämpfung der Geldwäsche und Terrorismusfinanzierung eingehalten werden. Dabei sollte jedoch in verhältnismässiger Weise vorgegangen werden. Deshalb sollten die Aufnahme-EWR-Staaten nicht automatisch alle Dienstleister für Trusts und Gesellschaften, die im Rahmen des freien Dienstleistungsverkehrs auf ihrem Hoheitsgebiet tätig sind, vollumfänglich ihren nationalen Rechtsvorschriften unterwerfen. Insbesondere sollte nicht von einem allgemeinen Betrugsverdacht ausgegangen werden, der zu vollständigen, systematischen Kontrollen aller Dienstleister mit Sitz in anderen EWR-Staaten, die im Aufnahme-EWR-Staat vorübergehend Dienstleistungen erbringen, führt (vgl. entsprechend *Kommission ./. Belgien*, oben erwähnt, Randnr. 53).

98 Überdies vertritt der Gerichtshof die Auffassung, dass der Aufnahme-EWR-Staat in Fällen, in denen er Informationen verlangt, wie Dokumente, die sich im EWR-Staat des rechtlichen Sitzes befinden, dem Dienstleister für Trusts und Gesellschaften eine angemessene Frist zur Bereitstellung dieser Informationen, z. B. durch die Vorlage von Kopien der Dokumente, gewähren muss. Diesbezüglich ist die angemessene Frist für die Bereitstellung abhängig von der Menge der geforderten Dokumente und dem Medium, auf dem diese gespeichert sind.

99 Die Beurteilung der Verhältnismässigkeit im gegenständlichen Verfahren obliegt jedoch letztlich dem vorlegenden Gericht und der Beschwerdekommission unter Berücksichtigung aller ihnen vorgetragenen Tatsachen und Verhältnisse und der Hilfestellung des Gerichtshofs.

100 For the sake of completeness, the Court notes that the guidance above is based on the premise that the defendant carried out his activities in Liechtenstein under the freedom to provide services and not the freedom of establishment. If the referring court and the Appeals Board find, however, that the defendant did not carry out his activities in Liechtenstein by means of the freedom to provide services, but as a trust and company services provider established there under Article 31 EEA, then the activities of the defendant performed on grounds of that establishment fall under the supervision of the competent authorities in Liechtenstein.

101 In determining whether the defendant operated under the freedom of establishment or merely under the freedom to provide services, the referring court and the Appeals Board need to consider the duration, regularity, periodical nature or continuity of the defendant's activity in Liechtenstein. A person may, while still remaining within the scope of application of the freedom to provide services, equip himself with some infrastructure in the host EEA State, including an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of performing the service in question (see, for comparison, the judgment in *Schnitzer*, C-215/01, EU:C:2003:662, paragraph 28 and case law cited). That situation must, however, be distinguished from that of a person who pursues a professional activity on a stable and continuous basis in another State where he holds himself out from an established professional base, to amongst others, nationals of that State. Such a person comes under the provisions on the freedom of establishment and not those on the freedom to provide services (see, for comparison, *Gebhard*, cited above, paragraph 28).

100 Der Vollständigkeit halber hält der Gerichtshof fest, dass die obige Hilfestellung von der Voraussetzung ausgeht, dass der Beschuldigte seiner Tätigkeit in Liechtenstein im Rahmen des freien Dienstleistungsverkehrs und nicht der Niederlassungsfreiheit nachging. Gelangen das vorlegende Gericht und die Beschwerdekommission jedoch zu dem Schluss, dass der Beschuldigte seiner Tätigkeit in Liechtenstein nicht im Rahmen des freien Dienstleistungsverkehrs, sondern als Dienstleister für Trusts und Gesellschaften, der dort im Sinne des Artikels 31 des EWR-Abkommens niedergelassen war, nachgegangen ist, dann unterliegt die Tätigkeit des Beschuldigten auf der Basis dieser Niederlassung der Überwachung durch die zuständigen Behörden in Liechtenstein.

101 Bei der Beurteilung, ob der Beschuldigte im Rahmen der Niederlassungsfreiheit oder nur des freien Dienstleistungsverkehrs tätig war, müssen das vorlegende Gericht und die Beschwerdekommission die Dauer, die Häufigkeit, die regelmässige Wiederkehr oder Kontinuität der Tätigkeit des Beschuldigten in Liechtenstein berücksichtigen. Die Möglichkeit, dass sich eine Person im Rahmen der Anwendung des freien Dienstleistungsverkehrs im Aufnahme-EWR-Staat mit einer bestimmten Infrastruktur, einschliesslich eines Büros, einer Praxis oder einer Kanzlei, ausstattet, ist nicht ausgeschlossen, soweit diese Infrastruktur für die Erbringung der fraglichen Leistung erforderlich ist (vgl. entsprechend das Urteil in *Schnitzer*, C-215/01, EU:C:2003:662, Randnr. 28, und die zitierte Rechtsprechung). Diese Situation ist jedoch von der einer Person zu unterscheiden, die in stabiler und kontinuierlicher Weise eine Berufstätigkeit in einem anderen Staat ausübt, indem sie sich von einem Berufsdomizil aus u. a. an die Angehörigen dieses Staates wendet. Eine solche Person fällt unter die Vorschriften über die Niederlassungsfreiheit und nicht unter jene über den freien Dienstleistungsverkehr (vgl. entsprechend *Gebhard*, oben erwähnt, Randnr. 28).

102 It follows from all the considerations above that the answer to the first two questions in each case is that the Directive must be interpreted as not precluding a host EEA State from making a trust and company service provider operating in its territory under the freedom to provide services subject to due diligence requirements laid down in its national legislation. However, in so far as such legislation gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services and is liable to be additional to the controls already conducted in the home EEA State of the trust and company service provider, thus dissuading the latter from carrying out such activities, it constitutes a restriction on the freedom to provide services. Article 36 EEA must be interpreted as not precluding such legislation provided that it is applied in a non-discriminatory manner, justified by the objective of combating money laundering and terrorist financing, suitable for securing the attainment of that aim and does not go beyond what is necessary in order to attain it. In particular, for national supervisory measures of the host EEA State to be considered proportionate, there should be no general presumption of fraud, leading to full, systematic checks of all those who are established in other EEA States and provide services on a temporary basis in the host EEA State. Furthermore, the host EEA State must, when requesting information, such as documents, located in the EEA State of establishment, grant the service provider a reasonable period of time to provide that information, e.g. by handing over copies of documents. In this regard, the appropriate length of the notice will depend on the volume of documents requested and the medium on which they are stored.

102 Aus den obigen Überlegungen folgt, dass die Antwort auf die ersten beiden Fragen in den jeweiligen Rechtssachen lautet, dass die Richtlinie so auszulegen ist, dass sie es einem Aufnahme-EWR-Staat nicht untersagt, einen Dienstleister für Trusts und Gesellschaften, der im Rahmen des freien Dienstleistungsverkehrs auf seinem Hoheitsgebiet tätig ist, den in seinen nationalen Rechtsvorschriften verankerten Sorgfaltspflichten zu unterwerfen. Sofern solche Rechtsvorschriften jedoch im Zusammenhang mit Tätigkeiten im Rahmen der Vorschriften über den freien Dienstleistungsverkehr Schwierigkeiten und Zusatzkosten verursachen und zu den bereits im EWR-Herkunftsstaat des Dienstleisters für Trusts und Gesellschaften durchgeführten Kontrollen hinzukommen, wodurch sie diesen von der Ausführung derartiger Tätigkeiten abbringen, stellen sie eine Beschränkung des freien Dienstleistungsverkehrs dar. Artikel 36 des EWR-Abkommens ist so auszulegen, dass er solchen Rechtsvorschriften nicht entgegensteht, wenn sie diskriminierungsfrei angewendet werden, durch das Ziel der Bekämpfung von Geldwäsche und Terrorismusfinanzierung gerechtfertigt sind und zur Erreichung dieses Ziels geeignet sind, ohne über das hinauszugehen, was dazu erforderlich ist. Insbesondere sollte, damit nationale Überwachungsmassnahmen des Aufnahme-EWR-Staats als verhältnismässig angesehen werden, nicht von einem allgemeinen Betrugsverdacht ausgegangen werden, der zu vollständigen, systematischen Kontrollen aller Dienstleister mit Sitz in anderen EWR-Staaten, die im Aufnahme-EWR-Staat vorübergehend Dienstleistungen erbringen, führt. Überdies muss der Aufnahme-EWR-Staat in Fällen, in denen er Informationen verlangt, wie Dokumente, die sich im EWR-Staat des rechtlichen Sitzes befinden, dem Dienstleister eine angemessene Frist zur Bereitstellung dieser Informationen, z. B. durch die Vorlage von Kopien der Dokumente, gewähren. Diesbezüglich ist die angemessene Frist für die Bereitstellung abhängig von der Menge der geforderten Dokumente und dem Medium, auf dem diese gespeichert sind.

THE THIRD QUESTIONS

103 By the third question in each case, the referring court and the Appeals Board ask, in essence, whether the answers to the first and second questions are any different where the company for which administrative services are provided is not incorporated in an EEA State.

OBSERVATIONS SUBMITTED TO THE COURT

104 The Liechtenstein Government submits that the place of incorporation, whether within or outside the EEA, of companies that are the recipients of services listed in Article 3(7) of the Directive has no relevance whatsoever. Only the location of the trust and company service provider is of relevance.

105 The Government of Spain argues that there is no reason under EEA law for a different treatment if the company for which administrative services are provided is not incorporated in an EEA State. The Government of Spain adds that such companies are not granted any rights under Articles 34 and 39 EEA to provide services.

106 ESA and the Commission submit that the provisions of the Directive are intended to impose obligations on trust and company service providers irrespective of the place of incorporation of companies in respect of which they provide administrative services. As the defendant is an EEA national, established in an EEA State and engaging in economic activity in another EEA State, the application of Article 36 EEA is not influenced by the place of incorporation of companies in respect of which he provides services in the EEA.

ZUR JEWEILS DRITTEN FRAGE

103 Mit der dritten Frage in den jeweiligen Rechtssachen ersuchen das vorlegende Gericht und die Beschwerdekommission im Wesentlichen um Klärung, ob die Antworten auf die erste und zweite Frage anders ausfallen, wenn die verwaltete Gesellschaft nicht in einem EWR-Staat inkorporiert ist.

DEM GERICHTSHOF VORGELEGTE STELLUNGNAHMEN

104 Die Regierung des Fürstentums Liechtenstein trägt vor, dass dem Ort der Inkorporation – sei er innerhalb oder ausserhalb des EWR – von Gesellschaften, welche die Dienstleistungen laut Artikel 3 Absatz 7 der Richtlinie in Anspruch nehmen, keinerlei Bedeutung zukommt. Massgeblich ist nur der Sitz des Dienstleisters für Trusts und Gesellschaften.

105 Der Regierung des Königreichs Spanien zufolge gibt es nach EWR-Recht keinen Grund für eine unterschiedliche Behandlung, wenn die verwaltete Gesellschaft nicht in einem EWR-Staat inkorporiert ist. Die Regierung des Königreichs Spanien fügt hinzu, dass solchen Gesellschaften keine Rechte zur Erbringung von Dienstleistungen nach Artikel 34 und Artikel 39 des EWR-Abkommens gewährt werden.

106 Die EFTA-Überwachungsbehörde und die Kommission vertreten die Auffassung, dass die Bestimmungen der Richtlinie der Schaffung von Verpflichtungen für Dienstleister für Trusts und Gesellschaften, unabhängig vom Ort der Inkorporation der verwalteten Gesellschaft, dienen. Da es sich beim Beschuldigten um einen EWR-Staatsangehörigen mit rechtlichem Sitz in einem EWR-Staat handelt, der in einem weiteren EWR-Staat eine wirtschaftliche Tätigkeit ausübt, wirkt sich der Ort der Inkorporation der im EWR verwalteten Gesellschaften nicht auf die Anwendung von Artikel 36 des EWR-Abkommens aus.

FINDINGS OF THE COURT

107 The Court has already established that, with regard to the supervision of trust and company service providers, the Directive is, in principle, based on home State control and a minimum level of harmonisation. Article 5 of the Directive allows EEA States to adopt stricter provisions, where those provisions seek to strengthen the combating of money laundering or terrorist financing. The Court has also concluded that Article 5 must be interpreted as meaning that national legislation, adopted in order to achieve the objectives of the Directive by granting the host EEA State certain competences with regard to those who operate in their territory by means of the freedom to provide services, has to comply with the fundamental freedoms guaranteed by the EEA Agreement, including Article 36 EEA.

108 For these reasons, trust and company service providers are, in principle, only subject to supervision in their EEA State of establishment. That supervision extends to their activities regardless of the place of incorporation of a company in respect of which they provide administrative services, whether the place of incorporation is in an EEA State or outside the EEA.

109 The answer to the third question in each case must therefore be that the answers to the first and second questions do not differ where the company to which administrative services are provided is not incorporated in an EEA State.

ENTSCHEIDUNG DES GERICHTSHOFS

107 Der Gerichtshof hat bereits festgehalten, dass die Richtlinie im Hinblick auf die Überwachung von Dienstleistern für Trusts und Gesellschaften im Grunde auf einer Herkunftslandkontrolle und einem Mindestmass an Harmonisierung beruht. Artikel 5 der Richtlinie erlaubt den EWR-Staaten den Erlass strengerer Vorschriften, sofern dadurch die Bekämpfung von Geldwäsche und Terrorismusfinanzierung gefördert wird. Der Gerichtshof gelangte ausserdem zu dem Schluss, dass Artikel 5 dahingehend auszulegen ist, dass die nationale Gesetzgebung zur Verwirklichung der Ziele der Richtlinie, indem dem Aufnahme-EWR-Staat gewisse Kompetenzen in Bezug auf im Rahmen des freien Dienstleistungsverkehrs auf seinem Hoheitsgebiet tätige Dienstleister gewährt werden, mit den im EWR-Abkommen, einschliesslich dessen Artikel 36, garantierten Grundfreiheiten vereinbar sein muss.

108 Aus diesen Gründen unterliegen Dienstleister für Trusts und Gesellschaften grundsätzlich nur im EWR-Staat ihres rechtlichen Sitzes einer Überwachung. Diese Überwachung erstreckt sich auf ihre Tätigkeit unabhängig vom Ort der Inkorporation der verwalteten Gesellschaft, gleichgültig, ob sich der Ort der Inkorporation in einem EWR-Staat oder ausserhalb des EWR befindet.

109 Die Antwort auf die dritte Frage in der jeweiligen Rechtssache muss daher lauten, dass die Antworten auf die erste und zweite Frage nicht anders ausfallen, wenn die verwaltete Gesellschaft nicht in einem EWR-Staat inkorporiert ist.

V COSTS

110 The costs incurred by the Government of the Principality of Liechtenstein, the Government of Spain, 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 Princely Court of Appeal of the Principality of Liechtenstein and the Appeals Board of the Financial Market Authority hereby gives the following Advisory Opinion:

1. **Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing must be interpreted as not precluding a host EEA State from making a trust and company service provider operating in its territory under the freedom to provide services subject to due diligence requirements laid down in its national legislation.**

V KOSTEN

110 Die Auslagen des Fürstentums Liechtensteins, der Regierung des Königreichs Spanien, 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 Obergericht und von der Beschwerdekommission der Finanzmarktaufsicht vorgelegten Fragen folgendes Gutachten:

1. **Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung ist so auszulegen, dass sie es einem Aufnahme-EWR-Staat nicht untersagt, einen Dienstleister für Trusts und Gesellschaften, der im Rahmen des freien Dienstleistungsverkehrs auf seinem Hoheitsgebiet tätig ist, den in seinen nationalen Rechtsvorschriften verankerten Sorgfaltspflichten zu unterwerfen.**

2. **However, in so far as such legislation gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services and is liable to be additional to the controls already conducted in the home EEA State of the trust and company service provider, thus dissuading the latter from carrying out such activities, it constitutes a restriction on the freedom to provide services. Article 36 EEA must be interpreted as not precluding such legislation provided that it is applied in a non-discriminatory manner, justified by the objective of combating money laundering and terrorist financing, suitable for securing the attainment of that aim and does not go beyond what is necessary in order to attain it. In particular, for national supervisory measures of the host EEA State to be considered proportionate, there should be no general presumption of fraud, leading to full, systematic checks of all those who are established in other EEA States and provide services on a temporary basis in the host EEA State. Furthermore, the host EEA State must, when requesting information, such as documents, located in the EEA State of establishment, grant the service provider a reasonable period of time to provide that information, e.g. by handing over copies of documents. In this regard, the appropriate length of the notice will depend on the volume of documents requested and the medium on which they are stored.**

2. Sofern solche Rechtsvorschriften jedoch im Zusammenhang mit Tätigkeiten im Rahmen der Vorschriften über den freien Dienstleistungsverkehr Schwierigkeiten und Zusatzkosten verursachen und zu den bereits im EWR-Herkunftsstaat des Dienstleisters für Trusts und Gesellschaften durchgeführten Kontrollen hinzukommen, wodurch sie diesen von der Ausführung derartiger Tätigkeiten abbringen, stellen sie eine Beschränkung des freien Dienstleistungsverkehrs dar. Artikel 36 des EWR-Abkommens ist so auszulegen, dass er solchen Rechtsvorschriften nicht entgegensteht, wenn sie diskriminierungsfrei angewendet werden, durch das Ziel der Bekämpfung von Geldwäsche und Terrorismusfinanzierung gerechtfertigt sind und zur Erreichung dieses Ziels geeignet sind, ohne über das hinauszugehen, was dazu erforderlich ist. Insbesondere sollte, damit nationale Überwachungsmassnahmen des Aufnahme-EWR-Staats als verhältnismässig angesehen werden, nicht von einem allgemeinen Betrugsverdacht ausgegangen werden, der zu vollständigen, systematischen Kontrollen aller Dienstleister mit Sitz in anderen EWR-Staaten, die im Aufnahme-EWR-Staat vorübergehend Dienstleistungen erbringen, führt. Überdies muss der Aufnahme-EWR-Staat in Fällen, in denen er Informationen verlangt, wie Dokumente, die sich im EWR-Staat des rechtlichen Sitzes befinden, dem Dienstleister eine angemessene Frist zur Bereitstellung dieser Informationen, z. B. durch die Vorlage von Kopien der Dokumente, gewähren. Diesbezüglich ist die angemessene Frist für die Bereitstellung abhängig von der Menge der geforderten Dokumente und dem Medium, auf dem diese gespeichert sind.

3. **The Court's answers to the first and second questions do not differ where the company to which administrative services are provided is not incorporated in an EEA State.**

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

Delivered in open court in Luxembourg on
***3 August 2016**.*

Theresa Haas
Acting Registrar

Páll Hreinsson
Acting President

3. **Die Antworten des Gerichtshofs auf die erste und zweite Frage fallen nicht anders aus, wenn die verwaltete Gesellschaft nicht in einem EWR-Staat inkorporiert ist.**

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

Verkündet in öffentlicher Sitzung in Luxemburg am
3. August 2016.

Theresa Haas
Geschäftsführender Kanzler

Páll Hreinsson
Geschäftsführender Präsident

Report for the Hearing

in Joined Cases E-26/15 and E-27/15

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 Princely Court of Appeal of the Principality of Liechtenstein (*Fürstliches Obergericht*) and the Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*), in cases pending before them, respectively, in

Criminal proceedings against B

=and=

B

=v=

Finanzmarktaufsicht

concerning the interpretation of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

I INTRODUCTION

1 By a letter of 4 November 2015, registered at the Court as Case E-26/15 on 9 November 2015, the Princely Court of Appeal ("the referring court") made a request for an Advisory Opinion in criminal proceedings against B ("the defendant") pending before it. By a separate letter of 30 October 2015, registered at the Court as Case

Sitzungsbericht

in den verbundenen Rechtssachen E-26/15 und E-27/15

ANTRÄGE des Fürstlichen Obergerichts und der Beschwerdekommission der Finanzmarktaufsicht an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs in den jeweiligen vor ihnen anhängigen Rechtssachen

Strafsache gegen B

sowie

B

gegen

Finanzmarktaufsicht

betreffend die Auslegung der Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung.

I EINLEITUNG

1 Mit Schreiben vom 4. November 2015, beim Gerichtshof am 9. November 2015 eingegangen und als Rechtssache E-26/15 registriert, stellte das Fürstliche Obergericht (im Folgenden: vorlegendes Gericht) einen Antrag auf Vorabentscheidung in der vor ihm anhängigen Strafsache gegen B (im Folgenden: Beschuldigter).

E-27/15 on 16 November 2015, the Appeals Board of the Financial Market Authority ("the referring authority") made a request for an Advisory Opinion in a case pending before it between the defendant and the Financial Market Authority (*Finanzmarktaufsicht*) ("the FMA").

2 The cases before the referring court and the referring authority concern the extent to which Liechtenstein legislation on money laundering and terrorist financing may apply to the activities of the defendant, an Austrian national living in the United Kingdom, who acts as a director for three foreign companies, but carries out individual administrative activities on behalf of these companies in Liechtenstein.

II LEGAL BACKGROUND

EEA LAW

3 Article 31(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") provides 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.

Mit getrenntem Schreiben vom 30. Oktober 2015, beim Gerichtshof am 16. November 2015 eingegangen und als Rechtssache E-27/15 registriert, stellte die Beschwerdekommission der Finanzmarktaufsicht (im Folgenden: vorlegende Behörde) einen Antrag auf Vorabentscheidung in einer zwischen dem Beschuldigten und der Finanzmarktaufsicht (im Folgenden: FMA) anhängigen Rechtssache.

2 Die vor dem vorlegenden Gericht bzw. der vorlegenden Behörde anhängigen Rechtssachen betreffen die Frage, inwieweit die liechtensteinischen Rechtsvorschriften über Geldwäscherei und Terrorismusfinanzierung auf die Tätigkeit des Beschuldigten angewendet werden können. Beim Beschuldigten handelt es sich um einen österreichischen Staatsangehörigen mit Wohnsitz im Vereinigten Königreich, der bei drei ausländischen Gesellschaften die Funktion als „Director“ ausübt, aber in Liechtenstein für die drei Gesellschaften einzelne Verwaltungshandlungen vornimmt.

II RECHTLICHER HINTERGRUND

EWR-RECHT

3 Artikel 31 Absatz 1 des Abkommens über den Europäischen Wirtschaftsraum (im Folgenden: EWR-Abkommen) lautet:

Im Rahmen dieses Abkommens unterliegt die freie Niederlassung von Staatsangehörigen eines EG-Mitgliedstaats oder eines EFTA-Staates im Hoheitsgebiet eines dieser Staaten keinen Beschränkungen. Das gilt gleichermaßen für die Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften durch Angehörige eines EG-Mitgliedstaats oder eines EFTA-Staates, die im Hoheitsgebiet eines dieser Staaten ansässig sind.

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.

4 Article 36(1) EEA provides as follows:

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

5 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[1] ("the Directive") was incorporated into the EEA Agreement at point 23b of Annex IX to the Agreement by EEA Joint Committee Decision No 87/2006 of 7 July 2006.[2] The decision entered into force on 1 April 2007.

6 Recital 17 in the preamble to the Directive reads as follows:

Acting as a company director or secretary does not of itself make someone a trust and company service provider. For that reason, the definition covers only those persons that act as a company director or secretary for a third party and by way of business.

1 OJ 2005 L 309, p. 15.
2 OJ 2006 L 289, p. 23, and EEA Supplement 2006 No 52, p. 19.

Vorbehaltlich des Kapitels 4 umfasst die Niederlassungsfreiheit die Aufnahme und Ausübung selbständiger Erwerbstätigkeiten sowie die Gründung und Leitung von Unternehmen, insbesondere von Gesellschaften im Sinne des Artikels 34 Absatz 2, nach den Bestimmungen des Aufnahmestaats für seine eigenen Angehörigen.

4 Artikel 36 Absatz 1 des EWR-Abkommens lautet:

Im Rahmen dieses Abkommens unterliegt der freie Dienstleistungsverkehr im Gebiet der Vertragsparteien für Angehörige der EG-Mitgliedstaaten und der EFTA-Staaten, die in einem anderen EG-Mitgliedstaat beziehungsweise in einem anderen EFTA-Staat als demjenigen des Leistungsempfängers ansässig sind, keinen Beschränkungen.

5 Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung[1] (im Folgenden: Richtlinie) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 87/2006 vom 7. Juli 2006 unter Nummer 23b des Anhangs IX in das EWR-Abkommen aufgenommen.[2] Der Beschluss trat am 1. April 2007 in Kraft.

6 Erwägungsgrund 17 der Präambel der Richtlinie lautet:

Die Ausübung der Funktion eines Leiters oder eines Geschäftsführers einer Gesellschaft macht die betreffende Person nicht automatisch zum Dienstleister für Trusts und Gesellschaften. Daher fallen unter diese Begriffsbestimmung lediglich Personen, die geschäftsmäßig für einen Dritten die Funktion eines Leiters oder Geschäftsführers einer Gesellschaft ausüben.

1 ABl. 2005 L 309, S. 15.
2 ABl. 2006 L 289, S. 23, und EWR-Beilage 2006, Nr. 52, S. 19.

7 Recital 28 in the preamble to the Directive reads as follows:

In the case of agency or outsourcing relationships on a contractual basis between institutions or persons covered by this Directive and external natural or legal persons not covered hereby, any anti-money laundering and anti-terrorist financing obligations for those agents or outsourcing service providers as part of the institutions or persons covered by this Directive, may only arise from contract and not from this Directive. The responsibility for complying with this Directive should remain with the institution or person covered hereby.

8 Recital 39 in the preamble to the Directive reads as follows:

When registering or licensing a currency exchange office, a trust and company service provider or a casino nationally, competent authorities should ensure that the persons who effectively direct or will direct the business of such entities and the beneficial owners of such entities are fit and proper persons. The criteria for determining whether or not a person is fit and proper should be established in conformity with national law. As a minimum, such criteria should reflect the need to protect such entities from being misused by their managers or beneficial owners for criminal purposes.

9 Article 1(1) of the Directive reads as follows:

Member States shall ensure that money laundering and terrorist financing are prohibited.

7 Erwägungsgrund 28 der Präambel der Richtlinie lautet:

Im Falle von Vertretungs- oder „Outsourcing"-Verhältnissen auf Vertragsbasis zwischen Instituten oder Personen, die dieser Richtlinie unterliegen, und externen natürlichen oder juristischen Personen, die dieser Richtlinie nicht unterliegen, erwachsen diesen Vertretern oder „Outsourcing"-Dienstleistern als Teil der dieser Richtlinie unterliegenden Institute oder Personen Pflichten zur Bekämpfung der Geldwäsche und der Terrorismusfinanzierung nur aufgrund des Vertrags und nicht aufgrund dieser Richtlinie. Die Verantwortung für die Einhaltung dieser Richtlinie sollte weiterhin bei dem dieser Richtlinie unterliegenden Institut oder der dieser Richtlinie unterliegenden Person liegen.

8 Erwägungsgrund 39 der Präambel der Richtlinie lautet:

Bei der Eintragung oder Zulassung einer Wechselstube, eines Dienstleisters für Trusts und Gesellschaften oder eines Kasinos auf nationaler Ebene sollten die zuständigen Behörden sicherstellen, dass die Personen, die die Geschäfte solcher Einrichtungen faktisch führen oder führen werden, und die wirtschaftlichen Eigentümer solcher Einrichtungen über die notwendige Zuverlässigkeit und fachliche Eignung verfügen. Die Kriterien, nach denen bestimmt wird, ob eine Person über die notwendige Zuverlässigkeit und fachliche Eignung verfügt, sollten gemäß den einzelstaatlichen Rechtsvorschriften festgelegt werden. Diese Kriterien sollten zumindest die Notwendigkeit widerspiegeln, solche Einrichtungen vor Missbrauch zu kriminellen Zwecken durch ihre Leiter oder wirtschaftlichen Eigentümer zu schützen.

9 Artikel 1 Absatz 1 der Richtlinie lautet:

Die Mitgliedstaaten sorgen dafür, dass Geldwäsche und Terrorismusfinanzierung untersagt werden.

10 Article 2 of the Directive reads as follows:

1. This Directive shall apply to:

...

(3) the following legal or natural persons acting in the exercise of their professional activities:

(a) auditors, external accountants and tax advisors;

(b) notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the:

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets;

(iii) opening or management of bank, savings or securities accounts;

(iv) organisation of contributions necessary for the creation, operation or management of companies;

(v) creation, operation or management of trusts, companies or similar structures;

(c) trust or company service providers not already covered under points (a) or (b);

...

10 Artikel 2 der Richtlinie lautet:

1. Diese Richtlinie gilt für:

...

3. die folgenden juristischen oder natürlichen Personen bei der Ausübung ihrer beruflichen Tätigkeit:

a) Abschlussprüfer, externe Buchprüfer und Steuerberater;

b) Notare und andere selbstständige Angehörige von Rechtsberufen, wenn sie im Namen und auf Rechnung ihres Klienten Finanz- oder Immobilientransaktionen erledigen oder für ihren Klienten an der Planung oder Durchführung von Transaktionen mitwirken, die Folgendes betreffen:

i) Kauf und Verkauf von Immobilien oder Gewerbebetrieben,

ii) Verwaltung von Geld, Wertpapieren oder sonstigen Vermögenswerten ihres Klienten,

iii) Eröffnung oder Verwaltung von Bank-, Spar- oder Wertpapierkonten,

iv) Beschaffung der zur Gründung, zum Betrieb oder zur Verwaltung von Gesellschaften erforderlichen Mittel,

v) Gründung, Betrieb oder Verwaltung von Treuhandgesellschaften, Gesellschaften oder ähnlichen Strukturen;

c) Dienstleister für Trusts und Gesellschaften, die nicht unter die Buchstaben a oder b fallen;

...

11 Article 3 of the Directive reads as follows:

For the purposes of this Directive the following definitions shall apply:

...

(7) 'trust and company service providers' means any natural or legal person which by way of business provides any of the following services to third parties:

(a) forming companies or other legal persons;

(b) acting as or arranging for another person to act as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;

(c) providing a registered office, business address, correspondence or administrative address and other related services for a company, a partnership or any other legal person or arrangement;

(d) acting as or arranging for another person to act as a trustee of an express trust or a similar legal arrangement;

(e) acting as or arranging for another person to act as a nominee shareholder for another person other than a company listed on a regulated market that is subject to disclosure requirements in

11 Artikel 3 der Richtlinie lautet:

Im Sinne dieser Richtlinie bedeutet:

...

7. „Dienstleister für Trusts und Gesellschaften" jede natürliche oder juristische Person, die geschäftsmäßig eine der folgenden Dienstleistungen für Dritte erbringt:

a) Gründung von Gesellschaften oder anderen juristischen Personen;

b) Ausübung der Funktion eines Leiters oder eines Geschäftsführers einer Gesellschaft, eines Gesellschafters einer Personengesellschaft oder Wahrnehmung einer vergleichbaren Position gegenüber anderen juristischen Personen oder Arrangement für eine andere Person, sodass sie die zuvor genannten Funktionen ausüben kann;

c) Bereitstellung eines Gesellschaftssitzes, einer Geschäfts-, Verwaltungs- oder Postadresse und anderer damit zusammenhängender Dienstleistungen für eine Gesellschaft, eine Personengesellschaft oder eine andere juristische Person oder Rechtsvereinbarung;

d) Ausübung der Funktion eines Treuhänders eines Direkttrusts oder einer ähnlichen Rechtsvereinbarung oder Arrangement für eine andere Person, sodass sie die zuvor genannten Funktionen ausüben kann;

e) Ausübung der Funktion eines nominellen Anteilseigners für eine andere Person, bei der es sich nicht um eine auf einem geregelten Markt notierte Gesellschaft handelt, die dem Gemeinschaftsrecht entsprechenden Offenlegungsanforderungen bzw. gleichwertigen internationalen Standards unterliegt, oder Arrangement für

conformity with Community legislation or subject to equivalent international standards;

...

(9) 'business relationship' means a business, professional or commercial relationship which is connected with the professional activities of the institutions and persons covered by this Directive and which is expected, at the time when the contact is established, to have an element of duration;

...

12 Article 5 of the Directive reads as follows:

The Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing.

13 Article 7 of the Directive reads as follows:

The institutions and persons covered by this Directive shall apply customer due diligence measures in the following cases:

(a) when establishing a business relationship;

...

(d) when there are doubts about the veracity or adequacy of previously obtained customer identification data.

14 Article 8 of the Directive reads as follows:

1. Customer due diligence measures shall comprise:

(a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;

eine andere Person, sodass sie die zuvor genannten Funktionen ausüben kann;

...

9. *„Geschäftsbeziehung“ jede geschäftliche, berufliche oder kommerzielle Beziehung, die in Verbindung mit den gewerblichen Tätigkeiten der dieser Richtlinie unterliegenden Institute und Personen unterhalten wird und bei der bei Zustandekommen des Kontakts davon ausgegangen wird, dass sie von gewisser Dauer sein wird;*

...

12 Artikel 5 der Richtlinie lautet:

Die Mitgliedstaaten können zur Verhinderung der Geldwäsche und der Terrorismusfinanzierung strengere Vorschriften auf dem unter diese Richtlinie fallenden Gebiet erlassen oder beibehalten.

13 Artikel 7 der Richtlinie lautet:

Die dieser Richtlinie unterliegenden Institute und Personen wenden Sorgfaltspflichten gegenüber Kunden in den nachfolgenden Fällen an:

a) Begründung einer Geschäftsbeziehung;

...

d) Zweifel an der Echtheit oder der Angemessenheit zuvor erhaltener Kundenidentifikationsdaten.

14 Artikel 8 der Richtlinie lautet:

(1) Die Sorgfaltspflichten gegenüber Kunden umfassen:

a) Feststellung der Identität des Kunden und Überprüfung der Kundenidentität auf der Grundlage von Dokumenten, Daten oder Informationen, die von einer glaubwürdigen und unabhängigen Quelle stammen;

(b) identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this Directive is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer;

(c) obtaining information on the purpose and intended nature of the business relationship;

(d) conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date.

2. The institutions and persons covered by this Directive shall apply each of the customer due diligence requirements set out in paragraph 1, but may determine the extent of such measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction. The institutions and persons covered by this Directive shall be able to demonstrate to the competent authorities mentioned in Article 37, including self-regulatory bodies, that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.

b) gegebenenfalls Feststellung der Identität des wirtschaftlichen Eigentümers und Ergreifung risikobasierter und angemessener Maßnahmen zur Überprüfung von dessen Identität, sodass das dieser Richtlinie unterliegende Institut oder die dieser Richtlinie unterliegende Person davon überzeugt ist, dass es bzw. sie weiß, wer der wirtschaftliche Eigentümer ist; im Falle von juristischen Personen, Trusts und ähnlichen Rechtsvereinbarungen schließt dies risikobasierte und angemessene Maßnahmen ein, um die Eigentums- und die Kontrollstruktur des Kunden zu verstehen;

c) Einholung von Informationen über Zweck und angestrebte Art der Geschäftsbeziehung;

d) Durchführung einer kontinuierlichen Überwachung der Geschäftsbeziehung, einschließlich einer Überprüfung der im Verlauf der Geschäftsbeziehung abgewickelten Transaktionen, um sicherzustellen, dass diese mit den Kenntnissen des Instituts oder der Person über den Kunden, seine Geschäftstätigkeit und sein Risikoprofil, einschließlich erforderlichenfalls der Quelle der Mittel, kohärent sind, und Gewährleistung, dass die jeweiligen Dokumente, Daten oder Informationen stets aktualisiert werden.

(2) Die dieser Richtlinie unterliegenden Institute und Personen wenden alle in Absatz 1 genannten Sorgfaltspflichten gegenüber Kunden an, können dabei aber den Umfang dieser Maßnahmen auf risikoorientierter Grundlage je nach Art des Kunden, der Geschäftsbeziehung, des Produkts oder der Transaktion bestimmen. Die dieser Richtlinie unterliegenden Institute und Personen müssen gegenüber den in Artikel 37 genannten zuständigen Behörden, einschließlich der Selbstverwaltungseinrichtungen, nachweisen können, dass der Umfang der Maßnahmen im Hinblick auf die Risiken der Geldwäsche und der Terrorismusfinanzierung als angemessen anzusehen ist.

15 Article 9 of the Directive reads as follows:

> *1. Member States shall require that the verification of the identity of the customer and the beneficial owner takes place before the establishment of a business relationship or the carrying-out of the transaction.*
>
> ...
>
> *6. Member States shall require that institutions and persons covered by this Directive apply the customer due diligence procedures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis.*

16 Article 21(1) of the Directive reads as follows:

> *Each Member State shall establish a FIU [financial intelligence unit] in order effectively to combat money laundering and terrorist financing.*

17 Article 22 of the Directive reads as follows:

> *1. Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully:*
>
> *(a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted;*
>
> *(b) by promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.*

15 Artikel 9 der Richtlinie lautet:

(1) Die Mitgliedstaaten schreiben vor, dass die Überprüfung der Identität des Kunden und des wirtschaftlichen Eigentümers vor der Begründung einer Geschäftsbeziehung oder der Abwicklung der Transaktion erfolgt.

...

(6) Die Mitgliedstaaten schreiben vor, dass die dieser Richtlinie unterliegenden Institute und Personen die Sorgfaltspflichten nicht nur auf alle neuen Kunden, sondern zu geeigneter Zeit auch auf die bestehende Kundschaft auf risikoorientierter Grundlage anwenden.

16 Artikel 21 Absatz 1 der Richtlinie lautet:

Jeder Mitgliedstaat richtet eine zentrale Meldestelle zur wirksamen Bekämpfung der Geldwäsche und der Terrorismusfinanzierung ein.

17 Artikel 22 der Richtlinie lautet:

(1) Die Mitgliedstaaten schreiben vor, dass die dieser Richtlinie unterliegenden Institute und Personen sowie gegebenenfalls deren leitendes Personal und deren Angestellte in vollem Umfang zusammenarbeiten, indem sie

a) die zentrale Meldestelle von sich aus umgehend informieren, wenn sie wissen, den Verdacht oder berechtigten Grund zu der Annahme haben, dass eine Geldwäsche oder Terrorismusfinanzierung begangen oder zu begehen versucht wurde oder wird,

b) der zentralen Meldestelle auf Verlangen umgehend alle erforderlichen Auskünfte im Einklang mit den Verfahren erteilen, die in den anzuwendenden Rechtsvorschriften festgelegt sind.

2. The information referred to in paragraph 1 shall be forwarded to the FIU of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated in accordance with the procedures provided for in Article 34 shall normally forward the information.

18 Article 30 of the Directive reads as follows:

Member States shall require the institutions and persons covered by this Directive to keep the following documents and information for use in any investigation into, or analysis of, possible money laundering or terrorist financing by the FIU or by other competent authorities in accordance with national law:

(a) in the case of the customer due diligence, a copy or the references of the evidence required, for a period of at least five years after the business relationship with their customer has ended;

(b) in the case of business relationships and transactions, the supporting evidence and records, consisting of the original documents or copies admissible in court proceedings under the applicable national legislation for a period of at least five years following the carrying-out of the transactions or the end of the business relationship.

19 Article 36(1) of the Directive reads as follows:

Member States shall provide that currency exchange offices and trust and company service providers shall be licensed or registered and casinos be licensed in order to operate their business legally. Without prejudice to future Community legislation, Member States shall provide

(2) Die in Absatz 1 genannten Informationen werden der zentralen Meldestelle des Mitgliedstaats übermittelt, in dessen Hoheitsgebiet sich das Institut oder die Person, von dem bzw. der diese Informationen stammen, befindet. Die Übermittlung erfolgt in der Regel durch die Person(en), die nach den in Artikel 34 genannten Verfahren benannt wurde(n).

18 Artikel 30 der Richtlinie lautet:

Die Mitgliedstaaten schreiben vor, dass die dieser Richtlinie unterliegenden Institute und Personen die nachstehenden Dokumente und Informationen im Hinblick auf die Verwendung in Ermittlungsverfahren wegen möglicher Geldwäsche oder Terrorismusfinanzierung oder im Hinblick auf die Durchführung entsprechender Analysen durch die zentrale Meldestelle oder andere zuständige Behörden gemäß dem nationalen Recht aufbewahren:

a) bei Kundendaten, die mit der gebührenden Sorgfalt ermittelt wurden, eine Kopie oder Referenzangaben der verlangten Dokumente für die Dauer von mindestens fünf Jahren nach Beendigung der Geschäftsbeziehung mit dem Kunden;

b) bei Geschäftsbeziehungen und Transaktionen die Belege und Aufzeichnungen, als Originale oder als Kopien, die nach den innerstaatlichen Rechtsvorschriften in Gerichtsverfahren anerkannt werden, für die Dauer von mindestens fünf Jahren nach Durchführung der Transaktion oder nach Beendigung der Geschäftsbeziehung.

19 Artikel 36 Absatz 1 der Richtlinie lautet:

Die Mitgliedstaaten sehen vor, dass Wechselstuben und Dienstleister für Trusts und Gesellschaften zugelassen oder eingetragen und dass Kasinos zugelassen sein müssen, um ihr Gewerbe legal betreiben zu können. Unbeschadet künftiger Rechtsvorschriften der Gemeinschaft

that money transmission or remittance offices shall be licensed or registered in order to operate their business legally.

20 Article 37 of the Directive reads as follows:

1. Member States shall require the competent authorities at least to effectively monitor and to take the necessary measures with a view to ensuring compliance with the requirements of this Directive by all the institutions and persons covered by this Directive.

2. Member States shall ensure that the competent authorities have adequate powers, including the power to compel the production of any information that is relevant to monitoring compliance and perform checks, and have adequate resources to perform their functions.

...

21 Article 39(1) of the Directive reads as follows:

Member States shall ensure that natural and legal persons covered by this Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive.

sehen die Mitgliedstaaten vor, dass Unternehmen, die das Finanztransfergeschäft betreiben, zugelassen oder eingetragen sein müssen, um ihr Gewerbe legal betreiben zu können.

20 Artikel 37 der Richtlinie lautet:

(1) Die Mitgliedstaaten schreiben vor, dass die zuständigen Behörden zumindest wirksam überwachen, ob alle dieser Richtlinie unterliegenden Institute und Personen die darin festgelegten Anforderungen einhalten, und dass sie die erforderlichen Maßnahmen treffen, um deren Einhaltung sicherzustellen.

(2) Die Mitgliedstaaten sorgen dafür, dass die zuständigen Behörden über angemessene Befugnisse, einschließlich der Möglichkeit, alle Auskünfte in Bezug auf die Überwachung der Einhaltung der einschlägigen Vorschriften zu verlangen und Kontrollen durchzuführen, sowie über die zur Wahrnehmung ihrer Aufgaben angemessenen Mittel verfügen.

...

21 Artikel 39 Absatz 1 der Richtlinie lautet:

Die Mitgliedstaaten stellen sicher, dass die dieser Richtlinie unterliegenden natürlichen und juristischen Personen für Verstöße gegen die nach dieser Richtlinie erlassenen nationalen Vorschriften verantwortlich gemacht werden können. Die Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein.

NATIONAL LAW[3]

22 Liechtenstein has implemented the Directive by way of the Law of 11 December 2008 on professional due diligence to combat money laundering, organised crime and terrorist financing ("SPG").[4]

23 Article 2 of the SPG reads as follows:

> *1. For the purposes of this law, the following definitions apply:*
>
> ...
>
> *(c) 'business relationship' means a business, professional or commercial relationship which is connected with the professional activities of the person under an obligation to apply due diligence measures and which is expected, at the time when the contact is established, to have an element of duration;*
>
> ...
>
> *(f) 'legal entity' means a legal person, company, trust or other collective or asset entity, irrespective of its legal form;*
>
> ...

24 Article 3 of the SPG reads as follows:

> *1. This law shall apply to persons under an obligation to apply due diligence measures. These are:*
>
> ...

3 Translations of national provisions are unofficial.
4 *Sorgfaltspflichtgesetz, LR 952.1.*

NATIONALES RECHT

22 Liechtenstein hat die Richtlinie im Wege des Gesetzes vom 11. Dezember 2008 über berufliche Sorgfaltspflichten zur Bekämpfung von Geldwäscherei, organisierter Kriminalität und Terrorismusfinanzierung (im Folgenden: SPG)[3] umgesetzt.

23 Artikel 2 SPG lautet:

1) Im Sinne dieses Gesetzes gelten als:

...

c) „Geschäftsbeziehung“: jede geschäftliche, berufliche oder kommerzielle Beziehung, die in Verbindung mit den gewerblichen Tätigkeiten des Sorgfaltspflichtigen unterhalten wird und bei der bei Zustandekommen des Kontakts davon ausgegangen wird, dass sie von gewisser Dauer sein wird;

...

f) „Rechtsträger“: eine juristische Person, Gesellschaft, Treuhänderschaft oder sonstige Gemeinschaft oder Vermögenseinheit, unabhängig von ihrer rechtlichen Ausgestaltung;

...

24 Artikel 3 SPG lautet:

1) Dieses Gesetz gilt für Sorgfaltspflichtige. Dies sind:

...

3 Sorgfaltspflichtgesetz, LR 952.1.

(r) natural and legal persons to the extent that by way of a business they provide to a legal entity a registered office, business address, correspondence or administrative address or other related services;

...

(t) natural and legal persons who, by way of a business and on the account of a third party, act as a partner of a partnership or on behalf of the board or as managing director of a legal entity or carry out a comparable function on the account of a third party;

...

2. To the extent that such branches are permitted, Liechtenstein branches of foreign undertakings referred to in paragraph 1 shall also be deemed subject to an obligation to apply due diligence measures.

...

25 Article 5 of the SPG reads as follows:

1. In the cases specified in paragraph 2, persons under an obligation to apply due diligence measures shall satisfy the following requirements:

...

(c) compile a business profile (Article 8);

2. Due diligence measures shall be applied in the following cases:

(a) when establishing a business relationship;

...

r) natürliche und juristische Personen, soweit sie berufsmässig für einen Rechtsträger einen Geschäftssitz, eine Geschäfts-, Verwaltungs- oder Postadresse und andere damit zusammenhängende Dienstleistungen bereitstellen;

...

t) natürliche und juristische Personen, die berufsmässig auf fremde Rechnung die Funktion eines Gesellschafters einer Personengesellschaft oder eines Organs oder Geschäftsführers eines Rechtsträgers auf fremde Rechnung ausüben oder eine vergleichbare Funktion auf fremde Rechnung wahrnehmen;

...

2) Sorgfaltspflichtige sind auch liechtensteinische Zweigstellen von ausländischen Unternehmen nach Abs. 1, soweit solche zulässig sind.

...

25 Artikel 5 SPG lautet:

1) Die Sorgfaltspflichtigen haben in den in Abs. 2 genannten Fällen folgende Pflichten wahrzunehmen:

...

c) Erstellung eines Geschäftsprofils (Art. 8);

2) Die Sorgfaltspflichten sind in folgenden Fällen wahrzunehmen:

a) bei Aufnahme einer Geschäftsbeziehung;

...

(c) when there are doubts about the veracity or adequacy of previously obtained data concerning the identity of the contracting party or the beneficial owner.

...

26 Article 6 of the SPG reads as follows:

1. Persons subject to the obligation to apply due diligence measures shall identify the identity of their contracting party and verify that identity by means of documentary evidence.

2. If in the course of the business relationship doubts arise concerning the identity of the contracting partner, persons subject to the obligation to apply due diligence measures shall identify and verify afresh the identity of the contracting party.

...

27 Article 8 of the SPG reads as follows:

1. Persons under an obligation to apply due diligence measures must compile a profile concerning the business relationship including in particular information on the origin of the assets and on the purpose and intended nature of the business relationship (business profile).

2. They shall ensure that the data and information contained in the business profile are kept up-to-date.

...

28 Article 30 of the SPG reads as follows:

1. The Princely Court of Justice shall punish with a sentence of imprisonment for a period not exceeding six months or a fine not exceeding 360 daily units for a misdemeanour any person who wilfully:

c) bei Zweifel an der Echtheit oder Angemessenheit zuvor erhaltener Daten zur Identität des Vertragspartners oder der wirtschaftlich berechtigten Person.

...

26 Artikel 6 SPG lautet:

1) Die Sorgfaltspflichtigen haben die Identität ihres Vertragspartners festzustellen und durch beweiskräftige Dokumente zu überprüfen.

2) Entstehen im Laufe der Geschäftsbeziehung Zweifel über die Identität des Vertragspartners, so müssen die Sorgfaltspflichtigen die Feststellung und Überprüfung der Identität des Vertragspartners wiederholen.

...

27 Artikel 8 SPG lautet:

1) Die Sorgfaltspflichtigen müssen ein Profil über die Geschäftsbeziehung erstellen, das insbesondere Informationen über Herkunft der Vermögenswerte sowie über Zweck und angestrebte Art der Geschäftsbeziehung enthält (Geschäftsprofil).

2) Sie haben sicherzustellen, dass die im Geschäftsprofil enthaltenen Daten und Informationen aktualisiert werden.

...

28 Artikel 30 SPG lautet:

1) Vom Landgericht wird wegen Vergehens mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu 360 Tagessätzen bestraft, wer vorsätzlich:

(a) does not carry out or repeat the identification and verification of the identity of the contracting party as specified in Article 6;

...

29 Article 31 of the SPG reads as follows:

1. The FMA shall punish for an administrative offence by a fine not exceeding SFR 100 000 any person who:

...

(e) does not compile and maintain up-to-date the profile concerning the business relationship as specified in Article 8;

...

III FACTS AND PROCEDURE

30 The defendant is an Austrian national who lives in the United Kingdom. He acts as a director for three companies, which are A Ltd and B Ltd, both registered in the United Kingdom, and CA Inc., registered in the British Virgin Islands. The defendant acts as the sole director, on behalf of third parties, in relation to all the companies in return for remuneration.

31 The defendant carried out individual administrative activities on behalf of these three companies in Liechtenstein.

32 In Case E-26/15, following an appeal by the defendant, the referring court is reviewing a judgment by the Princely Court of Justice (Fürstliches Landgericht) handed down on 13 July 2015. In that judgment, the defendant was convicted of a misdemeanour pursuant to Article 30(1)(a) of the SPG and sentenced to a suspended fine. That court found that in Vaduz, Liechtenstein, the defendant had failed wilfully to identify and verify the identity of the contracting party

a) die Feststellung oder Überprüfung der Identität des Vertragspartners nicht gemäss Art. 6 vornimmt oder wiederholt;

...

29 Artikel 31 SPG lautet:

1) Von der FMA wird wegen Übertretung mit Busse bis zu 100 000 Franken bestraft, wer:

...

e) das Profil über die Geschäftsbeziehung nicht gemäss Art. 8 erstellt und aktualisiert;

...

III SACHVERHALT UND VERFAHREN

30 Der Beschuldigte ist österreichischer Staatsangehöriger und lebt im Vereinigten Königreich. Er ist „Director" dreier Gesellschaften – A Ltd und B Ltd, beide im Vereinigten Königreich eingetragen, sowie CA Inc., die auf den British Virgin Islands eingetragen ist. Der Beschuldigte übt bei allen Gesellschaften die Funktion als einziger „Director" gegen Entgelt für dritte Personen aus.

31 Der Beschuldigte nahm für diese drei Gesellschaften in Liechtenstein einzelne Verwaltungshandlungen vor.

32 In der Rechtssache E-26/15 überprüft das vorlegende Gericht ein Urteil des Fürstlichen Landgerichts vom 13. Juli 2015, gegen das der Beschuldigte Berufung erhoben hat. Mit diesem Urteil wurde der Beschuldigte des Vergehens nach Artikel 30 Absatz 1 Buchstabe a SPG schuldig erkannt und zu einer bedingt nachgesehenen Geldstrafe verurteilt. Diesem Urteil zufolge hat er in Vaduz, Liechtenstein, vorsätzlich die Feststellung und Überprüfung der

and to carry out afresh such identification and verification, in particular, in relation to the three companies, on the establishment of the business relationship, with regard to A Ltd in 2004, B Ltd in 2008 and CA Inc. in 2008, and on a continuing basis from 1 September 2009 to 10 February 2014.

33 The finding of the Princely Court of Justice was based on the lack of any statement or clear information documenting that the defendant had identified and verified the identity of the contracting party. Likewise, there was nothing on file or no clear documentation to show when and on what grounds a renewed verification of the identity of the contracting party had been carried out, even though, according to the court, clearly contradictory information existed. Consequently, when the FMA carried out checks on the defendant in Liechtenstein, it had not been possible to establish an unambiguous identification of which person, at what time, and on which contractual basis had in fact been the contracting party under each of these mandates.

34 The Princely Court of Justice concluded that the obligation to apply due diligence measures resulted from the existence of a person subject to a duty to apply due diligence measures and the activities of that person. The registered office of the legal entity administered was not considered decisive in determining the existence of an obligation to apply due diligence measures. Consequently, it held that the defendant was under an obligation to apply due diligence measures when he acted in Liechtenstein, on behalf of third parties, as a governing body ("director") of a foreign legal entity. For the purposes of exercising that function, the Princely Court of Justice found it to suffice that telephone calls are made, resolutions are signed or other administrative activities are carried out on behalf of

Identität des Vertragspartners nicht vorgenommen und dies auch nicht später wiederholt bzw. nachgeholt, und zwar insbesondere weder hinsichtlich der drei Gesellschaften anlässlich der Aufnahme der Geschäftsbeziehung, d. h. für die A Ltd im Jahr 2004, für die B Ltd im Jahr 2008 und für die CA Inc. im Jahr 2008, noch fortlaufend vom 1. September 2009 bis zum 10. Februar 2014.

33 Das Fürstliche Landgericht begründete dieses Urteil damit, dass keine Erklärung oder eindeutige Information zu einer durch den Beschuldigten erfolgten Überprüfung und Feststellung der Identität des Vertragspartners vorhanden gewesen sei. Ebenso wenig sei aktenkundig bzw. nachvollziehbar dokumentiert gewesen, wann und aus welchen Gründen eine Überprüfung des Vertragspartners wiederholt wurde, obwohl – so das Landgericht – offensichtlich gleichzeitig sich widersprechende Angaben vorlagen. Eine zweifelsfreie Identifikation, welche Person zu welchem Zeitpunkt und basierend auf welchem Vertragsverhältnis tatsächlich Vertragspartner war, sei daher in keinem dieser Mandate anlässlich einer seitens der FMA beim Beschuldigten in Liechtenstein durchgeführten Kontrolle möglich gewesen.

34 Das Fürstliche Landgericht stellte fest, dass die Sorgfaltspflicht an den Sorgfaltspflichtigen und dessen Tätigkeit anknüpfe. Der satzungsmässige Sitz des verwalteten Rechtsträgers sei bei der Beurteilung der Sorgfaltspflicht nicht ausschlaggebend. Eine Sorgfaltspflicht des Beschuldigten sei dann gegeben, wenn er seine Funktion als Organ („Director“) eines ausländischen Rechtsträgers auf fremde Rechnung in Liechtenstein ausübt. Zum Zwecke eines Ausübens genügt beispielsweise, so das Fürstliche Landgericht, dass Telefonate geführt, Beschlüsse unterzeichnet oder sonstige administrative Handlungen für die ausländischen Rechtsträger

the foreign legal entities. As a result, the court held that the defendant was guilty of the misdemeanour specified in Article 30(1)(a) of the SPG.

35 The defendant has appealed against that conviction to the referring court, arguing, *inter alia*, that all three companies were, without exception, established from London and that it is inconceivable that all his English and Austrian clients could now also be subject to the requirements of the Liechtenstein SPG.

36 In Case E-27/15, the defendant has brought a complaint to the Appeals Board of the FMA challenging the FMA's order of 31 July 2015. The order concerns the defendant's duties as director of the three companies mentioned above.

37 Pursuant to the contested order, the defendant was found guilty of an administrative offence under Article 31(1)(e) of the SPG and ordered to pay a fine. According to that order, the defendant, as a person under an obligation to carry out due diligence measures in relation to the business relationships with the three companies concerned, had failed in the period from 1 February 2013 until at least 14 February 2014 in a total of three separate cases to compile the profile of the business relationship as required under Article 8 of the SPG.

38 The FMA's order resulted from its finding, when checks were carried out on the defendant in Vaduz concerning his business relationships with the three companies, that the profiles compiled on those business relationships were unsigned and undated. According to the FMA, the obligation to apply due diligence measures resulted from the existence of a person subject to a duty to apply due diligence measures and the activities of that person. Consequently, it held the defendant to be under an obligation to apply due diligence measures when he acts in Liechtenstein, on behalf of third parties, as company director.

gesetzt werden. Damit sei das Vergehen nach Artikel 30 Absatz 1 Buchstabe a SPG verwirklicht.

35 Der Beschuldigte hat gegen dieses Urteil vor dem vorlegenden Gericht Berufung erhoben, in welcher er u. a. geltend macht, dass die drei Gesellschaften ausnahmslos von London aus gegründet worden seien und unmöglich alle seine englischen und österreichischen Mandate nun auch dem liechtensteinischen SPG unterstehen könnten.

36 In der Rechtssache E-27/15 hat der Beschuldigte vor der Beschwerdekommission der FMA Beschwerde über die Verfügung der FMA vom 31. Juli 2015 erhoben. Die Verfügung betrifft die Pflichten des Beschuldigten als „Director" der drei oben genannten Gesellschaften.

37 Der angefochtenen Verfügung zufolge wurde der Beschuldigte der Übertretung nach Artikel 31 Absatz 1 Buchstabe e SPG schuldig erkannt und mit einer Geldbusse bestraft. Gemäss Verfügung hat es der Beschuldigte als Sorgfaltspflichtiger betreffend die Geschäftsbeziehungen mit den drei betroffenen Gesellschaften im Zeitraum vom 1. Februar 2013 bis zumindest zum 14. Februar 2014 in insgesamt drei Fällen unterlassen, das Profil der Geschäftsbeziehung gemäss Artikel 8 SPG zu erstellen.

38 Die Verfügung der FMA wurde erlassen, weil anlässlich einer beim Beschuldigte in Vaduz durchgeführten Kontrolle betreffend seine Geschäftsbeziehungen zu den drei Gesellschaften festgestellt wurde, dass die Profile betreffend diese Geschäftsbeziehungen nicht unterzeichnet und nicht datiert waren. Der FMA zufolge knüpft die Sorgfaltspflicht am Sorgfaltspflichtigen und seiner Tätigkeit an. Eine Sorgfaltspflicht des Beschuldigten sei dann gegeben, so die FMA, wenn er seine Funktion als „Director" einer Gesellschaft auf fremde Rechnung in Liechtenstein ausübt.

39 For the purposes of exercising that function, the FMA considered it to suffice that telephone calls are made, resolutions are signed or other administrative activities are carried out. The registered office of the legal entity administered was not considered decisive in determining the existence of an obligation to apply due diligence measures. As the profiles of the business relationships concerning the three companies did not meet the formal requirements, the FMA found that the defendant had failed to compile in full the business profiles required under Article 8 of the SPG and as a result he had committed an administrative offence pursuant to Article 31(1)(e) of the SPG in the period from 1 February 2013 until at least 14 February 2014.

40 In challenging this order, the defendant contends, *inter alia*, that all three companies were, without exception, established and operated from London.

41 By an order of 4 November 2015, received at the Court Registry on 9 November 2015, the referring court sought an Advisory Opinion in Case E26/15. By an order of 30 October 2015, received at the Court Registry on 16 November 2015, the referring authority sought an Advisory Opinion in Case E27/15.

42 By a decision of 21 December 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 written procedure, oral procedure and final judgment.

39 Zum Zwecke eines Ausübens genügt laut FMA beispielsweise, dass Telefonate geführt, Beschlüsse unterzeichnet oder sonstige administrative Handlungen gesetzt werden. Der Sitz des verwalteten Rechtsträgers sei bei der Beurteilung der Sorgfaltspflicht nicht ausschlaggebend. Da die Profile der Geschäftsbeziehungen betreffend die drei Gesellschaften nicht den formellen Anforderungen Rechnung tragen, gelangte die FMA zu der Schlussfolgerung, der Beschuldigte habe es unterlassen, die Geschäftsprofile vollständig gemäss Artikel 8 SPG zu erstellen, wodurch er die Übertretung nach Artikel 31 Absatz 1 Buchstabe e SPG im Zeitraum vom 1. Februar 2013 bis zumindest zum 14. Februar 2014 begangen habe.

40 In seiner Beschwerde gegen diese Verfügung macht der Beschuldigte u. a. geltend, dass die drei Gesellschaften ausnahmslos von London aus gegründet und betrieben worden seien.

41 Mit Beschluss vom 4. November 2015, beim Gerichtshof eingegangen am 9. November 2015, stellte das vorlegende Gericht einen Antrag auf Vorabentscheidung in der Rechtssache E-26/15. Mit Beschluss vom 30. Oktober 2015, beim Gerichtshof eingegangen am 16. November 2015, stellte die vorlegende Behörde einen Antrag auf Vorabentscheidung in der Rechtssache E-27/15.

42 Mittels Beschluss vom 21. November 2015 hat der Gerichtshof die beiden Rechtssachen gemäss Artikel 39 der Verfahrensordnung nach Eingang der schriftlichen Erklärungen der Parteien zur Durchführung des schriftlichen sowie des mündlichen Verfahrens und zum Erlass eines rechtskräftigen Urteils verbunden.

IV QUESTIONS

43 The following questions were referred to the Court in Case E-26/15:

1. **Must Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing be interpreted as meaning that 'trust and company service providers', within the meaning of Article 2(1)(3)(c) and point (7)(b) of Article 3 of that Directive, are subject to the obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive solely in accordance with the legislation of the Member State in which they are established (*in welchem [der Dienstleister für Trusts und Gesellschaften] seinen rechtlichen Sitz hat*)?**

2. **If Question 1 is answered in the negative: what criteria must be used to determine whether 'trust and company services providers' are under the obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive in accordance with the legislation of another Member State?**

3. **Do the answers to Questions 1 and 2 also apply where the company for which administrative services are provided is a company not incorporated in a Member State?**

44 In Case E-27/15, the first two questions referred are substantively similar to the first two questions in Case E-26/15, with the only difference being that instead of writing "obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive", the referring authority writes "obligation to

IV FRAGEN

43 In der Rechtssache E-26/15 wurden dem Gerichtshof die folgenden Fragen vorgelegt:

1. **Ist die Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26.10.2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung dahingehend auszulegen, dass einen „Dienstleister für Trusts und Gesellschaften" im Sinne der Art. 2 Abs. 1 Z 3 lit c und Art. 3 Z 7 lit b dieser Richtlinie die Pflicht zur Identifizierung des Kunden im Sinne der Art. 8 Abs. 1 lit a und Art. 9 Abs. 1 und Abs. 6 der Richtlinie ausschliesslich nach den Bestimmungen desjenigen Mitgliedstaates trifft, in welchem er seinen rechtlichen Sitz hat?**

2. **Für den Fall der Verneinung der Frage 1: Anhand welcher Kriterien ist festzustellen, ob den „Dienstleister für Trusts und Gesellschaften" die Pflicht zur Identifizierung des Kunden im Sinne der Art. 8 Abs. 1 lit a und Art. 9 Abs. 1 und Abs. 6 der Richtlinie nach den Bestimmungen eines anderen Mitgliedstaates trifft?**

3. **Gelten die zu vorstehenden Fragen 1 und 2 gegebenen Antworten auch dann, wenn es sich bei der verwalteten Gesellschaft nicht um eine in einem Mitgliedstaat inkorporierte Gesellschaft handelt?**

44 Die ersten beiden vorgelegten Fragen in der Rechtssache E-27/15 sind im Grunde identisch mit den ersten beiden Fragen in der Rechtssache E-26/15. Der einzige Unterschied besteht darin, dass die vorlegende Behörde anstelle des Wortlauts „Pflicht zur Identifizierung des Kunden im Sinne der Art. 8 Abs. 1 lit a und Art. 9 Abs. 1 und Abs. 6

obtain information on the purpose and intended nature of the business relationship as specified in Article 8(1)(c) and Article 9(6) of the Directive". The third question in Case E27/15 is identical to the third question in Case E-26/15.

V WRITTEN OBSERVATIONS

45 Pursuant to Article 20 of the Statute of the Court and Article 97 of the RoP, 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 Christoph Büchel, attorney at law, acting as Agents;
- the Government of the Kingdom of Spain, represented by Alejandro Rubio González, Abogado del Estado, member of the Spanish Legal Service before the Court of Justice of the European Union, acting as Agent;
- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Clémence Perrin and Lillian Biørnstad, Members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Ion Rogalski and Karl-Philipp Wojcik, Members of its Legal Service, acting as Agents.

der Richtlinie“ die Formulierung „Pflicht zur Einholung von Informationen über Zweck und angestrebte Art der Geschäftsbeziehung im Sinne der Art. 8 Abs. 1 lit c und Art 9 Abs. 6 der Richtlinie“ gewählt hat. Die dritte Frage in der Rechtssache E-27/15 ist identisch mit der dritten Frage in der Rechtssache E-26/15.

V SCHRIFTLICHE ERKLÄRUNGEN

45 Gemäss Artikel 20 der Satzung des Gerichtshofs und Artikel 97 der Verfahrensordnung haben in beiden Rechtssachen schriftliche Erklärungen abgegeben:

- die Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch, Direktorin der Stabstelle EWR, und Christoph Büchel, Rechtsanwalt, als Bevollmächtigte;
- die Regierung des Königreichs Spanien, vertreten durch Alejandro Rubio González, Abogado del Estado, Mitglied des spanischen Juristischen Diensts vor dem Gerichtshof der Europäischen Union, als Bevollmächtigter;
- die EFTA-Überwachungsbehörde, vertreten durch Carsten Zatschler, Clémence Perrin, sowie Lillian Biørnstad, Mitarbeiter der Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;
- die Europäische Kommission (im Folgenden: Kommission), vertreten durch Ion Rogalski und Karl-Philipp Wojcik, Mitarbeiter des Juristischen Diensts der Kommission, als Bevollmächtigte.

VI SUMMARY OF THE ARGUMENTS SUBMITTED AND ANSWERS PROPOSED

ADMISSIBILITY

46 The Liechtenstein Government contends that the referring court and the referring authority base their questions on the understanding that the defendant was a provider of services in Liechtenstein under Article 36 EEA. In contrast, the Liechtenstein Government argues, subject to the caveat that the facts of the cases have not yet been fully determined, that the defendant performed his services in the country by way of establishment in accordance with Article 31 EEA. If the Court accepts this view, this renders the requests for Advisory Opinions to a considerable extent redundant or hypothetical with the result that the Court might consider the requests inadmissible.

THE QUESTIONS REFERRED TO THE COURT

GOVERNMENT OF THE PRINCIPALITY OF LIECHTENSTEIN

47 Notwithstanding the submission on admissibility, the Liechtenstein Government deduces from the facts provided to the Court that the defendant performed his services in Liechtenstein by way of establishment and for that reason the SPG fully applies to him. Moreover, for the purposes of Article 31 EEA, the decisive factor is

VI ZUSAMMENFASSUNG DER VORGELEGTEN AUSFÜHRUNGEN UND VORGESCHLAGENEN ANTWORTEN

ZULÄSSIGKEIT

46 Die Regierung des Fürstentums Liechtenstein bringt vor, dass die Fragen des vorlegenden Gerichts und der vorlegenden Behörde voraussetzen, dass der Beschuldigte in Liechtenstein ein Dienstleistungserbringer im Sinne von Artikel 36 des EWR-Abkommens ist. Vorbehaltlich der vollständigen Klärung des Sachverhalts vertritt die Regierung des Fürstentums Liechtenstein hingegen die Ansicht, dass der Beschuldigte seine Dienstleistungen im Land im Rahmen der Niederlassung gemäss Artikel 31 des EWR-Abkommens erbracht hat. Schliesst sich der Gerichtshof dieser Auffassung an, würden sich die Anträge auf Vorabentscheidung dadurch in weiten Teilen als überflüssig oder hypothetisch erweisen, sodass sie der Gerichtshof möglicherweise als unzulässig betrachten könnte.

DEM GERICHTSHOF VORGELEGTE FRAGEN

DIE REGIERUNG DES FÜRSTENTUMS LIECHTENSTEIN

47 Unbeschadet des Vorbringens zur Zulässigkeit leitet die Regierung des Fürstentums Liechtenstein aus dem geschilderten Sachverhalt ab, dass der Beschuldigte seine Dienstleistungen in Liechtenstein im Rahmen der Niederlassung erbracht hat und das SPG aus diesem Grund uneingeschränkt Anwendung findet. Darüber hinaus ist der

not the place of the registered office, but the character of economic activity performed in the territory of an EEA State.[5]

48 Turning to the first question in each case, the Liechtenstein Government submits that the Directive does not include the term "legal seat". Consequently, that term cannot be decisive for the outcome of the cases. Rather, it is the activity of a person falling under the Directive which triggers its applicability. The reference in Article 22(2) of the Directive to "the Member State in whose territory the institution or person forwarding the information is situated" does not alter this conclusion since the case law of the Court of Justice of the European Union ("ECJ") demonstrates that these words must be understood in accordance with their ordinary meaning.[6] According to the Liechtenstein Government, the ordinary meaning of "situated" corresponds neither to the notion of a legal seat nor to the place of establishment.

49 Furthermore, the Liechtenstein Government argues that national supervisory authorities must have the competence, without exception, to supervise any activity covered by the Directive that is carried out in their territory.

50 With regard to the second question in each case, the Liechtenstein Government reiterates that a trust and company service provider, such as the defendant, has to comply with the national legislation of

5 Reference is made to the judgments in *Gebhard*, C-55/94, EU:C:1995:411, paragraphs 25 and 27, and *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 46.

6 Reference is made to the judgment in *Jyske Bank*, C-212/11, EU:C:2013:270, paragraph 42.

entscheidende Faktor für die Zwecke von Artikel 31 des EWR-Abkommens nicht der Geschäftssitz, sondern die Art der Geschäftstätigkeit, der im Hoheitsgebiet eines EWR-Staats nachgegangen wird.[4]

48 Bezugnehmend auf die erste Frage in den beiden Rechtssachen führt die Regierung des Fürstentums Liechtenstein aus, dass der Begriff „rechtlicher Sitz“ in der Richtlinie gar nicht vorkommt. Dementsprechend kann dieser Begriff auch nicht ausschlaggebend für die Entscheidung in diesen Rechtssachen sein. Die Anwendbarkeit ist vielmehr von der Tätigkeit einer der Richtlinie unterliegenden Person abhängig. Der Hinweis in Artikel 22 Absatz 2 der Richtlinie auf den Mitgliedstaat, „in dessen Hoheitsgebiet sich das Institut oder die Person, von dem bzw. der diese Informationen stammen, befindet” ändert nichts an dieser Schlussfolgerung, da aus der Rechtsprechung des Gerichtshofs der Europäischen Union (im Folgenden: EuGH) hervorgeht, dass diese Wendung ihrem gewöhnlichen Sinn nach zu verstehen ist.[5] Der Regierung des Fürstentums Liechtenstein zufolge entspricht der gewöhnliche Sinn des Wortes „befindet“ weder dem Begriff eines rechtlichen Sitzes noch eines Ortes der Niederlassung.

49 Zudem trägt die Regierung des Fürstentums Liechtenstein vor, dass nationale Aufsichtsbehörden ausnahmslos mit der erforderlichen Kompetenz ausgestattet sein müssen, alle Tätigkeiten, die der Richtlinie unterliegen und in ihrem Hoheitsgebiet ausgeführt werden, zu überwachen.

50 In Bezug auf die zweite Frage in den beiden Rechtssachen weist die Regierung des Fürstentums Liechtenstein darauf hin, dass ein Dienstleister für Trusts und Gesellschaften wie der Beschuldigte die

4 Es wird auf die Urteile in *Gebhard*, C-55/94, EU:C:1995:411, Randnrn. 25 und 27, und *Winner Wetten*, C-409/06, EU:C:2010:503, Randnr. 46, verwiesen.

5 Es wird auf das Urteil in *Jyske Bank*, C-212/11, EU:C:2013:270, Randnr. 42, verwiesen.

the EEA State in the territory of which he is active, or more precisely, where he performs the services covered by the Directive.

51 Furthermore, the Liechtenstein Government rejects the notion that Article 48(4) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC[7] can be relied upon in interpreting the Directive.

52 According to the Liechtenstein Government, Article 37 of the Directive does not contain any specific rules on cooperation between national supervisory authorities. Therefore, each national supervisory authority more or less stands by itself. Due to the lack of comprehensive cooperation and information exchange between national supervisory authorities, the FMA cannot resort to the equivalent authority in the United Kingdom and ascertain whether and to what extent the activities carried out by the defendant are being supervised there. In the absence of such cooperation, effective supervision of the defendant's compliance would not be ensured as required by the Directive if supervisory authorities were competent only to supervise service providers established in their territory.

53 With regard to the issue of whether double supervision might be a restriction on the defendant's freedom to provide services under Article 36 EEA, the Liechtenstein Government submits that, in

7 OJ 2015 L 141, p. 105.

nationalen Rechtsvorschriften des EWR-Staats einzuhalten hat, in dem er tätig ist bzw. – genauer gesagt – in dem er die der Richtlinie unterliegenden Dienstleistungen erbringt.

51 Überdies lehnt es die Regierung des Fürstentums Liechtenstein ab, Artikel 48 Absatz 4 der Richtlinie (EU) 2015/849 des Europäischen Parlaments und des Rates vom 20. Mai 2015 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung, zur Änderung der Verordnung (EU) Nr. 648/2012 des Europäischen Parlaments und des Rates und zur Aufhebung der Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates und der Richtlinie 2006/70/EG der Kommission[6] zur Auslegung der Richtlinie heranzuziehen.

52 Laut der Regierung des Fürstentums Liechtenstein enthält Artikel 37 der Richtlinie keine speziellen Vorschriften über die Zusammenarbeit zwischen den nationalen Aufsichtsbehörden. Das bedeutet, dass die jeweiligen nationalen Aufsichtsbehörden mehr oder minder auf sich allein gestellt sind. Da zwischen den nationalen Aufsichtsbehörden keine umfassende Zusammenarbeit und kein Informationsaustausch stattfindet, kann die FMA nicht auf ihr Gegenstück im Vereinigten Königreich zurückgreifen, um zu ermitteln, ob und inwieweit die Tätigkeit des Beschuldigten dort überwacht wird. In Ermangelung einer solchen Zusammenarbeit könnte keine wirksame Überwachung der Einhaltung der Vorschriften durch den Beschuldigten, wie in der Richtlinie vorgesehen, gewährleistet werden, sofern die Aufsichtsbehörden nur für die Überwachung von Dienstleistern mit einem rechtlichen Sitz in ihrem Hoheitsgebiet zuständig sind.

53 Im Hinblick auf die Frage, ob eine doppelte Überwachung für den Beschuldigten eine Beschränkung des freien Dienstleistungsverkehrs gemäss Artikel 36 des EWR-Abkommen darstellen könnte, bringt die

6 ABl. 2015 L 141, S. 105.

adhering to what is specified in the Directive, the application of the SPG cannot constitute a restriction on the freedom to provide services. Even if such a restriction were found to exist, it would certainly be justified.

54 Elaborating on the issue of justification, the Liechtenstein Government states that the requirements under national law on the defendant to identify customers and compile a business or risk profile must be regarded as serving the aim of preventing and combating money laundering. Those obligations are based on Article 8(1)(a) and (c) of the Directive and must therefore be considered suited for attaining the aims which they pursue.

55 Moving on to consider the issue of proportionality, the Liechtenstein Government emphasises that Article 37(1) of the Directive requires effective supervision of service providers such as the defendant. Noting the lack of comprehensive cooperation with other supervisory authorities in the EEA States, the Liechtenstein Government argues that an absence of the possibility of verification by the FMA could create weaknesses or even loopholes in the supervision of service providers. Furthermore, even if the defendant were required to comply with two or more national regimes regarding one and the same business relationship, that could not constitute a serious burden on him. Namely, this does not entail having to identify the customers or beneficial owners twice. Rather, the defendant would only have to keep two or more sets of due diligence files.

56 Turning to the third question in each case, the Liechtenstein Government submits that the place of incorporation, whether within or outside the EEA, of companies that are the recipients of services

Regierung des Fürstentums Liechtenstein vor, dass angesichts des Inhalts der Richtlinie die Anwendung des SPG keine Beschränkung des freien Dienstleistungsverkehrs darstellen kann. Selbst wenn eine solche Beschränkung festgestellt würde, wäre sie mit Sicherheit gerechtfertigt.

54 Bezugnehmend auf die Frage der Rechtfertigung legt die Regierung des Fürstentums Liechtenstein dar, dass die Anforderung an den Beschuldigten im nationalen Recht, die Identität der Kunden festzustellen und ein Geschäfts- oder Risikoprofil zu erstellen, dem Ziel der Verhinderung und Bekämpfung von Geldwäsche dient. Diese Verpflichtungen gehen auf Artikel 8 Absatz 1 Buchstaben a und c der Richtlinie zurück und müssen daher als für die mit ihnen verfolgten Ziele geeignet angesehen werden.

55 Mit Blick auf die Frage der Verhältnismässigkeit betont die Regierung des Fürstentums Liechtenstein, dass Artikel 37 Absatz 1 der Richtlinie die wirksame Überwachung von Dienstleistern wie dem Beschuldigten vorsieht. In Ermangelung einer umfassenden Zusammenarbeit mit anderen Aufsichtsbehörden in den EWR-Staaten, so die Regierung des Fürstentums Liechtenstein, könnte das Fehlen einer Kontrollmöglichkeit durch die FMA die Überwachung der Dienstleister schwächen und gegebenenfalls Schlupflöcher schaffen. Selbst wenn der Beschuldigte hinsichtlich ein und derselben Geschäftsbeziehung die nationalen Vorschriften zweier oder mehrerer Staaten einhalten müsste, könnte dies noch immer keine ernsthafte Belastung darstellen, da dies nicht bedeutet, dass die Identität der Kunden oder wirtschaftlichen Eigentümer zweimal festgestellt werden muss. Der Beschuldigte müsste die Erfüllung seiner Sorgfaltspflicht lediglich in doppelter bzw. mehrfacher Ausfertigung dokumentieren.

56 Zur dritten Frage in den beiden Rechtssachen trägt die Regierung des Fürstentums Liechtenstein vor, dass dem Ort der Inkorporation – sei er innerhalb oder ausserhalb des EWR – von Gesellschaften, welche

listed in Article 3(7) of the Directive has no relevance whatsoever. Only the provider of trust and company services is of relevance.

57 Should the Court consider the cases admissible, the Liechtenstein Government proposes that the Court should provide the following answers to the questions referred:

1. *Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing requires that institutions and persons covered by the Directive, such as trust and service providers according to the definition in Article 3(7) of that Directive, are subject to the customer due diligence measures as foreseen in the Directive, in particular in its Articles 7, 8 and 9, of the legislation in EEA States in the territory of which they perform such services covered by the Directive, irrespective of the place of their "rechtlicher Sitz", registered office, central administration, principal place of business, or establishment.*

2. *If institutions and persons covered by Directive 2005/60/EC perform services covered by that Directive by relying on the rules on the freedom to provide services in the territory of an EEA State (host) and being established in another EEA State, each EEA State has to apply its legislation implementing that Directive to the extent necessary to effectively pursue and ensure the attainment of the aims of that Directive regarding the prevention of money laundering and terrorist financing, provided the national measures applied are suitable for attaining such aims and are proportionate. In cases of doubt with respect to the applicability of the national provisions, such (host) EEA State shall resort to the national provisions transposing that Directive fully guaranteeing the pursuance of that*

die Dienstleistungen laut Artikel 3 Absatz 7 der Richtlinie in Anspruch nehmen, keinerlei Bedeutung zukommt. Massgeblich ist nur der Dienstleister für Trusts und Gesellschaften.

57 Sollte der Gerichtshof die Rechtssachen als zulässig erachten, schlägt die Regierung des Fürstentums Liechtenstein vor, dass der Gerichtshof die vorgelegten Fragen folgendermassen beantwortet:

1. *Die Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung legt fest, dass Institute oder Personen, die dieser Richtlinie unterliegen, wie Dienstleister für Trusts und Gesellschaften im Sinne der Definition in Artikel 3 Absatz 7 der Richtlinie, die in der Richtlinie – insbesondere in den Artikeln 7, 8 und 9 – vorgesehene Sorgfaltspflicht gegenüber Kunden nach den Rechtsvorschriften der EWR-Staaten, in deren Hoheitsgebiet sie die von der Richtlinie abgedeckten Dienstleistungen erbringen, trifft. Dies gilt unabhängig vom Ort ihres rechtlichen Sitzes, ihres Geschäftssitzes, ihrer zentralen Verwaltung, ihres Hauptsitzes oder ihrer Niederlassung.*

2. *Wenn Institute und Personen, die der Richtlinie 2005/60/EG unterliegen, von der Richtlinie abgedeckte Dienstleistungen unter Berufung auf den freien Dienstleistungsverkehr auf dem Hoheitsgebiet eines EWR-Staats (Aufnahmemitgliedstaat) erbringen, ihren rechtlichen Sitz aber in einem anderen EWR-Staat haben, wendet jeder EWR-Staat die Rechtsvorschriften an, mit denen er die Richtlinie in nationales Recht umgesetzt hat, soweit dies zur wirksamen Verfolgung und zur Erreichung der Ziele dieser Richtlinie zur Verhinderung von Geldwäsche und Terrorismusfinanzierung erforderlich ist, vorausgesetzt, die nationalen Massnahmen sind zur Erreichung dieser Ziele geeignet und verhältnismässig. Bei Zweifeln hinsichtlich der Anwendbarkeit*

Directive's aim of an effective and efficient EEA-wide supervision of activities covered by that Directive.

3. *The jurisdiction of incorporation of the company to which services in the meaning of Article 3(7) of Directive 2005/60/EC are provided is of no relevance for the question of applicability of customer due diligence measures provided for in the Directive.*

GOVERNMENT OF THE KINGDOM OF SPAIN

58 With regard to the first question referred in each case, the Government of Spain argues, focusing mainly on the first question in Case E-26/15, that this legal issue requires an assessment of whether the Directive forbids host State authorities to check if an operator has duly verified customer identities.

59 Referring to the objective of the Directive and the context in which it was adopted, the Government of Spain submits that the combating of money laundering and terrorist financing are legitimate aims which the Member States have endorsed both at international and European level.[8] It adds that the Directive does not constitute full harmonisation of this field.

8 Reference is made to the judgment in *Jyske Bank*, cited above, paragraphs 46 and 62. Reference is also made to the Opinion of Advocate General Bot in the same case, EU:C:2012:607, points 48 to 50, 55 to 56 and 63.

der nationalen Bestimmungen hat der EWR-Staat (Aufnahmemitgliedstaat) auf die nationalen Bestimmungen zur Umsetzung dieser Richtlinie zurückzugreifen, welche die Verfolgung der Zielsetzung dieser Richtlinie, die in einer wirksamen und effizienten EWR-weiten Überwachung der von dieser Richtlinie geregelten Tätigkeiten besteht, uneingeschränkt gewährleisten müssen.

3. *Dem Ort der Inkorporation der Gesellschaft, für die Dienstleistungen im Sinne von Artikel 3 Absatz 7 der Richtlinie 2005/60/EG erbracht werden, kommt in Bezug auf die Frage der Anwendbarkeit der in der Richtlinie vorgesehenen Sorgfaltspflicht gegenüber Kunden keinerlei Bedeutung zu.*

DIE REGIERUNG DES KÖNIGREICHS SPANIEN

58 Zur ersten Frage in den beiden Rechtssachen bringt die Regierung des Königreichs Spanien – vor allem mit Blick auf die erste Frage in der Rechtssache E-26/15 – vor, dass diese rechtliche Fragestellung eine Beurteilung erfordert, ob es die Richtlinie den Behörden des Aufnahmemitgliedstaats untersagt zu untersuchen, ob ein Anbieter die Identität seiner Kunden ordnungsgemäss überprüft hat.

59 Hinsichtlich der Zielsetzung der Richtlinie und des Hintergrunds, vor dem sie verabschiedet wurde, vertritt die Regierung des Königreichs Spanien die Auffassung, dass die Bekämpfung der Geldwäsche und der Terrorismusfinanzierung legitime Ziele darstellen, zu deren Erreichung sich die Mitgliedstaaten sowohl auf internationaler als auch auf europäischer Ebene verpflichtet haben.[7] Die Richtlinie führt jedoch, so die Regierung des Königreichs Spanien, keine vollständige Harmonisierung in diesem Bereich herbei.

7 Es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnrn. 46 und 62, verwiesen. Es wird ausserdem auf die Schlussanträge des Generalanwalts Bot in derselben Rechtssache, EU:C:2012:607, Nrn. 48, 49, 50, 55, 56 und 63, verwiesen.

60 The Government of Spain contends that the ECJ has accepted that Article 22(2) of the Directive does not preclude the host State from requiring an institution carrying out activities in its territory under the rules on the freedom to provide services to forward the required information directly to its own financial intelligence unit.[9]

61 Furthermore, the Government of Spain stresses that the ECJ's case law demonstrates that the combating of money laundering constitutes a legitimate aim capable of justifying a barrier to the freedom to provide services.[10]

62 The Government of Spain concludes that authorities of the host State should be entitled to monitor compliance with their domestic law obligations in accordance with the procedures established in their national legislation on anti-money laundering.

63 Turning to the second question referred in each case, the Government of Spain submits that in order to answer these questions, the Court will need to ascertain whether the obligations under national law are compatible with Article 36 EEA. In that regard, the Government of Spain stresses that, at the relevant time, there was no mechanism for cooperation and exchange of information that could have enabled host EEA States in all circumstances to effectively combat money laundering and terrorist financing. It adds that, although a due diligence requirement by the host EEA State may give rise to additional expenses and administrative burdens, these would be relatively limited,

9 Reference is made to the judgment in *Jyske Bank*, cited above, paragraph 56.
10 Reference is made to the judgment in *Jyske Bank*, cited above, paragraph 64. Reference is also made to the judgment in *Zeturf*, C212/08, EU:C:2011:437, paragraphs 45 to 46.

60 Die Regierung des Königreichs Spanien erläutert, dass der EuGH akzeptiert hat, dass es Artikel 22 Absatz 2 der Richtlinie dem Aufnahmemitgliedstaat nicht untersagt, von einem im Rahmen des freien Dienstleistungsverkehrs in seinem Hoheitsgebiet tätigen Institut die Weiterleitung der erforderlichen Angaben direkt an seine eigene zentrale Meldestelle zu verlangen.[8]

61 Darüber hinaus betont die Regierung des Königreichs Spanien, dass nach der Rechtsprechung des EuGH die Bekämpfung der Geldwäsche ein legitimes Ziel darstellt, das eine Beschränkung des freien Dienstleistungsverkehrs rechtfertigen kann.[9]

62 Die Regierung des Königreichs Spanien gelangt zu der Schlussfolgerung, dass die Behörden des Aufnahmemitgliedstaats das Recht haben sollten, die Einhaltung ihrer einzelstaatlichen Bestimmungen in Übereinstimmung mit den in ihrem nationalen Recht verankerten Verfahren zur Verhinderung von Geldwäsche zu überwachen.

63 Zur zweiten Frage in den beiden Rechtssachen führt die Regierung des Königreichs Spanien aus, dass der Gerichtshof zur Beantwortung dieser Fragen klären muss, ob die im nationalen Recht vorgesehenen Verpflichtungen mit Artikel 36 des EWR-Abkommens vereinbar sind. Die Regierung des Königreichs Spanien weist diesbezüglich darauf hin, dass zum entsprechenden Zeitpunkt kein Mechanismus zur Zusammenarbeit und zum Informationsaustausch existierte, der es den Aufnahme-EWR-Staaten ermöglicht hätte, Geldwäsche und Terrorismusfinanzierung unter allen Umständen wirksam zu bekämpfen. Zudem können die Anforderungen des Aufnahme-EWR-Staats hinsichtlich der Sorgfaltspflicht zwar zu zusätzlichem

8 Es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnr. 56, verwiesen.

9 Es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnr. 64, verwiesen. Es wird ausserdem auf das Urteil in *Zeturf*, C-212/08, EU:C:2011:437, Randnrn. 45 bis 46, verwiesen.

particularly since trust and company service providers should already have identified the customer and verified its identity in the EEA State where they are situated.

64 Turning to the third question referred in each case, the Government of Spain argues that there is no reason under EEA law to dispense a different treatment if the company for which administrative services are provided is a company not incorporated in an EEA State. The Government of Spain adds that such companies are not granted any rights under Articles 34 and 39 EEA to provide services.

65 The Government of Spain proposes that the Court should provide the following answers to the questions referred:

1. *Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing must be interpreted as meaning that "trust and company service providers" are not subject to the obligation to obtain information on the purpose and intended nature of the business relationship solely in accordance with the legislation of the Member State in which they are established. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing allows Host States to adopt legislation to more effectively combat money laundering and terrorist financing and impose obligations to non-established subjects which operate in their territory under the freedom to provide services.*

finanziellem und verwaltungstechnischem Aufwand führen, dieser wäre jedoch vergleichsweise begrenzt – insbesondere, da Dienstleister für Trusts und Gesellschaften die Identität des Kunden in dem EWR-Staat, in dem sie sich befinden, bereits festgestellt und überprüft haben sollten.

64 Bezugnehmend auf die dritte Frage in den beiden Rechtssachen gibt es der Regierung des Königreichs Spanien zufolge nach EWR-Recht keinen Grund für eine unterschiedliche Behandlung, wenn es sich bei der verwalteten Gesellschaft nicht um eine in einem EWR-Staat inkorporierte Gesellschaft handelt. Die Regierung des Königreichs Spanien fügt hinzu, dass solchen Gesellschaften keine Rechte zur Erbringung von Dienstleistungen nach Artikel 34 und Artikel 39 des EWR-Abkommens gewährt werden.

65 Die Regierung des Königreichs Spanien schlägt vor, dass der Gerichtshof die vorgelegten Fragen folgendermassen beantwortet:

1. Die Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung ist dahingehend auszulegen, dass einen „Dienstleister für Trusts und Gesellschaften" die Pflicht zur Einholung von Informationen über Zweck und angestrebte Art der Geschäftsbeziehung nicht ausschliesslich nach den Bestimmungen desjenigen Mitgliedstaats trifft, in welchem er seinen rechtlichen Sitz hat. Die Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung erlaubt den Aufnahmemitgliedstaaten die Verabschiedung von Rechtsvorschriften zur wirksameren Bekämpfung der Geldwäsche und der Terrorismusfinanzierung und zur Festlegung von Verpflichtungen für Leistungserbringer ohne rechtlichen Sitz, die im Rahmen des freien Dienstleistungsverkehrs auf ihrem Hoheitsgebiet tätig sind.

2. *"Trust and company service providers" are under the obligation to obtain information on the purpose and intended nature of the business relationship as specified in Article 8(1)(c) and Article 9(6) of the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing in accordance with the legislation of the host Member State provided they carry out activities in its territory.*

3. *There is not any reason under EEA law to dispense a different treatment if the company for which administrative services are provided is a company not incorporated in a Member State.*

ESA

66 At the outset, ESA argues that the cases require a balance to be struck between, on the one hand, the important aims of preventing money laundering and terrorist financing pursued by the Directive and, on the other, ensuring that the freedom to provide services of institutions and persons covered by the Directive is not unnecessarily restricted. ESA contends that the case law of the ECJ provides valuable guidance in this respect.[11]

11 Reference is made to the judgment in *Jyske Bank*, cited above, paragraphs 59 and 62 and onwards.

2. *„Dienstleister für Trusts und Gesellschaften" sind zur Einholung von Informationen über Zweck und angestrebte Art der Geschäftsbeziehung nach Artikel 8 Absatz 1 Buchstabe c und Artikel 9 Absatz 6 der Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung gemäss den Rechtsvorschriften des Aufnahmemitgliedstaats verpflichtet, sofern sie in dessen Hoheitsgebiet Tätigkeiten ausüben.*

3. *Nach EWR-Recht gibt es keinerlei Grund für eine unterschiedliche Behandlung, wenn es sich bei der verwalteten Gesellschaft nicht um eine in einem Mitgliedstaat inkorporierte Gesellschaft handelt.*

DIE EFTA-ÜBERWACHUNGSBEHÖRDE

66 Einleitend hält die EFTA-Überwachungsbehörde fest, dass die Rechtssachen eine Abwägung zwischen den wichtigen Zielsetzungen der Richtlinie zur Verhinderung von Geldwäsche und Terrorismusfinanzierung einerseits und der Vermeidung unnötiger Beschränkungen der Dienstleistungs-freiheit von Instituten und Personen, die der Richtlinie unterliegen, andererseits, erfordern. Die EFTA-Überwachungsbehörde weist darauf hin, dass die Rechtsprechung des EuGH in diesem Zusammenhang wertvolle Hilfestellungen bietet.[10]

10 Es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnrn. 59 und 62 ff., verwiesen.

67 Dealing with the first and second questions together, ESA submits that, although the Directive lacks some precision, it is in effect based on a home country control system. This is the case because whenever a specific reporting obligation is imposed, the reporting is to be done to the competent authorities of the EEA State where the institution or person is situated, which, according to the ECJ, means the State of origin.[12] ESA adds that the competent authorities of the EEA State of establishment are best placed to supervise compliance with the Directive. Moreover, the requirement under Article 36(1) of the Directive for EEA States to provide for trust and company service providers to be registered must entail that they only need register once, as any other interpretation would constitute a serious restriction on the fundamental freedoms.

68 ESA maintains that, consequently, the defendant was clearly bound by the due diligence requirements established in United Kingdom legislation. Nonetheless, the Directive, as a minimum harmonisation measure, does not preclude other EEA States from imposing due diligence requirements, as long as they seek to strengthen the effectiveness of the fight against money laundering and terrorist financing.

69 In ESA's view, in order to provide a satisfactory answer to the questions referred, the Court should also consider provisions of EEA law not mentioned in the questions. In this regard, ESA notes that the assumption underlying the references seems to be that the defendant provided services in Liechtenstein in accordance with

12 Reference is made to the judgment in *Jyske Bank*, cited above, paragraph 43.

67 Zur gemeinsamen Beantwortung der ersten und zweiten Frage erläutert die EFTA-Überwachungsbehörde, dass die Richtlinie – obschon es ihr an einer gewissen Präzision mangelt – im Grunde auf ein System der Herkunftslandkontrolle zurückgreift. Dies ist der Fall, da immer dann, wenn eine bestimmte Meldepflicht auferlegt wird, die Meldung an die zuständigen Behörden des EWR-Staats, in dem sich das Institut oder die Person befindet, zu übermitteln ist. Dem EuGH zufolge handelt es sich dabei um den Herkunftsmitgliedstaat.[11] Die EFTA-Überwachungsbehörde fügt hinzu, dass die zuständigen Behörden des EWR-Staats des rechtlichen Sitzes am besten geeignet sind, um die Einhaltung der Richtlinie zu überwachen. Zudem bedingt die Anforderung laut Artikel 36 Absatz 1 der Richtlinie, dass die EWR-Staaten vorsehen, dass Dienstleister für Trusts und Gesellschaften eingetragen sein müssen, lediglich eine einmalige Eintragung, da jede andere Auslegung eine ernsthafte Beschränkung der Grundfreiheiten darstellen würde.

68 Dementsprechend, so die EFTA-Überwachungsbehörde, unterlag der Beschuldigte eindeutig der in den Rechtsvorschriften des Vereinigten Königreichs verankerten Sorgfaltspflicht. Nichtsdestotrotz untersagt es die Richtlinie – als Massnahme der Mindestharmonisierung – anderen EWR-Staaten nicht, Sorgfaltspflichten vorzusehen, sofern dadurch eine Erhöhung der Wirksamkeit der Bekämpfung von Geldwäsche und Terrorismusfinanzierung angestrebt wird.

69 Nach Auffassung der EFTA-Überwachungsbehörde sollte der Gerichtshof zur sachdienlichen Beantwortung der vorgelegten Fragen auch Bestimmungen des EWR-Rechts berücksichtigen, auf die in den Fragen nicht Bezug genommen wird. Diesbezüglich stellt die EFTA-Überwachungsbehörde fest, dass die Anträge auf der Annahme beruhen zu scheinen, dass der Beschuldigte in Liechtenstein Dienstleistungen gemäss Artikel 36 des EWR-

11 Es wird auf das Urteil in *Jyske Bank*, oben erwähnt, Randnr. 43, verwiesen.

Article 36 EEA and was not established there within the meaning of Article 31 EEA. ESA stresses that this is an issue for the referring court and referring authority to assess in light of the concrete factual circumstances in which the defendant pursued his activities.

70 Continuing on the basis that Article 36 EEA applies to the present case, ESA notes that the defendant is established in the United Kingdom and is subject to its legislation. Any imposition of administrative requirements or formalities by Liechtenstein is therefore in principle liable to give rise to a restriction of his fundamental freedom to provide services. Notwithstanding that fact, national measures reinforcing due diligence obligations are in principle capable of being justified by reference to the objective of preventing the use of the financial system for the purpose of money laundering and terrorist financing, an objective recognised by the Directive itself in the first and third recitals in its preamble as an important public policy objective. Moreover, this objective has been accepted as a legitimate aim capable of justifying a barrier to a fundamental freedom.[13]

71 Moving on to the issue of proportionality, ESA notes that the referring court and the referring authority must examine whether the legitimate public interest is not already safeguarded by the rules of the State of establishment to which the service provider is subject. A duplication of requirements must be justified in itself, for example, by rendering more effective the combat against money laundering

13 Ibid., paragraph 64.

Abkommens erbracht hat und nicht im Sinne des Artikels 31 des EWR-Abkommens dort niedergelassen war. Die EFTA-Überwachungsbehörde betont, dass diese Frage durch das vorlegende Gericht und die vorlegende Behörde mit Blick auf die tatsächlichen Umstände, unter denen der Beschuldigte seine Tätigkeit ausgeübt hat, zu klären ist.

70 Geht man davon aus, dass Artikel 36 des EWR-Abkommens auf die gegenständliche Rechtssache anwendbar ist, so die EFTA-Überwachungsbehörde weiter, ist der Beschuldigte im Vereinigten Königreich ansässig und unterliegt den dortigen Rechtsvorschriften. Die Auferlegung von Verwaltungsanforderungen oder Formalitäten durch Liechtenstein kann daher grundsätzlich zu einer Beschränkung der Dienstleistungsfreiheit des Beschuldigten führen. Ungeachtet dessen können nationale Massnahmen zur Stärkung der Sorgfaltspflicht im Grunde unter Verweis auf das Ziel der Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung gerechtfertigt werden, wobei diese Zielsetzung im ersten und dritten Erwägungsgrund der Präambel der Richtlinie als Ziel der öffentlichen Ordnung genannt wird. Überdies wurde bereits anerkannt, dass es sich hierbei um ein legitimes Ziel handelt, welches eine Beschränkung einer Grundfreiheit rechtfertigen kann.[12]

71 In Bezug auf die Frage der Verhältnismässigkeit trägt die EFTA-Überwachungsbehörde vor, dass das vorlegende Gericht und die vorlegende Behörde zu prüfen haben, ob dem legitimen öffentlichen Interesse nicht bereits durch die Rechtsvorschriften des Staats, in dem der Dienstleister seinen rechtlichen Sitz hat, Rechnung getragen wird. Eine Duplizierung der Anforderungen muss an sich

12 Ebenda, Randnr. 64.

and terrorist financing in the absence of any effective mechanism guaranteeing full and complete cooperation between EEA States.[14]

72 ESA adds that it may be useful to distinguish between any application of national rules transposing the Directive to foreign service providers and procedures for verifying that such service providers have complied with the national implementing rules of the EEA State in which they are established. In the latter case, as long as the additional verifications requested by Liechtenstein are not unnecessarily burdensome for trust and company service providers, and in particular involve merely the presentation of documents which are already kept on file by virtue of the obligations imposed in the service provider's State of establishment, e.g. in light of Article 30(a) of the Directive, such additional verifications would, in principle, appear proportionate. However, as regards the requirements to establish and verify the identity of the customer and renew such verification, those requirements seem substantially equivalent to the requirements under the implementing legislation of the United Kingdom. Therefore, the application of Liechtenstein legislation to the defendant would in that case constitute an unjustified duplication of the requirements.

14 Reference is made to the judgment in *Jyske Bank*, cited above.

gerechtfertigt werden, beispielsweise, weil sie in Ermangelung eines wirksamen Mechanismus zur Gewährleistung einer vollständigen und lückenlosen Zusammenarbeit zwischen den EWR-Staaten zur wirksameren Bekämpfung der Geldwäsche und der Terrorismusfinanzierung beiträgt.[13]

72 Eine Differenzierung zwischen der Anwendung nationaler Vorschriften zur Umsetzung der Richtlinie auf ausländische Dienstleister und den Verfahren zur Überprüfung der Einhaltung der nationalen Umsetzungsvorschriften des EWR-Staats, in dem diese ausländischen Dienstleister ihren rechtlichen Sitz haben, durch diese Dienstleister könnte sich der EFTA-Überwachungsbehörde zufolge als zweckmässig erweisen. Im zweiten Fall – solange die von Liechtenstein verlangten zusätzlichen Überprüfungen für Dienstleister für Trusts und Gesellschaften nicht unnötig belastend sind und sich insbesondere auf die reine Vorlage von Dokumenten beschränken, die auf der Grundlage der im Staat des rechtlichen Sitzes des Dienstleisters vorgesehenen Verpflichtungen, also beispielsweise gemäss Artikel 30 Buchstabe a der Richtlinie, ohnehin aufbewahrt werden müssen – erscheinen solche zusätzlichen Überprüfungen im Grunde verhältnismässig. Was jedoch die Anforderungen zur Feststellung und Überprüfung der Identität des Kunden und zur Wiederholung dieser Überprüfung angeht, so erwecken diese im Wesentlichen den Eindruck der Gleichwertigkeit mit den Anforderungen der Rechtsvorschriften, mit denen das Vereinigte Königreich die Richtlinie umgesetzt hat. Somit würde die Anwendung der liechtensteinischen Rechtsvorschriften auf den Beschuldigten im gegenständlichen Fall eine ungerechtfertigte Duplizierung der Anforderungen darstellen.

13 Es wird auf das Urteil in *Jyske Bank*, oben erwähnt, verwiesen.

73 ESA argues that, by contrast, there are no provisions in the Directive which expressly require documents to be either dated or signed. Furthermore, such requirements do not seem necessary in order to attain the objectives of the Directive.

74 Finally, ESA notes that an EEA State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom to provide services for the purpose of avoiding professional rules which would be applicable to him if he were established within that State.[15]

75 As regards the third question referred in each case, ESA submits that the provisions of the Directive are intended to impose obligations on trust and company service providers irrespective of the place of incorporation of companies in respect of which they provide administrative services. As the defendant is an EEA national, established in an EEA State and engaging in economic activity in another EEA State, the application of Article 36 EEA is not influenced by the place of incorporation of companies in respect of which he provides services in the EEA.

76 ESA proposes that the Court should provide the following answers to the questions referred:

1. *Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing*

15 Reference is made to the judgment in *van Binsbergen*, C-33/74, EU:C:1974:131, paragraph 13.

73 Allerdings, so die EFTA-Überwachungsbehörde weiter, enthält die Richtlinie keine Bestimmungen, aus denen ausdrücklich hervorgeht, dass Unterlagen zu datieren oder zu unterzeichnen sind. Zur Erreichung der Zielsetzungen der Richtlinie erscheinen derartige Anforderungen auch nicht erforderlich.

74 Abschliessend hält die EFTA-Überwachungsbehörde fest, dass einem EWR-Staat nicht das Recht zum Erlass von Vorschriften abgesprochen werden kann, die verhindern sollen, dass der Erbringer einer Leistung, dessen Tätigkeit ganz oder vorwiegend auf das Gebiet dieses Staates ausgerichtet ist, sich den freien Dienstleistungsverkehr zunutze macht, um sich den Berufsregelungen zu entziehen, die auf ihn Anwendung fänden, wenn er im Gebiet dieses Staates ansässig wäre.[14]

75 Betreffend die dritte Frage in den beiden Rechtssachen erklärt die EFTA-Überwachungsbehörde, dass die Bestimmungen der Richtlinie der Schaffung von Verpflichtungen für Dienstleister für Trusts und Gesellschaften, unabhängig vom Ort der Inkorporation der verwalteten Gesellschaft, dienen. Da es sich beim Beschuldigten um einen EWR-Staatsangehörigen mit rechtlichem Sitz in einem EWR-Staat handelt, der in einem weiteren EWR-Staat eine wirtschaftliche Tätigkeit ausübt, wirkt sich der Ort der Inkorporation der im EWR verwalteten Gesellschaften nicht auf die Anwendung von Artikel 36 des EWR-Abkommens aus.

76 Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die vorgelegten Fragen folgendermassen beantwortet:

1. Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der

14 Es wird auf das Urteil in *van Binsbergen*, C-33/74, EU:C:1974:131, Randnr. 13, verwiesen.

must be interpreted as not precluding an EEA State on whose territory a 'trust and company service provider' established in another EEA State engages in activities such as those in issue in the present cases from making that provider subject to due diligence requirements laid down in its national legislation, as long as those requirements are justified by meeting an overriding requirement relating to the public interest which is not already safeguarded to the same level of protection by the rules to which the service provider is subject in the EEA State in which it is established, are appropriate for securing the attainment of the aim which they pursue and do not go beyond what is necessary in order to attain it.

2. *The place of incorporation of a company in respect of which a 'trust and company service provider' provides administrative services, and whether or not such a company is incorporated in an EEA State, is immaterial for these purposes.*

THE COMMISSION

77 The Commission's arguments, with regard to the questions referred in each case, are for the most part substantively the same as those of ESA.

78 In addition, the Commission argues that further support for reading the Directive as including the home country principle can be found in Article 6, Article 22(2), and Articles 37 and 39 of the Directive.

79 With regard to proportionality, the Commission adds that it would tend to consider a requirement to keep in Liechtenstein all original records of the foreign trust and company service provider, such as certified copies of passports, transaction documents etc., as disproportionate, since less restrictive means can be envisaged in the

Terrorismusfinanzierung ist dahingehend auszulegen, dass sie es einem EWR-Staat, in dessen Hoheitsgebiet ein „Dienstleister für Trusts und Gesellschaften" mit rechtlichem Sitz in einem anderen EWR-Staat Tätigkeiten wie jene ausübt, die Gegenstand der vorliegenden Rechtssachen sind, nicht verbietet, diesen Dienstleister einer in den nationalen Rechtsvorschriften verankerten Sorgfaltspflicht zu unterwerfen, wenn diese Sorgfaltspflicht auf zwingenden Gründen des Allgemeininteresses beruht und dieses Interesse nicht schon im selben Mass durch Vorschriften geschützt wird, denen der Dienstleister in dem EWR-Staat unterliegt, in dem er seinen rechtlichen Sitz hat, und wenn sie geeignet ist, die Erreichung des mit ihr verfolgten Ziels zu gewährleisten, ohne über das hinauszugehen, was dazu erforderlich ist.

2. *Der Ort der Inkorporation einer von einem „Dienstleister für Trusts und Gesellschaften" verwalteten Gesellschaft und die Frage, ob eine solche Gesellschaft in einem EWR-Staat inkorporiert ist oder nicht, ist in diesem Zusammenhang gegenstandslos.*

DIE KOMMISSION

77 Die Argumente der Kommission hinsichtlich der Fragen in den beiden Rechtssachen entsprechen im Wesentlichen jenen der EFTA-Überwachungsbehörde.

78 Des Weiteren bringt die Kommission vor, dass Artikel 6, Artikel 22 Absatz 2, Artikel 37 und Artikel 39 der Richtlinie eine Auslegung, nach der die Richtlinie das Herkunftslandprinzip beinhaltet, bestätigen.

79 Hinsichtlich der Verhältnismässigkeit äussert die Kommission, sie neige dazu, eine Forderung, alle Originaldokumente des ausländischen Dienstleisters für Trusts und Gesellschaften – wie beglaubigte Passkopien, Transaktionsunterlagen usw. – in Liechtenstein aufzubewahren, als unverhältnismässig anzusehen, da

case of cross-border provision of services, such as producing a copy of those records, upon request.[16] According to the Commission, a similar conclusion appears to be warranted with regard to the requirements that the profiles of business relationships should be dated and signed. Finally, there should be no general presumption of fraud, leading to a full, systemic check on all entities established in other EEA States that provide services on a temporary basis in the host EEA State.[17]

80 The Commission proposes that the Court should provide the following answers to the questions referred:

1. *Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing must be interpreted as not precluding legislation of an EEA State, adopted to prevent money laundering and terrorist financing, being made applicable to a trust and company service provider established in another EEA State and providing cross-border services on its territory, and thus conferring to its competent authorities the power to take supervisory measures and to apply penalties with a view to ensuring compliance of the service provider with those requirements, irrespective of where the recipient of the services rendered by the trust and company service provider is incorporated.*

16 Reference is made, by analogy, to the judgment in *Arblade and Others*, Joined Cases C-369/96 and C-376/96, EU:C:1999:575, paragraph 65.

17 Reference is made to the judgment in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 53.

für den Fall der grenzüberschreitenden Erbringung von Dienstleistungen auch weniger einschränkende Massnahmen, wie die Vorlage einer Kopie dieser Dokumente auf Anfrage, denkbar sind.[15] Der Kommission zufolge bietet sich im Hinblick auf die Forderung, dass die Profile der Geschäftsbeziehungen datiert und unterzeichnet sein müssen, eine ähnliche Schlussfolgerung an. Schliesslich sollte nicht von einem allgemeinen Betrugsverdacht ausgegangen werden, der zu einer vollständigen, systematischen Kontrolle aller Einrichtungen mit Sitz in anderen EWR-Staaten, die im Aufnahme-EWR-Staat vorübergehend Dienstleistungen erbringen, führt.[16]

80 Die Kommission schlägt vor, dass der Gerichtshof die vorgelegten Fragen folgendermassen beantwortet:

1. *Richtlinie 2005/60/EG des Europäischen Parlaments und des Rates vom 26. Oktober 2005 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche und der Terrorismusfinanzierung ist dahingehend auszulegen, dass sie Rechtsvorschriften eines EWR-Staats nicht entgegensteht, welche zur Verhinderung von Geldwäsche und Terrorismusfinanzierung verabschiedet wurden und auf einen Dienstleister für Trusts und Gesellschaften mit rechtlichem Sitz in einem anderen EWR-Staat angewendet werden, der grenzüberschreitende Dienstleistungen auf dem Hoheitsgebiet des ersten EWR-Staats erbringt und dieser Staat daher seinen zuständigen Behörden die Kompetenz überträgt, Überwachungsmassnahmen zu ergreifen und mit Blick auf die Gewährleistung der Einhaltung dieser Anforderungen durch den Dienstleister Strafen zu verhängen, unabhängig davon, wo der Empfänger der vom Dienstleister für Trusts und Gesellschaften erbrachten Dienstleistungen inkorporiert ist.*

15 Es wird sinngemäss auf das Urteil in *Arblade u. a.*, verbundene Rechtssachen C-369/96 und C-376/96, EU:C:1999:575, Randnr. 65, verwiesen.

16 Es wird auf das Urteil in *Kommission ./. Belgien*, C-577/10, EU:C:2012:814, Randnr. 53, verwiesen.

2. *Such legislation needs to comply with Article 36 of the EEA Agreement. Article 36 of the EEA Agreement does not preclude such legislation if it is justified by the objective of combating money laundering and terrorist financing, if it is suitable for securing the attainment of that aim and if it does not go beyond what is necessary in order to attain it. In particular, national supervisory measures may be considered proportionate if they take into account the equivalent rules and controls to which the service provider is subject in the EEA State in which it is established, in view of avoiding a duplication of similar requirements, and if controls on service providers established in other EEA States are not based on a general presumption of fraud, but on concrete suspicions related to individual transactions concluded on their territory.*

Páll Hreinsson
Judge-Rapporteur

2. *Entsprechende Rechtsvorschriften müssen mit Artikel 36 des EWR-Abkommens vereinbar sein. Artikel 36 des EWR-Abkommens steht solchen Rechtsvorschriften nicht entgegen, wenn sie durch das Ziel der Bekämpfung von Geldwäsche und Terrorismusfinanzierung gerechtfertigt sind und zur Erreichung dieses Ziels geeignet sind, ohne über das hinauszugehen, was dazu erforderlich ist. Insbesondere können nationale Überwachungsmassnahmen als verhältnismässig angesehen werden, wenn sie die gleichwertigen Vorschriften und Kontrollen berücksichtigen, denen der Dienstleister in dem EWR-Staat, in dem er seinen rechtlichen Sitz hat, unterliegt, um eine Duplizierung ähnlicher Anforderungen zu vermeiden, und sofern die Kontrollen der Dienstleister mit rechtlichem Sitz in anderen EWR-Staaten nicht auf einem allgemeinen Betrugsverdacht, sondern auf konkreten Verdachtsmomenten im Zusammenhang mit einzelnen auf dem Hoheitsgebiet des EWR-Staats durchgeführten Transaktionen beruhen.*

Páll Hreinsson
Berichterstatter

Case

E-29/15

Sorpa bs.

=V=

The Icelandic Competition Authority (*Samkeppniseftirlitið*)

(Abuse of a dominant position – Notion of undertaking – Cooperative agencies established by municipalities – Waste management – Services of general economic interest – Dissimilar conditions applied to equivalent transactions with other trading parties – Price discrimination)

Mál

E-29/15

Sorpa bs.

gegn

Samkeppniseftirlitinu

(Misnotkun á markaðsráðandi stöðu – Hugtakið fyrirtæki – Byggðasamlag sveitarfélaga – Þjónusta er hefur almenna efnahagslega þýðingu – Mismunun viðskiptaaðila með ólíkum skilmálum vegna sams konar viðskipta – Verðmismunun)

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Efnisyfirlit

Summary of the Judgment

1 A public law entity constitutes an undertaking within the meaning of Article 54 EEA when it does not act in the exercise of official authority but engages in an economic activity which consists in offering goods or services on a market.

2 In order to determine whether the service provided is an economic activity, the existence of competition with private entities and the level of the compensation received must be taken into account. The fact that an entity decided to charge a fee for the provision services, although it was not obliged to do so, is a further indication of the economic nature of its activity.

3 Under Article 59(2) EEA, undertakings are exempted from the application of EEA competition rules where (i) they are entrusted with the operation of services of general economic interest, and (ii) the application of such rules would obstruct the performance of their tasks.

4 It is for the national court to determine whether the application of Article 54 EEA would make it impossible for the public law entity in question to provide the services it has been entrusted with, or to perform them under economically acceptable conditions.

5 Under Article 54(2)(c) EEA, an abuse of a dominant position may consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

6 Companies belonging to the same group as the dominant undertaking may be regarded as trading parties of that undertaking. This is because they may contract with that undertaking and either receive goods or services from it or provide it with goods or services.

Samantekt

1 Opinberar stofnanir geta talist fyrirtæki í skilningi 54. gr. EES-samningsins þegar þær eru ekki að beita opinberum valdheimildum sínum heldur sinna efnahagsstarfsemi sem felur í sér að þær bjóði vörur eða þjónustu á markaði.

2 Svo unnt sé að ákvarða hvort starfsemi teljist efnahagsleg er nauðsynlegt að taka tillit til, núverandi samkeppni við einkafyrirtæki og þess hversu hátt endurgjald hafi verið tekið fyrir starfsemina. Sú staðreynd að tekið hafi verið fé fyrir gjaldtökuna, jafnvel þótt ekki standi skylda til þess, er frekari vísbending um að starfsemin teljist efnahagsleg.

3 Samkvæmt 2. mgr. 59. gr. EES-samningsins, eru þau fyrirtæki undanskilin samkeppnisreglum EES-samngsins sem (i) falið er að veita þjónustu sem hefur almenna efnahagslega þýðingu, og (ii) beiting samkeppnisreglna EES-samningsins kemur í veg fyrir að þau geti leyst af hendi verkefnin sem þeim er falin.

4 Það er landsdómstólsins að leggja mat á það hvort beiting 54. gr. EES-samningsins myndi gera það ómögulegt fyrir opinberu stofnunina að veita þá þjónustu sem henni hefur hefur verið falin, eða þá að veita hana við efnahagslega ásættanlegar aðstæður.

5 Samkvæmt c-lið 2. mgr. 54. gr. EES-samningsins getur misnotkun á ráðandi stöðu meðal annars falist í beitingu ólíkra skilmála í sams konar viðskiptum sem veikir samkeppnisstöðu þess viðskiptaaðila sem bjóðast lakari skilmálar.

6 Fyrirtæki sem tilheyra sömu fyrirtækjasamstöðu geta talist viðskiptaaðilar. Það er vegna þess að þau geta samið við hið ráðandi fyrirtæki og bæði fengið vörur eða þjónustu frá því eða veitt því vörur eða þjónustu.

7 For a trading party of the dominant firm to be placed at a competitive disadvantage, that party must be placed at a disadvantage vis-à-vis its competitors. Since it is a trading partner of the dominant undertaking, that disadvantage must occur on a market either downstream or upstream of the dominated market.

8 Should the national court find that the public law entity did not infringe Article 54(2)(c) EEA, the said entity may nevertheless have infringed Article 54 EEA. This is also for the national court to assess.

7 Til þess að samkeppnisstaða viðskiptaaðila markaðsráðandi fyrirtækisins teljist hafa verið veikt verður hann að standa verr að vígi gagnvart samkeppnisaðilum sínum. Þar sem sá aðili er viðskiptaaðili markaðsráðandi fyrirtækisins verður hin veikta samkeppnisstaða að birtast á fráliggjandi eða aðliggjandi markaði hins ráðandi markaðar.

8 Telji landsdómur að opinbera stofnunin hafi ekki brotið c. lið 2. mgr. 54. gr. EES-samningsins, getur háttsemin engu að síður talist misnotkun í skilningi 54. gr. EES-samningsins. Það er einnig landsdóms að meta slíkt.

Judgment of the Court

22 September 2016[1]

(Abuse of a dominant position – Notion of undertaking – Cooperative agencies established by municipalities – Waste management – Services of general economic interest – Dissimilar conditions applied to equivalent transactions with other trading parties – Price discrimination)

In Case E-29/15,

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 Iceland (*Hæstiréttur Íslands*), in the case between

Sorpa bs.

≡V≡

The Icelandic Competition Authority (*Samkeppniseftirlitið*),

concerning the interpretation of the EEA Agreement, and in particular Article 54 thereof,

1 Language of the request: Icelandic. Translations of national provisions are unofficial and based on those contained in the documents of the case.

Dómur Dómstólsins

22. september 2016[1]

(Misnotkun á markaðsráðandi stöðu – Hugtakið fyrirtæki – Byggðasamlag sveitarfélaga – Þjónusta er hefur almenna efnahagslega þýðingu – Mismunun viðskiptaaðila með ólíkum skilmálum vegna sams konar viðskipta – Verðmismunun)

Mál E-29/15,

BEIÐNI samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls um ráðgefandi álit EFTA-dómstólsins, frá Hæstarétti Íslands, í máli sem þar er rekið

Sorpa bs.

gegn

Samkeppniseftirlitinu,

um túlkun á samningnum um Evrópska efnahagssvæðið, sérstaklega 54. gr. hans.

1 Beiðni um ráðgefandi álit á íslensku.

The Court

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

– Sorpa bs. ("Sorpa"), represented by Hörður Felix Harðarson, Supreme Court Attorney;

– the Icelandic Competition Authority ("the Competition Authority"), represented by Gizur Bergsteinsson, Supreme Court Attorney;

– the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Clémence Perrin and Øyvind Bø, Members of its Department of Legal & Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Henning Leupold and Ioannis Zervas, Members of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of Sorpa, represented by Hörður Felix Harðarson; the Competition Authority, represented by Gizur Bergsteinsson; ESA, represented by Clémence Perrin and Øyvind Bø; the Commission, represented by Henning Leupold and Ioannis Zervas, at the hearing on 24 May 2016,

gives the following

Dómstóllinn,

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

dómritari: Gunnar Selvik,

hefur, með tilliti til skriflegra greinargerða frá:

– Sorpu bs., í fyrirsvari er Hörður Felix Harðarson, hrl.

– Samkeppniseftirlitinu, í fyrirsvari er Gizur Bergsteinsson, hrl.

– ESA, í fyrirsvari sem umboðsmenn eru Carsten Zatschler, Clémence Perrin og Øyvind Bø, lögfræðingar á lögfræði- og framkvæmdasviði.

– Framkvæmdastjórn Evrópusambandsins (framkvæmdastjórnin), í fyrirsvari sem umboðsmenn eru Henning Leupold og Ioannis Zervas frá lagaskrifstofu framkvæmdastjórnarinnar.

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings lögmanns Sorpu, Harðar Felix Harðarsonar, lögmanns Samkeppniseftirlitsins, Gizurar Bergsteinssonar, fulltrúa ESA, Clémence Perrin og Øyvind Bø, og fulltrúa framkvæmdastjórnar Evrópusambandsins, Henning Leupold og Ioannis Zervas, sem fram fór 24. maí 2016,

kveðið upp svofelldan

Judgment

I LEGAL BACKGROUND

EEA LAW

1 Article 54 EEA reads as follows:

An 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.

Dóm

I LÖGGJÖF

EES-RÉTTUR

1 Í 54. gr. EES-samningsins segir:

Misnotkun eins eða fleiri fyrirtækja á yfirburðastöðu á svæðinu sem samningur þessi tekur til, eða verulegum hluta þess, er ósamrýmanleg framkvæmd samnings þessa og því bönnuð að því leyti sem hún kann að hafa áhrif á viðskipti milli samningsaðila.

Slík misnotkun getur einkum falist í því að:

(a) beint eða óbeint sé krafist ósanngjarns kaup- eða söluverðs eða aðrir ósanngjarnir viðskiptaskilmálar settir;

(b) settar séu takmarkanir á framleiðslu, markaði eða tækniþróun, neytendum til tjóns;

(c) öðrum viðskiptaaðilum sé mismunað með ólíkum skilmálum í sams konar viðskiptum og samkeppnisstaða þeirra þannig veikt;

(d) sett sé það skilyrði fyrir samningagerð að hinir viðsemjendurnir taki á sig viðbótarskuldbindingar sem tengjast ekki efni samninganna, hvorki í eðli sínu né samkvæmt viðskiptavenju.

2 Article 59 EEA reads as follows:

> *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.*
>
> *3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measure to the States falling within their respective territory.*

NATIONAL LAW

THE COMPETITION ACT

3 Article 54 EEA is essentially reproduced in Article 11 of the Icelandic Competition Act No 44/2005 ("the Competition Act").

4 Article 11 of the Competition Act reads as follows:

> *Any abuse by one or more undertakings of a dominant position is prohibited.*

2 Í 59. gr. EES-samningsins segir:

1. Eigi í hlut opinber fyrirtæki, og fyrirtæki sem aðildarríki EB eða EFTA-ríki veita sérstök réttindi eða einkarétt, skulu samningsaðilar tryggja að hvorki séu gerðar né viðhaldið nokkrum þeim ráðstöfunum sem fara í bága við reglur samnings þessa, einkum reglur sem kveðið er á um í 4. gr. og 53.–63. gr.

2. Reglur samnings þessa, einkum reglurnar um samkeppni, gilda um fyrirtæki sem falið er að veita þjónustu er hefur almenna efnahagslega þýðingu eða eru í eðli sínu fjáröflunareinkasölur, að því marki sem beiting þeirra kemur ekki í veg fyrir að þau geti að lögum eða í raun leyst af hendi þau sérstöku verkefni sem þeim eru falin. Þróun viðskipta má ekki raska í þeim mæli að það stríði gegn hagsmunum samningsaðilanna.

3. Framkvæmdastjórn EB og eftirlitsstofnun EFTA skulu hvor innan síns valdsviðs tryggja að ákvæðum þessarar greinar sé beitt og gera, eftir því sem þörf krefur, viðeigandi ráðstafanir gagnvart þeim ríkjum sem eru á svæðum hvorrar um sig.

LANDSRÉTTUR

SAMKEPPNISLÖG

3 11. gr. samkeppnislaga nr. 44/2005 er í aðalatriðum samhljóða 54. gr. EES-samningsins.

4 Í 11. gr. samkeppnislaga segir:

Misnotkun eins eða fleiri fyrirtækja á markaðsráðandi stöðu er bönnuð.

Abuse according to Paragraph 1 may, inter alia, 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.

THE WASTE DISPOSAL ACT

5 The Waste Disposal Act No 55/2003 ("the Waste Disposal Act") was adopted, inter alia, to give effect in Icelandic law to rules corresponding to Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1), Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles (OJ 2000 L 269, p. 34), and Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (OJ 2000 L 332, p. 91).

6 According to Article 4(5) of the Waste Disposal Act, at the relevant time, municipalities were to determine arrangements for collecting domestic and industrial waste produced in their municipal area and they were responsible for transportation of domestic waste. They also were to ensure that collection and acceptance centres were operated in their area. Under Article 5 of the Waste Disposal Act, the

Misnotkun skv. 1. mgr. getur m.a. falist í því að:

(a) beint eða óbeint sé krafist ósanngjarns kaup- eða söluverðs eða aðrir ósanngjarnir viðskiptaskilmálar settir,

(b) settar séu takmarkanir á framleiðslu, markaði eða tækniþróun, neytendum til tjóns,

(c) viðskiptaaðilum sé mismunað með ólíkum skilmálum í sams konar viðskiptum og samkeppnisstaða þeirra þannig veikt,

(d) sett sé það skilyrði fyrir samningagerð að hinir viðsemjendurnir taki á sig viðbótarskuldbindingar sem tengjast ekki efni samninganna, hvorki í eðli sínu né samkvæmt viðskiptavenju.

LÖG UM MEÐHÖNDLUN ÚRGANGS

5 Með lögum nr. 55/2003 um meðhöndlun úrgangs (lög um meðhöndlun úrgangs) var meðal annars stefnt að því að innleiða í landsrétt reglur sem svara til tilskipunar ráðsins 75/442/EBE frá 15. júlí 1975 um úrgang (stjtíð. ESB 1975 L 194, bls. 39), tilskipunar ráðsins 1999/31/EB frá 26. apríl 1999 um urðun úrgangs (stjtíð. ESB 1999 L 182, bls. 1), tilskipunar Evrópuþingsins og ráðsins 2000/53/EB frá 18. september 2000 um úr sér gengin ökutæki (stjtíð. ESB 2000 L 269, bls. 34) og tilskipunar Evrópuþingsins og ráðsins 2000/76/EB frá 4. desember 2000 um brennslu úrgangs (stjtíð. ESB 2000 L 332, bls. 91).

6 Á þeim tíma sem máli skiptir fyrir atvik þessa máls var í 5. mgr. 4. gr. laga um meðhöndlun úrgangs mælt fyrir um að sveitarfélög skyldu ákveða fyrirkomulag söfnunar og flutnings á heimilis- og rekstrarúrgangi og bera ábyrgð á flutningi heimilisúrgangs. Að auki bar þeim að tryggja rekstur móttöku- og söfnunarstöðva fyrir úrgang í þeirra umdæmi. Samkvæmt 5. gr. laganna veitti Umhverfisstofnun

Environment Agency of Iceland granted licences for waste acceptance centres, which could not be operated without such a licence. It followed from Articles 6 and 8 of the Waste Disposal Act that licences could be issued to private as well as public entities.

7 Pursuant to Article 11(1) of the Waste Disposal Act, the entity operating a landfill site, whether a municipality, a municipal cooperative agency (*byggðasamlag*) or a private entity, was obliged to charge a fee for the disposal of waste. As regards all other types of waste management and related activities, such as the acceptance of waste, Article 11(2) allowed the municipality to charge a fee. According to Article 11(3), the fee charged by a municipality or a cooperative agency for the provision of either waste disposal or waste acceptance services could not exceed the costs incurred in relation to the provision of those services.

THE LOCAL GOVERNMENT ACT

8 Article 98 of the Local Government Act No 8/1986 ("the Local Government Act 1986") provided, at the time when Sorpa was established, that municipalities could enter into an agreement establishing a cooperative agency for the performance of specific functions. Article 98 reads as follows:

In the case of a long-term collaborative arrangement between municipalities, such as the operation of schools, health facilities or fire departments, the municipalities may form a cooperative agency to handle the implementation of the task.

An agreement which shall be made on the cooperative agency shall make provision for the agency's board, election of representatives to this board, their number and electoral term, on alternates, and other relevant matters.

starfsleyfi fyrir móttökustöðvar úrgangs, sem óheimilt var að reka án slíks leyfis. Af 6. og 8. gr. laganna leiddi að heimilt var að veita einkaaðilum sem og opinberum aðilum slíkt leyfi.

7 Samkvæmt 1. mgr. 11. gr. laga um meðhöndlun úrgangs, var rekstraraðila förgunarstaðar, hvort sem um sveitarfélag, byggðasamlag eða einkaaðila var að ræða, skylt að innheimta gjald fyrir förgun úrgangs. Að því er varðaði alla aðra meðferð úrgangs og tengda starsemi, svo sem móttöku úrgangs, var í 2. mgr. 11. gr. laganna kveðið á um að sveitarfélögum væri heimilt að innheimta gjöld fyrir slíka starfsemi. Þá var í 3. mgr. mælt fyrir um að gjald sem sveitarfélag eða byggðasamlag innheimti vegna móttöku eða förgunar úrgangs skyldi ekki vera hærri en sem næmi kostnaði sem á það félli vegna veitingar þjónustunnar.

SVEITARSTJÓRNARLÖG

8 Við stofnun Sorpu árið 1988 var í 98. gr. sveitarstjórnarlaga nr. 8/1986 kveðið á um að sveitarfélögum væri heimilt að gera með sér samning um stofnun byggðasamlags til að taka að sér framkvæmd afmarkaðra verkefna. Í 98. gr. laganna segir:

Sé um að ræða varanlegt samvinnuverkefni sveitarfélaga, svo sem rekstur skóla og heilbrigðisstofnana eða brunavarnir, geta sveitarfélög myndað byggðasamlag sem tekur að sér framkvæmd verkefnisins.

Í samningi, sem gera skal um byggðasamlag, skulu vera ákvæði m.a. um stjórn samlagsins og kjör fulltrúa til hennar, fjölda þeirra, kjörtímabil, um varafulltrúa og annað sem máli skiptir í því sambandi.

The agreement shall provide for when a board meeting constitutes a quorum, and for the board's mandate to undertake obligations on behalf of the municipal treasuries. It shall also include provisions on when a resolution of the agency's board is subject to confirmation by the municipal councils.

Where not otherwise specified in the articles of association of the cooperative agency, the principles of this Act shall apply, as applicable, with regard to procedure, obligations and rights of board members, staff, financial procedures and auditing of annual accounts.

The municipal treasuries are individually liable for the financial obligations of the cooperative agency to which they are party; the liability of each is in proportion with their respective populations.

9 The Local Government Act 1986 was replaced by the Local Government Act No 45/1998 ("the Local Government Act 1998"), which entered into force on 1 June 1998. Article 82 of that Act was identical to Article 98 of the Local Government Act 1986.

10 The Local Government Act 1998 was later replaced by the Local Government Act No 138/2011, which entered into force on 1 January 2012. Article 94, on cooperative agencies, reads as follows:

Municipalities may establish cooperative agencies to undertake the execution of specific tasks of the municipalities such as the operation of schools or fire-prevention measures.

Cooperative agencies shall have the sole right, and shall be obliged, to include the word byggðasamlag ('cooperative agency'), or the abbreviation bs. in their titles.

An agreement on a cooperative agency shall include provisions on:

1. the title of the cooperative agency, the ownership shares of individual municipalities in the cooperative agency, what functions it is to execute and its authorisations and powers,

Í samningnum skulu vera ákvæði um hvenær stjórnarfundur er ályktunarhæfur og um umboð stjórnar til að skuldbinda sveitarsjóði. Þá skulu vera ákvæði um í hvaða tilvikum þörf er staðfestingar sveitarstjórna á samþykktum sem gerðar eru í stjórn byggðasamlags.

Þar sem eigi er öðruvísi ákveðið í samþykktum byggðasamlags gilda eftir því sem við eiga meginreglur laga þessara um meðferð mála, skyldur og réttindi stjórnarmanna, starfslið, meðferð fjármála og endurskoðun reikninga.

Sveitarsjóðir bera einfalda ábyrgð á fjárhagslegum skuldbindingum byggðasamlags sem þeir eru aðilar að en innbyrðis skiptist ábyrgðin í hlutfalli við íbúatölu.

9 Sveitarstjórnarlög nr. 45/1998, sem komu í stað laga 8/1986, tóku gildi 1. júní 1998. Í 82. gr. þeirra laga var að finna ákvæði samhljóða 98. gr. hinna eldri laga.

10 Sveitarstjórnarlög 45/1998 voru síðar felld úr gildi með nýjum sveitarstjórnarlögum nr. 138/2011, sem tóku gildi 1. janúar 2012. Í 94. gr. nýju laganna, sem fjallar um byggðasamlög, segir:

Sveitarfélögum er heimilt að stofna byggðasamlög sem taka að sér framkvæmd afmarkaðra verkefna þeirra, svo sem rekstur skóla eða brunavarnir.

Byggðasamlögum er einum rétt og skylt að hafa orðið byggðasamlag í heiti sínu eða skammstöfunina bs.

Í samningi um byggðasamlag skulu m.a. vera ákvæði um:

1. heiti byggðasamlags, eignarhluti einstakra sveitarfélaga í byggðasamlaginu, hvaða verkefnum það sinnir og valdheimildir,

2. *elections to its board, the number of board members, their term of appointment and the provisions on alternates,*

3. *what constitutes a quorum at meetings and other relevant matters in that connection,*

4. *the board's authority to bind the member municipalities in commitments,*

5. *when the approval of the municipal councils is required for the board's decisions to be valid,*

6. *authorisations to enter into contracts with private entities (cf. Art. 100),*

7. *authorisations to enter into agreements with individual member municipalities under which they are to undertake specific parts of the functions that have been entrusted to the co-owned agency,*

8. *withdrawal from the cooperative agency, including as regards the settlement of accounts between the member municipalities, responsibility for obligations and the right to redeem ownership shares.*

Steps shall be taken to ensure that the authorisation held by the board of a cooperative agency to bind the member municipalities in obligations is in accordance with the provisions of this Act concerning municipal finances, including the binding values of the budget for the coming year.

Election to the board of a cooperative agency may take place either at the annual general meeting of the cooperative agency or on the basis of nominations by the municipal councils of the individual member municipalities. If the election of members of the board takes place at the annual general meeting of the cooperative agency, then the agreement on the cooperative agency shall also include the appropriate provisions on its annual general meeting, including all the matters covered in items 2-5 of the third paragraph.

2. *kjör til stjórnar, fjölda stjórnarmanna, kjörtímabil og varafulltrúa,*

3. *ályktunarhæfi funda og annað sem máli skiptir í því sambandi,*

4. *umboð stjórnar til að skuldbinda aðildarsveitarfélög,*

5. *hvenær þörf er staðfestingar sveitarstjórna á ákvörðunum stjórnar,*

6. *heimildir til samninga við einkaaðila, sbr. 100. gr.,*

7. *heimildir til samninga við einstök aðildarsveitarfélög um að þau taki að sér afmarkaða þætti í þeirri starfsemi sem falin hefur verið byggðasamlagi,*

8. *úrgöngu úr byggðasamlagi, þar á meðal um uppgjör aðildarsveitarfélaga, ábyrgð á skuldbindingum og rétt til innlausnar á eignarhlutum.*

Tryggt skal að umboð stjórnar byggðasamlags til að skuldbinda aðildarsveitarfélög sé í samræmi við reglur laga þessara um fjármál sveitarfélaga, þ.m.t. bindandi gildi fjárhagsáætlunar næstkomandi árs.

Kjör til stjórnar byggðasamlags getur annaðhvort farið fram á aðalfundi byggðasamlags eða á grundvelli tilnefninga sveitarstjórna einstakra aðildarsveitarfélaga. Ef kjör til stjórnar fer fram á aðalfundi byggðasamlags skulu í samningi um byggðasamlag einnig vera viðeigandi ákvæði um aðalfund þess, þar á meðal um öll þau atriði sem getur í 2.–5. tölul. 3. mgr.

In other respects, cooperative agencies shall be subject to the provisions of this Act as regards procedure, the rights and obligations of board members, their employees, finances, budgets and the auditing of annual accounts, administrative supervision and other general rules applying to the functions of the municipalities and other public authorities.

The individual municipal councils and the auditors of the member municipalities shall have the right of access to all materials concerning the administration of the cooperative agency.

Municipalities shall be individually liable for the financial obligations of cooperative agencies of which they are members; between themselves, their liability shall be divided in proportion to their populations.

II FACTS AND PROCEDURE

11 Sorpa was established on 15 February 1988 as a cooperative agency by an agreement between the City of Reykjavík and the municipalities of Kópavogur, Garðabær, Bessastaðahreppur, Hafnarfjörður, Mosfellsbær and Seltjarnarnes ("Sorpa's owners"), pursuant to the Local Government Act 1986. That agreement was later amended and restated with effect from 1 January 2007 in accordance with the Local Government Act 1998 ("the establishment contract"). The name "Sorpa" is an abbreviation for "Sorpeyðing höfuðborgarsvæðisins byggðasamlag", which means "Metropolitan Area Waste Disposal cooperative agency". Each of those municipalities owns a share in Sorpa. However, since the municipalities of Garðabær and Bessastaðahreppur have merged, Sorpa now has only six owners.

12 Sorpa is active in the waste management sector, including waste recycling. On 11 June 2001, two licences were issued to Sorpa for the operation of an acceptance, sorting and bundling centre for waste at

Byggðasamlög lúta að öðru leyti ákvæðum laga þessara um meðferð mála, skyldur og réttindi stjórnarmanna, starfslið, fjármál, fjárhagsáætlanir og endurskoðun ársreikninga og stjórnsýslueftirlit og þeim almennu reglum sem að öðru leyti gilda um störf sveitarfélaga og annarra stjórnvalda.

Einstakar sveitarstjórnir og endurskoðendur aðildarsveitarfélaga eiga rétt á aðgangi að öllum gögnum um stjórnsýslu byggðasamlags.

Sveitarfélög bera einfalda ábyrgð á fjárhagslegum skuldbindingum byggðasamlags sem þau eru aðilar að en innbyrðis skiptist ábyrgðin í hlutfalli við íbúatölu.

II MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

11 Með samningi milli Reykjavíkurborgar, Kópavogsbæjar, Garðabæjar, Bessastaðahrepps, Hafnarfjarðarbæjar, Mosfellsbæjar og Seltjarnarnesbæjar (eigendur Sorpu) var Sorpa stofnuð sem byggðasamlag 15. febrúar 1988 sem byggðasamlag, á grundvelli þágildandi sveitarstjórnarlaga nr. 8/1986. Þeim samningi var síðar breytt og tók nýr samningur gildi 1. janúar 2007 í samræmi við sveitarstjórnarlögin frá 1998 (stofnsamningurinn). Nafnið „Sorpa“ er stytting á heitinu „Sorpeyðing höfuðborgarsvæðisins byggðasamlag“. Hvert þessara sveitarfélaga á hlut í Sorpu, en þar sem Garðabær og Bessastaðahreppur hafa síðan sameinast eru eigendur Sorpu aðeins sex í dag.

12 Sorpa starfar á sviði meðhöndlunar úrgangs, þar á meðal endurvinnslu hans. Gefin voru út tvö starfsleyfi til Sorpu 11. júní 2001, til starfrækslu móttöku-, flokkunar- og böggunarstöðvar fyrir

Gufunes and a landfill site at Álfsnes, both situated in Reykjavík. Those licences were to run until the end of 2012.

13 Sorpa is not engaged in waste collection, either from homes or from businesses.

14 Sorpa's functions, as defined by the establishment contract, consist in particular in providing and operating landfill sites, building and operating acceptance centres, transporting waste from such centres, producing and selling fuel and energy from waste, and processing and selling substances derived from waste for recycling.

15 The establishment contract provides that Sorpa's board of directors consists of one representative per member municipality. The board approves the annual budget and the project schedule, as well as all "major agreements that are made and are not considered part of the day-to-day management functions of the general manager". The board also appoints the general manager. It sets the amount of the fees to be paid for the services provided by the cooperative agency.

16 According to the establishment contract, Sorpa's sources of income include the fees received "for weighed-in waste accepted from the waste disposal services of the relevant municipality and from private entities". They also include the revenues generated by the sale of substances derived from waste recycling and the sale of energy produced from waste, as well as the fees received for the acceptance and the disposal of hazardous waste substances and the dividends received from undertakings of which Sorpa is a shareholder.

17 Sorpa's expenses consist, inter alia, of dividends paid to its owners. The establishment contract provides that Sorpa's owners are entitled to receive dividends in proportion to their share in Sorpa's initial capital. However, the establishment contract further provides that, rather than distribute dividends to its owners, Sorpa may choose to grant them a discount on the above mentioned fee ("the owners' discount"). In that case, Sorpa does not charge its owners the full

úrgangsefni íGufunesi í Reykjavík og urðunarstaðar á Álfsnesi í Reykjavík. Þau leyfi áttu að gilda til ársloka 2012.

13 Sorpa fæst ekki við sorphirðu, hvorki frá heimilum né fyrirtækjum.

14 Verkefni Sorpu, eins og þau eru skilgreind í stofnsamningnum, felast sérstaklega í því að útvega og starfrækja urðunarstaði fyrir sorp, reisa og reka móttökustöðvar, flytja sorp frá slíkum stöðvum, framleiða og selja eldsneyti og orku úr sorpi, og vinna og selja efni úr sorpi til endurnýtingar.

15 Samkvæmt stofnsamningnum skal einn fulltrúi frá hverju aðildarsveitarfélagi eiga sæti í stjórn Sorpu. Stjórnin samþykkir árlega fjárhags- og starfsáætlun, sem og alla „meiriháttar samninga sem gerðir eru og ekki teljast til daglegrar stjórnunar framkvæmdastjóra." Stjórnin ræður einnig framkvæmdastjóra og hún ákveður gjaldskrá fyrir þjónustu sem veitt er af hálfu byggðasamlagsins.

16 Samkvæmt stofnsamningnum eru tekjur Sorpu gjöld „fyrir innvegið sorp sem tekið er við frá sorphirðu viðkomandi sveitarfélags og einkaaðilum". Einnig samanstanda tekjurnar af söluverði efna sem til verða vegna endurvinnslu úrgangs og söluverði orku sem unnin er úr úrgangsefnum, sem og gjöldum sem innheimt eru fyrir móttöku og eyðingu hættulegra úrgangsefna, auk móttekins arðs úr hendi félaga sem Sorpa er eigandi að.

17 Útgjöld Sorpu felast meðal annars í arðgreiðslum til eigenda. Stofnsamningurinn kveður á um að eigendur Sorpu eigi rétt á arðgreiðslum í samræmi við hluta sinn í stofnfé Sorpu. Þó er tekið fram í stofnsamningnum að í stað þess að greiða arðinn út sé Sorpu heimilt að veita eigendum afslátt af fyrrnefndum gjöldum („eigendaafslátt"). Í þeim tilvikum krefur Sorpa eigendur sína ekki að fullu um fjárhæð þess gjalds sem tekið er fyrir móttöku sorps í

amount of the fee that it sets for accepting waste at the Gufunes centre, and which covers only the costs incurred. Instead, Sorpa grants its owners a discount on such fee. In 2010, the owners' discount amounted to 18 % as regards domestic waste.

18 Customers other than Sorpa's owners are granted lower discounts, the amount of which varies in accordance with the monthly turnover achieved with the customer. As from 1 December 2009, customer discounts amounted to 3 % for a monthly turnover between ISK 500 000 and ISK 1 000 000; 5 % for a monthly turnover between ISK 1 001 000 and ISK 5 000 000; and 7% for a monthly turnover in excess of ISK 5 000 000.

19 Gámaþjónustan hf. ("Gámaþjónustan") is a private company active in the waste management and recycling business. It runs an acceptance and sorting centre at Berghella 1 in Hafnarfjörður, under an operating licence issued on 18 February 2011 and valid for 16 years. The waste treated at Berghella 1 originates, inter alia, from the municipality of Hafnarfjörður, an owner of Sorpa.

20 Gámaþjónustan has also collected waste for the municipality of Hafnarfjörður since 2003.

21 Gámaþjónustan's centre at Berghella 1 competes with Sorpa's acceptance and sorting centre at Gufunes. In 2009, the Gufunes centre accounted for 68.2 % by income and 67.3 % by volume of the market in the metropolitan area of Reykjavík, while the market share of the Berghella 1 centre amounted to 31.8 % by income and 32.7 % by volume during the same period. In 2010, while the Gufunes centre held 72.6 % of the market by income and 68.8 % by volume, the Berghella 1 centre accounted for 27.4 % of the market by income and 31.2 % by volume.

móttökustöðinni í Gufunesi, og sem nemur einungis útlögðum kostnaði. Þess í stað veitir Sorpa eigendum sínum afslátt af gjaldinu. Árið 2010 nam eigendaafslátturinn 18% vegna heimilisúrgangs.

18 Viðskiptavinum Sorpu, öðrum en eigendum, er veittur lægri afsláttur, sem er breytilegur eftir mánaðarlegri veltu viðskiptavinarins hjá fyrirtækinu. Frá 1. desember 2009 var veittur 3% afsláttur vegna mánaðarlegrar veltu á milli 500.000 og 1.000.000 krónur, 5% vegna veltu á milli 1.001.000 og 5.000.000 króna og 7% vegna mánaðarlegrar veltu sem nemur hærri fjárhæð en 5.000.000 króna.

19 Gámaþjónustan hf. (Gámaþjónustan) er félag í einkaeigu sem fæst við meðhöndlun úrgangs og endurvinnslu. Félagið rekur móttöku- og flokkunarstöð að Berghellu 1 í Hafnarfirði, samkvæmt starfsleyfi veittu 18. febrúar 2011 sem gildir til 16 ára. Úrgangurinn sem meðhöndlaður er að Berghellu 1 kemur meðal annars frá Hafnarfjarðarbæ, einum eigenda Sorpu.

20 Gámaþjónustan hefur einnig sinnt sorphirðu fyrir Hafnarfjarðarbæ frá 2003.

21 Stöð Gámaþjónustunnar að Berghellu 1 er í samkeppni við móttöku- og flokkunarstöðina í Gufunesi. Á árinu 2009 var markaðshlutdeild Gufunesstöðvarinnar á höfuðborgarsvæðinu 68,2% miðað við tekjur og 67,3% miðað við magn, en á sama tímabili var markaðshlutdeild stöðvarinnar að Berghellu 1 31,8% miðað við tekjur og 32,7% miðað við magn. Á árinu 2010 nam hlutdeild stöðvarinnar í Gufunesi 72,6% miðað við tekjur og 68,8% miðað við magn, en hlutdeild stöðvarinnar að Berghellu 1 27,4% miðað við tekjur og 31,2% miðað við magn.

22 Gámaþjónustan does not run any landfill sites. Only one landfill site is operated in the Reykjavík metropolitan area: Sorpa's centre at Álfsnes. Therefore, Gámaþjónustan disposes of the waste that, after treatment at Berghella 1, cannot be recycled, by depositing it at Álfsnes.

23 On 10 December 2009, Gámaþjónustan lodged a complaint against Sorpa with the Competition Authority.

24 According to the complaint, Sorpa had engaged in discriminatory pricing, thereby infringing, in particular, Article 11 of the Competition Act. First, Sorpa granted its owners, inter alia the municipality of Hafnarfjörður, the owners' discount on the fee for waste acceptance at its Gufunes centre and the fee for waste disposal at its Álfsnes site. Therefore, when in 2009 the municipality of Hafnarfjörður launched a tender for the collection of domestic waste, whereby tenderers could choose which acceptance centre they would deliver the waste to, Gámaþjónustan was placed at a disadvantage in comparison with Sorpa. Second, by contract of 22 May 2009, Sorpa granted favourable discounts not only to its owners but also to Sorpstöð Suðurlands bs. ("Sorpstöð Suðurlands"), a cooperative agency established by 13 municipalities located outside Sorpa's operating area. Such discounts amounted to between 12 % and 45 % for waste delivered to Sorpa's centre at Gufunes. Consequently, Gámaþjónustan requested the Competition Authority to prohibit Sorpa from granting such favourable discounts. Alternatively, it requested the Competition Authority to order Sorpa to grant it similar discounts.

25 By decision of 21 December 2012 ("the Decision of the Competition Authority"), the Competition Authority found that Sorpa had infringed Article 11 of the Competition Act.

22 Gámaþjónustan rekur engar urðunarstöðvar. Aðeins er rekin ein urðunarstöð á höfuðborgarsvæðinu og er það stöð Sorpu á Álfsnesi. Gámaþjónustan flytur því úrgang, sem ekki er hægt að endurvinna að lokinni meðferð að Berghellu 1, til urðunar á Álfsnesi.

23 Hinn 10. desember 2009 beindi Gámaþjónustan erindi til Samkeppniseftirlitsins vegna Sorpu.

24 Samkvæmt erindinu hafði Sorpa mismunað viðskiptavinum við verðlagningu og þar með einkum brotið gegn 11. gr. samkeppnislaga. Í fyrsta lagi veitti Sorpa eigendum sínum, þar á meðal Hafnarfjarðarbæ, afslátt af móttökugjöldum vegna úrgangs í Gufunesstöðinni, sem og af gjöldum vegna urðunar úrgangs á Álfsnesi. Vegna þessa hafi Gámaþjónustan staðið verr að vígi gagnvart Sorpu, þegar Hafnarfjörður bauð út sorphirðu sveitarfélagsins vegna heimilissorps árið 2009 og veitti bjóðendum kost á að velja til hvaða móttökustöðvar úrganginum yrði skilað. Í öðru lagi veitti Sorpa ekki aðeins eigendum sínum hagstæðari afslætti. Samkvæmt samningi frá 22. maí 2009, veitti hún einnig öðru byggðasamlagi afslátt, Sorpstöð Suðurlands bs. (Sorpstöð Suðurlands), sem sett hafði verið á fót af 13 sveitarfélögum utan starfssvæðis Sorpu. Slíkir afslættir voru á bilinu 12% til 45% af móttökugjaldi vegna úrgangs sem skilað var á stöð Sorpu í Gufunesi. Með vísan til þessa krafðist Gámaþjónustan þess að Samkeppniseftirlitið bannaði Sorpu að veita svo hagstæð afsláttarkjör. Til vara var þess krafist að Sorpu yrði gert að veita Gámaþjónustunni sambærileg afsláttarkjör.

25 Með ákvörðun sinni, hinn 21. desember 2012, komst Samkeppniseftirlitið að þeirri niðurstöðu að Sorpa hefði brotið gegn 11. gr. samkeppnislaga (ákvörðun Samkeppniseftirlitsins).

26 The Competition Authority rejected Sorpa's argument that basic services of waste acceptance and treatment, prescribed by law and performed using official powers, fell outside the scope of the Competition Act. The Competition Authority also rejected Sorpa's argument that, since it was not seeking profits, it could not be regarded as an undertaking within the meaning of the Competition Act.

27 The Competition Authority defined two relevant product markets: the market for waste acceptance, including the sorting and bundling of waste; and the market for waste disposal. Both markets covered the metropolitan area of Reykjavík. As regards the market for waste acceptance in the metropolitan area of Reykjavík, Sorpa held a 65 to 75 % market share through its Gufunes centre, while Gámaþjónustan held a 25 to 35 % share through its Berghella 1 centre. Therefore, Sorpa held a dominant position on that market. As regards the market for waste disposal in the metropolitan area of Reykjavík, Sorpa was the only operator through its landfill site at Álfsnes. Sorpa thus enjoyed a dominant position on that market too.

28 The Competition Authority found that, in granting its owners a large discount (the owners' discount) on the fee for waste acceptance at its Gufunes centre and on the fee for waste disposal at its landfill site at Álfsnes and in granting Sorpstöð Suðurlands substantial discounts on the fee for waste acceptance at its Gufunes centre, Sorpa had infringed Article 11(2)(c) of the Competition Act. It imposed on Sorpa a fine of ISK 45 million.

29 On 17 January 2013, Sorpa brought an appeal to the Competition Appeals Committee, which by ruling of 18 March 2013 upheld the Decision of the Competition Authority.

26 Samkeppniseftirlitið hafnaði röksemdum Sorpu um að grunnþjónusta við móttöku og meðferð úrgangs, sem teldist til lögbundinna skyldna og þar sem opinberum valdheimildum væri beitt við starfsemina, félli utan gildissviðs samkeppnislaga. Samkeppniseftirlitið hafnaði jafnframt röksemdum Sorpu um að hún gæti ekki talist fyrirtæki í skilningi samkeppnislaga, þar sem hún væri ekki rekin í hagnaðarskyni.

27 Samkeppniseftirlitið skilgreindi tvo vörumarkaði sem á reyndi: annars vegar markað fyrir móttöku úrgangs, þar með talin flokkun og böggun úrgangs, og hins vegar markað fyrir förgun úrgangs. Báðir markaðir náðu yfir höfuðborgarsvæðið. Hvað varðaði markað fyrir móttöku úrgangs á höfuðborgarsvæðinusvæðinu naut Sorpa 65 til 75% markaðshlutdeildar með rekstri stöðvarinnar í Gufunesi, en Gámaþjónustan hafði 25 til 35% markaðshlutdeild með rekstri stöðvar sinnar að Berghellu 1. Vegna þessa, var Sorpa í ráðandi stöðu á þeim markaði. Hvað varðaði markað fyrir förgun úrgangs á höfuðborgarsvæðinu, var Sorpa eini starfandi aðilinn með urðunarstað á Álfsnesi. Sorpa var því einnig í ráðandi stöðu á þeim markaði.

28 Samkeppniseftirlitið komst að þeirri niðurstöðu að Sorpa hefði brotið gegn c-lið 2. mgr. 11. gr. samkeppnislaga með því að veita eigendum sínum mikla afslætti (eigendaafslátt) af gjöldum fyrir móttöku úrgangs í stöðinni í Gufunesi og af gjöldum fyrir urðun úrgangs á urðunarstöðinni á Álfsnesi, og með því að veita Sorpstöð Suðurlands verulega afslætti af gjöldum vegna móttöku úrgangs í Gufunesi. Var Sorpu því gert að greiða sekt að fjárhæð 45.000.000 krónur.

29 Hinn 17. janúar 2013 kærði Sorpa ákvörðun Samkeppniseftirlitsins til áfrýjunarnefndar samkeppnismála, sem staðfesti hana með úrskurði sínum 18. mars 2013.

30 On 11 September 2013, Sorpa brought an action before Reykjavík District Court (*Héraðsdómur Reykjavíkur*), seeking the annulment of the decision of the Competition Appeals Committee. That action was dismissed on the merits by judgment of 16 January 2015.

31 On 15 April 2015, Sorpa brought an appeal against the judgment of Reykjavík District Court to the Supreme Court of Iceland.

32 On 10 December 2015, the Supreme Court of Iceland made a 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 and posed the following questions:

1. *Is a municipality in a Contracting Party to the EEA Agreement which carries out, in its jurisdiction, the management of waste in conformity with the provisions of Directives 75/442/EEC, 1999/31/EC and 2000/76/EC, an undertaking in the sense of Article 54 of the Agreement? In this connection, the Court asks whether, when this question is answered, the following are of significance: a) That the treatment of waste is among the legally-prescribed functions of municipalities according to the laws of the relevant Contracting Party. b) That competition may exist over the treatment of waste between private entities and public entities under the laws of the Contracting Party. c) That it is prescribed, in the laws of the Contracting Party, that in this field, a municipality may not charge a higher fee than covers the cost of the treatment of waste and related activities.*

2. *If the answer to the first question is in the negative, does the same apply to a cooperative agency which is operated by two or more municipalities and attends, on their behalf, to the management of waste in their operating areas?*

3. *When assessing whether Article 54 EEA applies to an activity of a municipality or a cooperative agency, is it of significance that the laws of the Contracting Party in question contain provisions*

30 Hinn 11. september 2013 höfðaði Sorpa mál fyrir Héraðsdómi Reykjavíkur þar sem leitað var ógildingar á úrskurði áfrýjunarnefndar samkeppnismála. Þeirri kröfu var hafnað með dómi sem kveðinn var upp 16. janúar 2015.

31 Sorpa áfrýjaði dómi Héraðsdóms Reykjavíkur til Hæstaréttar 15. apríl 2015.

32 Hinn 10. desember 2015 barst EFTA-dómstólnum beiðni Hæstaréttar Íslands um ráðgefandi álit samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, með eftirfarandi spurningum:

1. *Telst sveitarfélag í ríki sem á aðild að EES-samningnum og annast í umdæmi sínu meðferð úrgangs í samræmi við ákvæði tilskipana 75/442/EBE, 1999/31/EB og 2000/76/EB, fyrirtæki í skilningi 54. gr. samningsins? Í því sambandi er spurt hvort máli skipti þegar spurningunni er svarað: a) Að meðferð úrgangs er eitt af lögbundnum verkefnum sveitarfélaga samkvæmt lögum viðkomandi ríkis. b) Að samkeppni getur verið um meðferð úrgangs milli einkaaðila og opinberra aðila samkvæmt lögum ríkisins. c) Að mælt sé svo fyrir í lögum ríkisins að á þessu sviði megi sveitarfélag ekki taka hærra gjald en sem nemur kostnaði af meðferð úrgangs og tengdri starfsemi.*

2. *Ef svarið við fyrstu spurningunni er neitandi, gildir það sama um byggðasamlag sem rekið er af tveimur eða fleiri sveitarfélögum og annast í þeirra stað meðferð úrgangs á starfssvæði þeirra?*

3. *Skiptir máli þegar metið er hvort 54. gr. EES-samningsins gildir um starfsemi sveitarfélags eða byggðasamlags að lög viðkomandi ríkis hafa að geyma reglur um heimild eða skyldu opinberra aðila til*

authorising or obliging public bodies to perform the activity? Is it compatible with the EEA Agreement that a Contracting Party exempts, through legislation, certain activities by public entities from the scope of competition law?

4. *Can municipalities which are the owners of a cooperative agency such as the one referred to in Question 2 be considered as its trading parties in the sense of Article 54(2)(c) EEA? And if so, does a discount granted to the owners which is not available to other parties constitute placing other parties at a disadvantage in the sense of the same provision?*

33 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

ADMISSIBILITY

34 ESA submits that, although the Decision of the Competition Authority whose annulment is sought in the national proceedings is not based on EEA law, the Court has jurisdiction to rule on the case. The Court notes that, according to settled case law of the Court of Justice of the European Union ("the ECJ"), where the facts in the main proceedings fall outside the scope of EU law, the questions referred may nevertheless be answered provided that the provisions of EU law at stake have been rendered applicable by national law to purely internal situations (compare the judgment in *SIA «Maxima Latvija»,* C-345/14, *EU:C:2015:784, paragraph 12*). This approach must also apply in EEA law. In the present case, Article 11 of the

hennar? Er samrýmanlegt EES-samningnum að ríki sem aðild á að honum undanskilur í lögum tiltekna starfsemi opinberra aðila samkeppnislögum?

4. *Geta sveitarfélög sem eru eigendur byggðasamlags eins og þess sem um ræðir í annarri spurningunni talist til viðskiptaaðila samlagsins í skilningi c. liðar 2. mgr. 54. gr. EES-samningsins? Ef svo telst vera er spurt hvort afsláttur til eigenda, sem ekki býðst öðrum, feli í sér mismunun í skilningi sama ákvæðis?*

33 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.

III SVÖR DÓMSINS

SPURNINGAR TÆKAR TIL EFNISMEÐFERÐAR

34 ESA telur, að þótt ákvörðun Samkeppniseftirlitsins sem leitað er ógildingar á í málinu sem rekið er fyrir Hæstarétti byggist ekki á EES-rétti hafi dómstóllinn lögsögu í málinu. Dómurinn bendir á að samkvæmt viðurkenndri dómaframkvæmd dómstóls Evrópusambandsins (Evrópudómstólsins) geti sá síðarnefndi svarað þeim spurningum sem til hans er beint, þótt sakarefni málsins sem rekið sé fyrir landsdómstólnum falli utan gildissviðs Evrópuréttar, að því gefnu að þau ákvæði Evrópuréttar sem um ræðir hafi verið talin eiga við að landsrétti þegar um staðbundin mál er að ræða (sjá, til samanburðar, mál *SIA «Maxima Latvija»*, C-345/14, EU:C:2015:784, 12. mgr.) Sú nálgun verði einnig talin eiga við um EES-rétt. Hvað

Competition Act was adopted in order to incorporate Article 54 EEA. Therefore, the former must be interpreted in accordance with the latter.

35 As regards the question of admissibility on the ground that the case pending before the referring court concerns a purely internal situation, the Court recalls that where domestic legislation, in regulating purely internal situations, adopts the same or similar situations as those adopted in EEA law in order to avoid any distortion of competition, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law (see Case E17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, paragraph 45).

36 Article 11 of the Competition Act is almost identical to Article 54 EEA. Therefore, it must be held that the Court has jurisdiction to rule on the questions referred to it by the Supreme Court of Iceland.

THE FIRST QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

37 Sorpa claims that a municipality cannot be considered as an undertaking within the meaning of Article 54 EEA when it carries out waste management.

varðar hið fyrirliggjandi mál, hafi 11. gr. samkeppnislaga verið sett til að innleiða 54. gr. EES-samningsins og því eigi að skýra fyrrnefndu greinina til samræmis við þá síðarnefndu.

35 Varðandi það hvort spurningar séu tækar til efnismeðferðar á grundvelli þess að málið sem rekið er fyrir landsdómstólnum eigi aðeins við um innlendar aðstæður, bendir dómurinn á að þegar reglur landsréttar, sem einungis eiga við um aðstæður innanlands, byggjast á sömu eða svipuðum lausnum og EES-réttur, í þeim tilgangi að forðast röskun á samkeppni, er það EES-samstarfinu í hag að komið sé í veg fyrir ólíka túlkun í framtíðinni. Af þeim sökum verður að gæta samræmis við túlkun reglna eða hugtaka sem fengin eru úr EES-rétti, óháð þeim aðstæðum sem þau eiga við um. Þar sem lögsaga dómstólsins er einvörðungu bundin við skoðun og túlkun ákvæða EES-réttar er það landsdómstólsins eins að meta að hvaða marki vísað er til EES-réttar í ákvæðum landsréttar (sjá mál E17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, 45. mgr.).

36 11. gr. samkeppnislaga er nánast samhljóða 54. gr. EES-samningsins. Af því leiðir að spurningarnar sem Hæstiréttur Íslands hefur beint til dómstólsins eru tækar til efnismeðferðar.

FYRSTA SPURNINGIN

ATHUGASEMDIR SEM LAGÐAR VORU FYRIR DÓMSTÓLINN

37 Sorpa telur að sveitarfélag geti ekki talist fyrirtæki í skilningi 54. gr. EES-samningsins þegar það annast meðferð úrgangs.

38 According to Sorpa, waste management is by nature a public activity, since it is usually carried out by municipalities, it is performed in the public interest and it serves environmental purposes. Moreover, the function of waste collection and disposal has been assigned to municipalities by Icelandic law. Therefore, municipalities are obliged to carry out such function, and their tasks are defined by Icelandic law.

39 Sorpa maintains that, in order to determine whether the activity carried out by a public entity is economic, it is irrelevant whether that activity may be performed by a private company (reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62, paragraph 80). That Sorpa charges a fee for the services it provides does not entail the classification of those services as an economic activity, since according to Article 11 of the Waste Disposal Act the amount of such a fee cannot exceed the costs of the services provided.

40 Finally, Sorpa submits that waste management constitutes a service of general economic interest within the meaning of Article 59(2) EEA (reference is made to the judgment *Sydhavnens Sten & Grus ApS v Københavns Kommune*, C-209/98, EU:C:2000:279, paragraph 75). For undertakings entrusted with services of general economic interest to fall outside the scope of the competition rules, the application of those rules does not have to threaten their survival. It is sufficient that the application of those rules would obstruct the performance of the services at stake under economically acceptable conditions (reference is made to the judgment in *Criminal proceedings against Paul Corbeau*, C-320/91, EU:C:1993:198, paragraph 16). If the municipalities were bound by competition rules, their ability to achieve the objectives of Directives 75/442/EEC, 1999/31/EC and 2000/76/EC would be seriously jeopardised.

38 Sorpa telur að meðferð úrgangs sé í eðli sínu opinber starfsemi, þar sem henni sé alla jafna sinnt af sveitarfélögum, hún sé í almannaþágu og þjóni umhverfissjónarmiðum. Enn fremur feli íslensk löggjöf sveitarfélögum að sinna sorphirðu og farga úrgangi. Sveitarfélögunum sé því skylt að sinna því hlutverki og verkefni þeirra séu skilgreind í íslenskum lögum.

39 Sorpa heldur því fram að þegar skera skuli úr um hvort starfsemi opinberrar stofnunar sé efnahagsstarfsemi, skipti ekki máli hvort einkafyrirtæki geti leyst hana af hendi (vísað er til máls E-5/07 *Private Barnehagers Landsforbund* gegn *Eftirlitsstofnun EFTA* [2008] EFTA Ct. Rep. 62, 80. mgr.). Sú staðreynd, að tekið sé gjald vegna þjónustunnar þýði ekki að þjónustan flokkist sem efnahagsstarfsemi þar sem fjárhæð slíks gjalds geti ekki verið hærri en kostnaðurinn sem til fellur við að veita þjónustuna, samkvæmt 11. gr. laga um meðhöndlun úrgangs.

40 Loks heldur Sorpa því fram að meðhöndlun úrgangs verði að teljast þjónusta sem hafi almenna efnahagslega þýðingu í skilningi 2. mgr. 59. gr. EES-samningsins (vísað er til máls *Sydhavnens Sten & Grus ApS* gegn Københavns Kommune, C-209/98, EU:C:2000:279, 75. mgr.). Svo að fyrirtæki, sem ætlað sé að sinna þjónustu sem hafi almenna efnahagslega þýðingu, falli utan gildissviðs samkeppnisreglna þurfi beiting þeirra reglna ekki að ógna tilvist þess. Nægilegt sé að beiting reglnanna myndi hindra framkvæmd þjónustunnar sem um ræðir við ásættanlegar efnahagslegar aðstæður (vísað er til máls Ákæruvaldið gegn *Paul Corbeau*, C-320/91, EU:C:1993:198, 16. mgr.). Getu sveitarfélaganna til að uppfylla markmið tilskipana 75/442/EBE, 1999/31/EB og 2000/76/EB væri stefnt í hættu ef þau væru bundin af samkeppnisreglum.

41 Conversely, the Competition Authority, ESA and the Commission claim that a municipality may be considered an undertaking when it carries out waste management.

42 According to the Competition Authority, competition between municipalities and private companies for the provision of waste management services is a clear indication that those services are to be regarded as an economic activity. Directive 75/442/EEC, Directive 1999/31/EC and Directive 2000/76/EC make no distinction between public and private entities as regards the permit requirements for carrying out waste treatment. Therefore, public entities compete with private companies for the provision of waste management services, as evidenced by the terms of the call for tenders by the municipality of Hafnarfjörður. Moreover, municipalities cannot avoid classification as undertakings on the ground that the fee charged for waste management services does not exceed the costs of those services, since Article 102 TFEU has been applied whether or not the activities at stake are carried out with a profit-making aim (reference is made to the judgment in *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, C-222/04, EU:C:2006:8, paragraph 123).

43 ESA asserts that an activity cannot be regarded as economic unless it is carried out in a market environment. An activity is likely to be performed in a market environment where the entity at stake faces competition from other operators and where it receives a remuneration for the services provided.

44 Where an entity carries out several activities, each activity must be assessed separately in order to determine whether it is an economic activity (reference is made to the judgment in Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio, C49/07, EU:C:2008:142, paragraph 25).

41 Samkeppniseftirlitið, ESA og framkvæmdastjórn ESB halda því á hinn bóginn fram að sveitarfélag geti talist fyrirtæki þegar það sinnir meðhöndlun úrgangs.

42 Samkeppniseftirlitið telur að samkeppni sveitarfélaga við einkafyrirtæki um veitingu þjónustu við meðferð úrgangs sé skýr vísbending um að slík þjónusta skuli teljast efnahagsstarfsemi. Tilskipanir 75/442/EBE, 1999/31/EB og 2000/76/EB geri engan greinarmun á opinberum aðilum og einkaaðilum þegar kemur að skilyrðum fyrir leyfisveitingu til meðferðar úrgangs. Þar af leiðandi keppi opinberir aðilar við einkafyrirtæki þegar kemur að veitingu þjónustu við meðferð úrgangs, eins og útboðslýsing Hafnarfjarðarbæjar hafi sýnt. Sveitarfélög geti að sama skapi ekki komist hjá því að flokkast sem fyrirtæki með því að vísa til þess að gjaldtakan vegna þjónustunnar sé ekki hærri en sem nemur kostnaði við meðhöndlun úrgangsins, enda hafi 102. gr. sáttmálans um starfshætti Evrópusambandsins (SSESB) verið beitt óháð því hvort starfsemin sem um ræðir sé innt af hendi í hagnaðarskyni (vísað er til áður tilvitnaðs máls *Ministero dell'Economia e delle Finanze* gegn *Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato og Cassa di Risparmio di San Miniato SpA*, C222/04, EU:C:2006:8, 123. mgr.).

43 ESA heldur því fram að starfsemi geti ekki talist efnahagsstarfsemi nema hún fari fram í markaðsumhverfi. Líklegt megi teljast að starfsemin fari fram í markaðsumhverfi þegar stofnunin sem um ræðir á í samkeppni við aðra söluaðila og fær endurgjald fyrir veitta þjónustu.

44 Þegar stofnun fæst við ýmiss konar starfsemi verður, að sögn ESA, að meta hverja þeirra um sig til að unnt sé að ákvarða hvort hún teljist efnahagsstarfsemi (vísað er til máls *Motosykletistiki Omospondia Ellados NPID (MOTOE)* gegn *Elliniko Dimosio*, C-49/07, EU:C:2008:142, 25. mgr.).

45 Consequently, ESA submits that Sorpa's activity consisting in the management of its owners' waste must be assessed separately from its activity consisting in the management of the waste from its customer Sorpstöð Suðurlands. The management of its owners' waste would fall outside the scope of the EEA competition rules if Sorpa's owners awarded Sorpa a contract for waste management without calling for bids from other operators, and no other operator was allowed to process waste from Sorpa's owners, which is not the case. The management of the waste from Sorpstöð Suðurlands is also to be regarded as an economic activity.

46 The Commission claims that, in order to determine whether the activity carried out by a public entity is economic, it is of paramount importance whether that activity is also carried out by private companies. The fact that an entity is a profit-making body is not decisive.

47 The Commission considers that the operation by Sorpa of an acceptance centre at Gufunes should be assessed separately from the operation of a landfill site at Álfsnes. The former constitutes an economic activity, since, under Icelandic law, private companies as well as public entities may obtain a licence to operate an acceptance centre, and it is thus possible that public entities face competition from private companies. Moreover, it is irrelevant that the fees charged by Sorpa are cost-based. The operation of a landfill site also constitutes an economic activity.

FINDINGS OF THE COURT

48 By its first question, the referring court seeks to establish whether a municipality may be regarded as an undertaking within the meaning of the EEA competition rules when it provides waste management services, and whether account should be taken of the following three criteria: the fact that municipalities have been entrusted with waste

45 ESA telur, þar af leiðandi, að skilja verði á milli þeirrar starfsemi sem varðar meðferð Sorpu á úrgangi eigenda byggðasamlagsins og þeirrar starfsemi sem tekur til meðferðar úrgangs viðskiptavinarins Sorpstöðvar Suðurlands. Meðhöndlun Sorpu á úrgangi eigendanna myndi falla utan gildissviðs samkeppnisreglna EES ef eigendur Sorpu hafi gert samning við félagið um meðhöndlun sorps, án þess að leita tilboða hjá öðrum fyrirtækjum og engum öðrum þjónustuaðila hafi gefist kostur á að meðhöndla sorp frá eigendum Sorpu, sem sé ekki raunin. Meðhöndlun úrgangs frá Sorpstöð Suðurlands verði einnig að teljast efnahagsstarfsemi.

46 Framkvæmdastjórnin heldur því fram að þegar ákvarða skuli hvort starfsemi á vegum opinberrar stofnunar sé efnahagsleg, skipti mestu máli hvort einkafyrirtæki sinni einnig þeirri starfsemi. Sú staðreynd að stofnun sé ekki rekin í hagnaðarskyni ráði ekki úrslitum.

47 Framkvæmdastjórnin telur að greina verði á milli reksturs móttökustöðvar Sorpu í Gufunesi og reksturs urðunarstaðarins á Álfsnesi. Hið fyrrnefnda teljist efnahagsstarfsemi þar sem einkafyrirtæki jafnt sem opinberar stofnanir geti fengið leyfi til starfrækslu móttökustöðvar samkvæmt íslenskum lögum og því sé mögulegt að opinberar stofnanir mæti samkeppni frá einkafyrirtækjum. Enn fremur skipti það ekki máli að gjaldtaka Sorpu miðist við kostnað. Þá telur framkvæmdastjórnin að starfræksla urðunarstaðarins teljist einnig efnahagsstarfsemi.

ÁLIT DÓMSTÓLSINS

48 Með fyrstu spurningunni leitar landsdómstólinn svars við því hvort sveitarfélag geti talist fyrirtæki í skilningi samkeppnisreglna EES-samningsins þegar það sinnir þjónustu við meðferð úrgangs, og hvort taka skuli mið af þremur eftirfarandi viðmiðum: þeirri staðreynd að meðferð úrgangs er eitt af lögbundnum verkefnum

management tasks by national legislation, that they face competition from private entities, and that the fees charged by the municipalities cannot exceed the costs incurred.

49 Although the first question concerns only the interpretation of the notion of undertaking within the meaning of the EEA competition rules, Sorpa submits that waste management constitutes a service of general economic interest within the meaning of Article 59(2) EEA and is not subject to the EEA competition rules, since their application would obstruct the performance of its waste management tasks.

50 Therefore, the Court will examine, first, whether waste management may be regarded as an economic activity within the meaning of the EEA competition rules and, second, whether waste management may constitute a service of general economic interest within the meaning of Article 59(2) EEA and whether it is subject to the EEA competition rules.

Notion of undertaking

51 Under the EEA competition rules, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (see Article 1 of Protocol 22 to the EEA Agreement and Case E-8/00 *Norwegian Federation of Trade Unions and Others* v *Norwegian Association of Local and Regional Authorities and Others ("LO")* [2002] EFTA Ct. Rep. 114, paragraph 62).

52 Any activity consisting of offering goods or services in a given market constitutes an economic activity (see Case E-14/15 *Holship Norge AS* v *Norsk Transportarbeiderforbund*, judgment of 19 April 2016, not yet reported, paragraph 69 and case law cited).

sveitarfélaga samkvæmt landslögum, að þau séu í samkeppni við einkaaðila, og að gjaldtakan megi ekki vera hærri en sem nemur kostnaði sem til fellur við starfsemina.

49 Þótt fyrri spurningin eigi aðeins við um skýringu hugtaksins „fyrirtæki“ í skilningi samkeppnisreglna EES-samningsins, heldur Sorpa því fram að meðferð úrgangs sé þjónusta sem hafi almenna efnahagslega þýðingu í skilningi 2. mgr. 59. gr. EES-samningsins og falli því ekki undir samkeppnisreglur hans, þar sem beiting þeirra myndu hindra Sorpu í framkvæmd verkefna þess sem lúta að meðferð úrgangs.

50 Dómstóllinn mun því fyrst skoða hvort flokka megi meðferð úrgangs undir efnahagsstarfsemi í skilningi samkeppnisreglna EES-samningsins og því næst hvort meðferð úrgangs geti talist hafa almenna efnahagslega þýðingu í skilningi 2. mgr. 59. gr. EES-samningsins og hvort sú þjónusta falli undir samkeppnisreglur EES-samningsins.

Hugtakið „fyrirtæki“

51 Samkvæmt samkeppnisreglum EES-réttar tekur hugtakið „fyrirtæki“ til allra aðila sem leggja stund á efnahagsstarfsemi, óháð lagalegri stöðu þeirra og því hvernig þeir eru fjármagnaðir (sjá 1. gr. bókunar 22 við EES-samninginn og mál E-8/00 *Norwegian Federation of Trade Unions og aðrir* gegn *Norwegian Association of Local and Regional Authorities og öðrum* (LO)[2002] EFTA Ct. Rep. 114, 62. mgr.)

52 Hvers kyns starfsemi sem felur í sér að boðin sé fram vara eða þjónusta á tilteknum markaði telst vera efnahagsstarfsemi (sjá mál E-14/15, *Holship Norge AS* gegn *Norsk Transportarbeiderforbund,* óbirtur dómur frá 19. apríl 2016, 69. mgr. og dómaframkvæmd sem þar er vitnað til).

53 The basic test is thus whether the entity in question is engaged in an activity which consists in offering goods or services on a market and which could, in principle, be carried out by a private actor in order to make profits (see, for comparison, the Opinion of Advocate General Jacobs in *Cisal*, C-218/00, EU:C:2001:448, point 38).

54 Activities which fall within the exercise of public powers are not of an economic nature justifying the application of the EEA competition rules (compare, to that effect, *MOTOE*, cited above, paragraph 24).

55 As regards the possible application of the EEA competition rules to an entity of public law, a distinction must be made between the situation where the entity acts in the exercise of official authority, and that where it offers goods or services in the market. Articles 53 and 54 EEA may only apply to the latter situation (see *LO*, cited above, paragraph 63).

56 Sorpa's owners, the municipalities in the metropolitan area of Reykjavík, are public law entities. To the extent that the activities of a municipality consist of political decision-making or public administration, it will, in that capacity, not act as an undertaking (see *LO*, cited above, paragraph 64). However, the activity under consideration is the provision of waste acceptance and waste disposal services by municipalities. That activity cannot be characterised as, and bears no relation to, the municipalities' activities of political decision-making or public administration. Therefore, the Court must assess separately whether by providing waste acceptance and waste disposal services the municipalities act as undertakings.

57 First, the Court notes that the activity of waste management does not fall outside the scope of the EEA competition rules for the sole reason that it has an impact on the protection of the environment. Although in *Diego Calì* the activity of anti-pollution surveillance was

53 Frumskilyrðið er því hvort stofnun fáist við efnahagsstarfsemi sem felst í að bjóða vöru eða þjónustu á markaði, sem einkaaðili gæti jafnframt sinnt með það að markmiði að skila hagnaði (sjá, til samanburðar, álit Jacobs lögsögumanns í máli *Cisal*, C-218/00, EU:C:2001:448, 38. liður).

54 Starfsemi sem fellur undir beitingu opinbers valds telst ekki efnahagslegs eðlis og réttlætir því ekki beitingu samkeppnisreglna EES-réttar (sjá, til samanburðar, varðandi það atriði, áður tilvitnað mál *MOTOE*, 24. mgr.)

55 Hvað mögulega beitingu samkeppnisreglna EES-réttar um opinbera stofnun varðar, verður að greina á milli aðstæðna þar sem stofnunin beitir opinberum valdheimildum og aðstæðna þar sem stofnunin býður vörur eða þjónustu á markaði. Ákvæði 53. og 54. gr. EES-samningsins geta aðeins átt við um síðarnefnda tilvikið (sjá áður tilvitnað mál *LO*, 63. mgr.).

56 Eigendur Sorpu, sveitarfélögin á höfuðborgarsvæðinu, eru opinberar stofnanir. Þegar sveitarfélag sinnir starfsemi sem felur í sér pólitíska ákvarðanatöku eða stjórnsýslu telst það ekki fyrirtæki (sjá áður tilvitnað mál *LO*, 64. mgr.). Sú starfsemi sem til skoðunar er í þessu máli er hins vegar móttaka og förgun úrgangs á vegum sveitarfélaga. Slík starfsemi á ekkert skylt við starfsemi sveitarfélaganna sem lýtur að pólitískri ákvarðanatöku og stjórnsýslu. Dómurinn verður því að leggja sérstakt mat á það hvort sveitarfélögin starfi sem fyrirtæki þegar þau bjóða þjónustu við móttöku og förgun úrgangs.

57 Í fyrsta lagi bendir dómurinn á að starfsemi sem tengist meðferð úrgangs fellur ekki utan gildissviðs samkeppnisreglna EES-samningsins vegna þess eins að hún hafi áhrif á verndun umhverfisins. Þótt starfsemi sem hafi lotið að

found to fall outside the scope of competition rules, it cannot be inferred from that judgment that any activity serving an environmental purpose falls outside the scope of those rules (*Diego Calì*, C-343/95, EU:C:1997:160, paragraph 23). In order to determine whether such an activity is economic, it is necessary to take account of other elements, in particular the existence and the level of the compensation received and the competition with private companies on a market (compare the Opinion of Advocate General Cosmas in *Diego Calì*, C-343/95, EU:C:1996:482, point 42). Accordingly, in *Diego Calì* account was taken of the fact that the tariffs charged to port users for the performance of anti-pollution surveillance were approved by public authorities (*Diego Calì*, cited above, paragraph 24).

58 Second, the fact that an activity may be exercised by a private undertaking is an indication that the activity in question may be regarded as economic (compare, to that effect, the judgment in *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 82).

59 It is for the referring court to assess whether Sorpa faces competition from private undertakings on the markets for waste acceptance and waste disposal in the metropolitan area of Reykjavík.

60 In that regard, the Court notes that, pursuant to the Waste Disposal Act, licences for the operation of waste acceptance centres and landfill sites may be granted to private as well as public entities, and one licence for the operation of a waste acceptance centre was granted to Gámaþjónustan, a private entity. Therefore, Sorpa faces actual and/or potential competition from private entities on the markets for waste acceptance and waste disposal.

mengunarvarnaeftirliti hafi verið talin falla utan gildissviðs samkeppnisreglnanna í máli *Diego Calì,* er ekki hægt að draga þá ályktun af því máli að hvers kyns starfsemi sem þjónar markmiði umhverfisverndar falli utan gildissviðs reglnanna (sjá mál *Diego Calì*, C-343/95, EU:C:1997:160, 23. mgr.). Svo unnt sé að ákvarða hvort slík starfsemi teljist efnahagsleg er nauðsynlegt að taka tillit til annarra atriða, sérstaklega hvort, og þá hversu hátt, endurgjald hafi verið tekið fyrir starfsemina og hvernig samkeppni við einkafyrirtæki á markaði var háttað (sjá, til samanburðar, álit Comas lögsögumanns í máli *Diego Calì*, C-343/95, EU:C:1996:482, 42. liður.). Í samræmi við það var tekið tillit til þeirrar staðreyndar í máli *Diego Calì* að tollar sem lagðir voru á notendur tiltekinnar hafnar vegna mengunarvarnaeftirlits hafi verið samþykktir af opinberum yfirvöldum (24. mgr.).

58 Í öðru lagi, bendir sú staðreynd að einkafyrirtæki geti sinnt starfseminni sem um ræðir til þess að hún gæti talist efnahagsleg (sjá, til samanburðar, varðandi það atriði mál *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, 82. mgr.).

59 Það er landsdómstólsins að meta hvort Sorpa eigi í samkeppni við einkafyrirtæki á markaði fyrir móttöku og förgun úrgangs á höfuðborgarsvæðinu.

60 Í þessu sambandi bendir dómurinn á að samkvæmt lögum um meðhöndlun úrgangs er heimilt að veita jafnt einkaaðilum sem obinberum aðilum leyfi til reksturs móttökustöðva og förgunarstaða úrgangs. Sorpa á því í raunverulegri og/eða mögulegri samkeppni við einkaaðila á markaði fyrir móttöku og förgun úrgangs.

61 Third, in *Cassa di Risparmio di Firenze* (cited above, paragraph 123), the ECJ held that the entity in question was engaged in an economic activity notwithstanding the fact that the offer of goods or services was made without profit motive, since that offer would be in competition with that of profit-making operators. Therefore, the provision of waste acceptance and waste disposal services by Sorpa may be regarded as an economic activity even though, pursuant to Article 11(3) of the Waste Disposal Act, the amount of the fees received by Sorpa for the provision of those services cannot exceed the costs incurred.

62 That Sorpa did not rely on public financing but decided to take advantage of the authorisation under Article 11(2) of the Waste Disposal Act to charge a fee for the provision of waste acceptance services is a further indication of the economic nature of its activity.

63 According to the case law of the ECJ, the fact that the remuneration provided in return for a service supplied by a public entity is not determined, directly or indirectly, by that entity, but is laid down by law, is an indication that its activity cannot be regarded as economic (compare judgments in *Diego Calì*, cited above, paragraph 24, *SAT Fluggesellschaft*, C-364/92, EU:C:1994:7, paragraph 29, and *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraphs 39 and 42). It is for the referring court to ascertain whether the fees charged by Sorpa are determined by that entity. However, according to the establishment contract, the fees are set by Sorpa's board. Moreover, at the hearing Sorpa's representative indicated that to the best of his knowledge Sorpa is free to set the amount of the fees, provided that such amount does not exceed the costs incurred, and to determine its method of calculation.

61 Í þriðja lagi kvað Evrópudómstóllinn á um það, í áður tilvitnuðu máli *Cassa di Risparmio di Firenze* (123. mgr.) að stofnunin sem þar um ræddi fengist við efnahagsstarfsemi þrátt fyrir þá staðreynd að hún byði vöru og þjónustu án þess að sækjast eftir gróða, þar sem hún átti í samkeppni við aðra aðila sem stunduðu sömu starfsemi í gróðaskyni. Þjónusta Sorpu við móttöku og förgun úrgangs gæti því talist efnahagsstarfsemi þrátt fyrir að fjárhæð gjaldsins sem Sorpa innheimtir fyrir þjónustuna megi ekki vera umfram kostnað samkvæmt 3. mgr. 11. gr. laga um meðhöndlun úrgangs.

62 Nýting Sorpu á heimild til gjaldtöku vegna þjónustu við móttöku úrgangs í samræmi við 2. mgr. 11. gr. laga um meðhöndlun úrgangs, í stað notkunar opinbers fjár, er frekari vísbending um að starfsemin sé efnahagslegs eðlis.

63 Sú staðreynd, að endurgjaldið fyrir þjónustu sem opinber stofnun veitir sé ekki ákveðið, beint eða óbeint, af þeirri stofnunheldur sé mælt fyrir um það í lögum bendir samkvæmt dómaframkvæmd Evrópudómstólsins til þess að starfsemi stofnunarinnar geti ekki talist efnahagslegs eðlis (sjá, til samanburðar, áður tilvitnað mál *Diego Calì*, 24. mgr., mál *SAT Fluggesellschaft*, C-364/92, EU:C:1994:7, 29. mgr., og mál *Compass-Datenbank*, C-138/11, EU:C:2012:449, 39. og 42. mgr.). Það er landsdómstólsins að skera úr um hvort gjaldtaka Sorpu sé í höndum stofnunarinnar sjálfrar. Samkvæmt stofnsamningnum er það þó stjórn Sorpu sem ákveður þær fjárhæðir. Við munnlegan málflutning gaf fulltrúi Sorpu enn fremur í skyn að Sorpu væri, eftir því sem hann best vissi, í sjálfsvald sett hverjar fjárhæðir þeirra gjalda væru, að því virtu að fjárhæðin væri ekki hærri en sem næmi kostnaði, og stofnunin hefði frjálsar hendur við val á aðferð við útreikninga.

64 Finally, the Court notes that the situation in the present case is to be distinguished from that in *Private Barnehagers Landsforbund (cited above, paragraphs 82 and 83)*, where the operation of municipal kindergartens was regarded as non-economic since, in particular, 80% of the costs were borne by the public purse. In that regard, the Court notes that at the hearing, Sorpa's representative explained that, to the best of his knowledge, the fees received by Sorpa covered the major part of its costs, although he was unsure if they covered all of its costs. Should, however, the referring court find that the fees received by Sorpa cover only a negligible part of its costs, it would have to balance that finding against the fact that Sorpa faces competition from private undertakings in order to determine whether Sorpa is an undertaking within the meaning of the EEA competition rules.

Article 59(2) EEA

65 Under Article 59(2) EEA, undertakings entrusted with the operation of services of general economic interest are subject to the EEA competition rules 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.

66 Therefore, for the derogation in Article 59(2) EEA to apply, it must be established, first, that the undertaking in question has been entrusted with the operation of a service of general economic interest, second, that the application of the EEA competition rules would obstruct the performance of its tasks.

64 Loks bendir dómurinn á að greina verði milli aðstæðnanna í málinu sem rekið er fyrir landsdómstólnum og aðstæðnanna í áður tilvitnuðu máli *Private Barnehagers Landsforbund* (82. og 83. mgr.). Í því máli var rekstur leikskóla á vegum sveitarfélaga ekki talinn efnahagsstarfsemi, einkum þar sem 80% útgjalda hans voru fjármögnuð úr opinberum sjóðum. Varðandi þetta atriði bendir dómurinn á að fulltrúi Sorpu hafi skýrt svo frá að hann teldi gjaldheimtu Sorpu standa undir stærstum hluta útgjalda byggðasamlagsins, þótt hann hafi verið óviss um hvort svo sé að öllu leyti. Komist landsdómstóllinn hins vegar að því að gjaldtaka Sorpu standi aðeins undir óverulegum hluta útgjaldanna, yrði hann að meta það atriði út frá þeirri staðreynd að Sorpa er í samkeppni við einkafyrirtæki, svo skera megi úr um hvort Sorpa sé fyrirtæki í skilningi samkeppnisreglna EES-samningsins.

2. mgr. 59. gr. EES-samningsins

65 Samkvæmt 2. mgr. 59. gr. EES-samningsins, gilda samkeppnisreglur EES-samningsins um fyrirtæki sem falið er að veita þjónustu er hefur almenna efnahagslega þýðingu, að því marki sem beiting þeirra kemur ekki í veg fyrir að þau geti að lögum eða í raun leyst af hendi þau sérstöku verkefni sem þeim eru falin.

66 Svo frávik 2. mgr. 59. gr. verði talið eiga við verður því í fyrsta lagi að skera úr um hvort fyrirtækinu sem um ræðir hafi verið falið að veita þjónustu er hefur almenna efnahagslega þýðingu, og í öðru lagi, hvort beiting samkeppnisreglna EES-samningsins kemur í veg fyrir að það geti leyst af hendi verkefnin sem því eru falin.

67 First, the Court notes that waste management may be regarded as a service of general economic interest (compare the judgment in *Entreprenørforeningens Affalds/Miljøsektion*, C209/98, EU:C:2000:279, paragraph 75, and the Opinion of Advocate General Jacobs in *Chemische Afvalstoffen Dusseldorp, C-203/96, EU:C:*1997:508, point 103).

68 Moreover, the undertaking must have been entrusted with the exercise of the service of general economic interest by an act of public authority (compare *MOTOE*, cited above, paragraph 45). It is for the referring court to determine whether Sorpa has been entrusted with waste management tasks by an act of public authority. In that regard, the Waste Disposal Act entrusts municipalities with waste management tasks and the municipalities established Sorpa to carry on those tasks. Therefore, it appears that Sorpa has been entrusted with the tasks at issue by an act of public authority.

69 Second, as regards the condition that the application of the EEA competition rules would obstruct the performance of the particular tasks at stake, it is not necessary that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the exclusive rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject, or that maintenance of those rights is necessary to enable the holder thereof to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (compare the judgment in *AG2R Prévoyance*, C-437/09, EU:C:2011:112, paragraph 76).

67 Í upphafi vill dómurinn taka fram að meðferð úrgangs geti talist þjónusta sem hefur almenna efnahagslega þýðingu (sjá, til samanburðar, mál *Entreprenørforeningens Affalds/Miljøsektion*, C209/98, EU:C:2000:279, 75. mgr., og álit Jacobs lögsögumanns í máli *Chemische Afvalstoffen Dusseldorp*, C-203/96, EU:C:1997:508, 103. liður).

68 Enn fremur verði fyrirtækinu að hafa verið falið að veita þjónustu er hefur almenna efnahagslega þýðingu, með ákvörðun hins opinbera (sjá, til samanburðar, áður tilvitnað mál *MOTOE*, 45. mgr.). Það er landsdómstólsins að ákveða hvort Sorpu hafi verið falið að sjá um meðferð úrgangs samkvæmt ákvörðun hins opinbera. Í því sambandi fela lög um meðhöndlun úrgangs sveitarfélögum að sjá um verkefni sem varða meðferð úrgangs og hafa sveitarfélögin sett Sorpu á laggirnar til að sjá um framkvæmd þeirra verkefna. Það virðist því sem Sorpu hafi verið falið að sjá um téð verkefni samkvæmt ákvörðun hins opinbera.

69 Að því er varðar skilyrðið um að beiting samkeppnisreglna EES-samningsins komi í veg fyrir að fyrirtæki geti leyst af hendi þau verkefni sem því hafa verið falin, telst það ekki nauðsynlegt að fjárhagslegu jafnvægi eða lífvænleika fyrirtækisins, sem falið hefur verið að veita þjónustu er hefur almenna efnahagslega þýðingu, sé ógnað. Nægilegt telst að fyrirtækið gæti ekki sinnt þeim tilteknu verkefnum sem því hafa verið falin, eins þau eru skilgreind með tilvísun til þeirra skyldna og takmarkana sem fyrirtækið lýtur, ef það nyti ekki einkaréttarins, eða að nauðsynlegt sé að viðhalda þeim réttindum sem fyrirtækinu hafa verið veitt, svo því sé unnt að sinna þeim verkefnum sem hafa almenna efnahagslega þýðingu og því hafa verið falin, við ásættanlegar efnahagslegar aðstæður (sjá, til samanburðar, mál *AG2R Prévoyance*, C-437/09, EU:C:2011:112, 76. mgr.).

70 Sorpa contends that the application of Article 54 EEA would seriously jeopardise its ability to achieve the objectives of the Waste Disposal Act and the EEA directives to which that Act gives effect. At the hearing, the Competition Authority submitted that the application of Article 54 EEA would not obstruct the performance of waste management tasks, while ESA argued that nothing in the request indicates that such an obstruction would occur.

71 It is for the referring court to assess whether the application of Article 54 EEA would make it impossible for Sorpa to provide the waste management services it has been entrusted with, or to perform them under economically acceptable conditions. However, the Court notes that, in its written submissions and at the hearing, Sorpa relied on general assumptions and did not explain why the application of the EEA competition rules would prevent it from providing the services at stake.

72 Therefore, the answer to the first question is that a municipality may constitute an undertaking within the meaning of Article 54 EEA when it engages in an economic activity, which consists in the offering of goods or services on the market. In order to determine whether an activity such as waste management is economic, account must be taken of the existence of competition with private entities. In that regard, the fact that the fee received for the provision of waste management services cannot exceed the costs incurred must be balanced against the existence of competition on the market.

73 Moreover, waste management may constitute a service of general economic interest within the meaning of Article 59(2) EEA. It is for the referring court to determine whether the application of Article 54 EEA would make it impossible for the municipalities to provide the waste management services they have been entrusted with, or to provide them under economically acceptable conditions.

70 Sorpa heldur því fram að beiting 54. gr. EES-samningsins myndi stefna getu þess til að uppfylla markmið laga um meðhöndlun úrgangs og þeirra EES-tilskipana sem henni var ætlað að innleiða í verulega hættu. Við munnlegan málflutning hélt Samkeppniseftirlitið því fram að beiting 54. gr. EES-samningsins myndi ekki koma í veg fyrir að unnt yrði að leysa af hendi verkefni sem lúta að meðferð úrgangs, og ESA hélt því fram að ekkert í álitsbeiðninni renndi stoðum undir að slík hindrun væri til staðar.

71 Það er landsdómstólsins að leggja mat á það hvort beiting 54. gr. EES-samningsins myndi gera Sorpu ómögulegt að sinna þeim verkefnum sem lúta að meðferð úrgangs og henni hafa verið falin, eða hvort Sorpu væri það kleift við efnahagslega ásættanlegar aðstæður. Dómurinn bendir þó á að Sorpa hafi, jafnt í skriflegri greinargerð sem og í munnlegum málflutningi sínum, skírskotað til almennra forsendna, án þess að gera grein fyrir því með hvaða hætti beiting samkeppnisreglna EES-samningsins myndi koma í veg fyrir að hún gæti veitt þá þjónustu sem um ræðir.

72 Því verður að svara fyrstu spurningunni með þeim hætti að sveitarfélag geti talist fyrirtæki í skilningi 54. gr. EES-samningsins þegar það sinnir efnahagsstarfsemi sem felur í sér að það bjóði vörur eða þjónustu á markaði. Þegar skorið skal úr um hvort starfsemi á borð við meðferð úrgangs teljist efnahagsleg, verður að taka mið af því hvort samkeppni frá einkaaðilum sé til staðar. Í því sambandi verður að meta þá staðreynd, með hliðsjón af samkeppni á markaðnum, að gjaldið sem innheimt er fyrir þjónustu við meðferð úrgangs má ekki vera umfram kostnað sem til fellur.

73 Meðferð úrgangs getur enn fremur talist þjónusta er hefur almenna efnahagslega þýðingu í skilningi 2. mgr. 59. gr. EES-samningsins. Það er landsdómstólsins að meta hvort beiting 54. gr. EES-samningsins geri sveitarfélögunum ómögulegt að veita þá þjónustu við meðferð úrgangs sem þeim hefur verið falin, eða veita hana við efnahagslega ásættanlegar aðstæður.

THE SECOND QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

74 All those who have submitted observations to the Court agree that there is no reason to make a distinction between municipalities and municipal cooperatives.

75 Sorpa and the Competition Authority contend that municipal cooperatives are established to perform the tasks entrusted to the municipalities, in other words, that they carry on the same tasks. The Competition Authority and ESA submit that the legal form of the entity is not a decisive factor when assessing whether that entity is an undertaking within the meaning of Article 54 EEA (compare *Diego Calì*, cited above, paragraphs 16 to 18).

76 Consequently, Sorpa submits that a municipal cooperative providing waste management services does not constitute an undertaking within the meaning of Article 54 EEA, whereas the Competition Authority, ESA and the Commission claim that it does.

77 The Commission states that it appears from the request that the acceptance centre at Gufunes and the landfill at Álfsnes are operated by Sorpa itself and not by its owners. Therefore, the conduct under examination must be attributed to Sorpa. However, if the municipalities owning Sorpa do, in fact, operate those centres themselves, the conduct under examination should be attributed to those municipalities. Finally, should the referring court find that the owners exercise control over Sorpa, it must examine whether they are to be regarded as forming one undertaking with Sorpa.

ÖNNUR SPURNINGIN

ATHUGASEMDIR SEM LAGÐAR VORU FYRIR DÓMSTÓLINN

74 Allir aðilar sem lögðu skriflegar athugasemdir fyrir dómstólinn eru sammála um að engin ástæða sé til að greina á milli sveitarfélaga og byggðasamlaga.

75 Sorpa og Samkeppniseftirlitið halda því fram að byggðasamlögin séu sett á stofn til að sinna verkefnum sem sveitarfélögunum hafa verið falin. Með öðrum orðum, sinni byggðasamlögin verkefnum sveitarfélaganna. Samkeppniseftirlitið og ESA telja að rekstrarform aðila hafi ekki úrslitaáhrif við mat á því hvort sá aðili teljist fyrirtæki í skilningi 54. gr. EES-samningsins (sjá, til samanburðar, áður tilvitnað mál *Diego Calì*, 16. til 18. mgr.).

76 Þar af leiðandi heldur Sorpa því fram að byggðasamlag sem sinnir meðferð úrgangs geti ekki talist fyrirtæki í skilningi 54. gr. EES-samningsins, en Samkeppniseftirlitið, ESA og framkvæmdastjórn Evrópusambandsins eru á öndverðum meiði.

77 Framkvæmdastjórn Evrópusambandsins telur að ráða megi af álitsbeiðninni að það sé Sorpa, en ekki eigendur fyrirtækisins, sem reki móttökustöðina í Gufunesi og urðunarstaðinn á Álfsnesi. Háttsemin sem um ræðir í málinu verði því að teljast vera á ábyrgð Sorpu. Ef sveitarfélögin sem eiga Sorpu starfrækja í raun sjálf þessar stöðvar beri hinsvegar að líta svo á að háttsemin sé á vegum sveitarfélaganna. Komist landsdómstóllinn að þeirri niðurstöðu að eigendur beiti yfirráðum sínum yfir Sorpu verður hann að skoða hvort þeir kunni að teljast mynda eitt fyrirtæki ásamt Sorpu.

FINDINGS OF THE COURT

78 By its second question, the referring court asks whether, should municipalities not be regarded as undertakings within the meaning of the EEA competition rules, a municipal cooperative may constitute an undertaking.

79 The Court sees no reason to make a distinction between a municipality and a cooperative between municipalities. Both are entities of public law. Both may constitute an undertaking within the meaning of the EEA competition rules, provided that they meet the criteria mentioned above in answer to the first question (see LO, cited above, paragraph 81).

80 As regards the question whether the conduct under investigation should be attributed to Sorpa or to its owners, the municipalities in the metropolitan area of Reykjavík, the Court finds that the responsibility for that conduct should be attributed to the entity which operates the acceptance centre at Gufunes and the landfill site at Álfsnes and which sets the rebates at stake. This is a matter of fact and as such for the referring court to assess. However, as submitted by the Commission, it appears from the request that Sorpa itself operates the Gufunes centre and the Álfsnes site and sets its tariffs. This suggests that the conduct at stake should be attributed to Sorpa.

81 Therefore, the answer to the second question is that, in order to determine whether a public entity constitutes an undertaking within the meaning of the EEA competition rules when it provides waste management services, it is irrelevant whether that entity is a municipality or a cooperative entered into by several municipalities.

ÁLIT DÓMSTÓLSINS

78 Með annarri spurningu sinni spyr landsdómstóllinn hvort byggðasamlög geti talist fyrirtæki í skilningi samkeppnisreglna EES-samningsins, ef ekki verði talið að svo hátti til um sveitarfélög.

79 Dómurinn sér enga ástæðu til að greina á milli sveitarfélags og byggðasamlags sveitarfélaga. Bæði teljast opinberar stofnanir. Bæði geta talistfyrirtæki í skilningi samkeppnisreglna EES-samningsins, að því gefnu að þau uppfylli þau skilyrði sem nefnd voru í svari við fyrstu spurningunni. (sjá áður tilvitnað mál *LO*, 81. mgr.).

80 Varðandi álitaefnið um hvort sú háttsemi sem hér er til skoðunar skuli teljast vera á ábyrgð Sorpu eða eigenda þess, sveitarfélaganna á höfuðborgarsvæðinu, telur dómurinn að ábyrgðin á háttseminni skuli hvíla á þeirri stofnun sem rekur móttökustöðina í Gufunesi og urðunarstaðinn á Álfsnesi og ákveður þá afslætti sem deilt er um í málinu. Þetta atriði fellur undir staðreyndir málsins og er því landsdómstólsins að meta. Eins og fram kom af hálfu framkvæmdastjórnarinnar virðist engu að síður mega ráða af álitsbeiðninni að Sorpa starfræki sjálf móttökustöðina í Gufunesi og urðunarstaðinn á Álfsnesi og ákveði gjaldskrá þeirra, líkt og framkvæmdastjórnin bendir á. Það bendir til þess að háttsemin sem um ræðir sé á ábyrgð Sorpu.

81 Annarri spurningunni ber því að svara með þeim hætti, að þegar skorið skal úr um hvort opinber stofnun teljist fyrirtæki í skilningi samkeppnisreglna EES-samningsins þegar hún veitir þjónustu við meðferð úrgangs, skiptir ekki máli hvort stofnunin sé sveitarfélag eða byggðasamlag sem mörg sveitarfélög standa saman að.

THE THIRD QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

82 Sorpa submits that Article 54 EEA does not apply where the anti-competitive behaviour under consideration is required by national legislation (reference is made to the judgment in *Altair Chimica SpA* v *ENEL Distribuzione SpA*, C207/01, EU:C:2003:451, paragraph 30). In the present case, when performing the waste management services at issue, Sorpa and its owners have restricted autonomy, since they have to comply with national statutes and regulations. Therefore, Article 54 EEA is not applicable.

83 The Competition Authority submits that a Contracting Party may not restrict by law the scope of application of Article 54 EEA, except in accordance with Article 59(2) EEA. However, an EEA State does not infringe Article 54 EEA by granting exclusive rights to an undertaking, provided that such undertaking does not abuse its dominant position or is not led necessarily to commit an abuse (reference is made to the judgment in *Corsica Ferries France*, C-266/96, EU:C:1998:306, paragraph 41). In the present case, Icelandic law requires that the fee received by Sorpa does not exceed the costs incurred. It neither authorises nor obliges Sorpa to set the fee at a level where it makes a profit. Therefore, Icelandic law does not authorise Sorpa to distribute dividends in the form of discounts granted to its owners.

84 As regards the question whether a Contracting Party to the EEA Agreement may exempt from the application of the EEA competition rules certain activities by public entities, the Commission claims that the EEA Agreement does not allow for an exemption in *abstracto*. Such an exemption is permitted only if it is compatible with Article 59 EEA.

ÞRIÐJA SPURNINGIN

ATHUGASEMDIR SEM LAGÐAR VORU FYRIR DÓMSTÓLINN

82 Sorpa telur að 54. gr. EES-samningsins eigi ekki við þegar landslög mæli fyrir um samkeppnishamlandi hegðun (Vísað er til máls *Altair Chimica SpA* gegn *ENEL Distribuzione SpA*, C-207/01, EU:C:2003:451, 30. mgr.). Í málinu sem hér um ræði, búi Sorpa og eigendur hennar við skert sjálfræði þegar þjónusta sé veitt vegna meðhöndlunar úrgangs, þar sem þau verði að fara eftir lögum og stjórnvaldsfyrirmælum. Því eigi 54. gr. EES-samningsins ekki við.

83 Samkeppniseftirlitið telur að aðildarríki geti ekki takmarkað gildissvið 54. gr. EES-samningsins með lögum, nema í samræmi við 2. mgr. 59. gr. hans. EES-ríki brjóti þó ekki gegn 54. gr. samningsins með því að veita fyrirtæki einkarétt, að því gefnu að slíkt fyrirtæki misnoti ekki ráðandi stöðu sína eða sé gert annað óhjákvæmilegt (vísað er sérstaklega til máls *Corsica Ferries France*, C-266/96, EU:C:1998:306, 41. mgr.). Í hinu fyrirliggjandi máli kveði íslensk lög á um að gjaldtaka Sorpu megi ekki vera umfram kostnað sem til fellur vegna þjónustunnar. Þau hvorki heimili né skyldi Sorpu til að ákvarða gjaldtökuna með þeim hætti að hún skili hagnaði. Þannig heimili íslensk lög ekki úthlutun arðs í formi afsláttar til eigenda.

84 Hvað varðar það álitaefni, hvort aðildarríki EES-samningsins geti undanþegið tiltekna starfsemi opinberra aðila gildissviði samkeppnisreglna, telur framkvæmdastjórnin að EES-samingurinn heimili ekki slíka undanþágu *in abstracto*. Slík undanþága sé aðeins heimil, ef hún samrýmist 59. gr. EES-samningsins.

FINDINGS OF THE COURT

85 By its third question, the referring court essentially asks, first, whether Article 54 EEA applies to conduct authorised or required by national legislation, and second, whether an EEA State may exempt through legislation certain activities of public entities from the scope of the EEA competition rules.

86 As regard the first part of the third question, the Court notes that Articles 53 and 54 EEA apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 53 and 54 EEA do not apply. In such a situation the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles 53 and 54 EEA may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (compare the judgment in *Commission and France v Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraphs 33 and 34).

87 In the present case, the Waste Disposal Act does not require Sorpa to grant discounts to its owners or Sorpstöð Suðurlands. Article 11(3) of the Waste Disposal Act only prohibits Sorpa from charging fees exceeding its costs. Consequently, by granting specific discounts to municipalities or municipal cooperatives, it appears that Sorpa engages in autonomous conduct. The restriction of competition, if any, arising from such conduct would under such circumstances be attributable to Sorpa alone.

ÁLIT DÓMSTÓLSINS

85 Með þriðju spurningu sinni leitar landsdómstóllinn aðallega svars við því, annars vegar, hvort 54. gr. EES-samningsins eigi við um háttsemi sem mælt er fyrir um í landslögum, og hins vegar, hvort aðildarríki EES-samningsins geti með lögum undanþegið tiltekna starfsemi opinberra aðila gildissviði samkeppnisreglna EES-samningsins.

86 Hvað fyrri hluta þriðju spurningarinnar varðar, bendir dómurinn á að 53. og 54. gr. EES-samningsins eigi aðeins við um samkeppnishamlandi háttsemi fyrirtækja að þeirra eigin frumkvæði. Ef mælt er fyrir um samkeppnishamlandi háttsemi í landslögum eða ef landslög búa til umgjörð sem kemur í veg fyrir samkeppni fyrirtækja, eiga 53. og 54. gr. EES-samningsins ekki við. Við slíkar aðstæður er ekki unnt að rekja hömlur á samkeppni til eigin frumkvæðis fyrirtækjanna, eins og gerð er skýr krafa um í fyrrnefndum ákvæðum. Ákvæði 53. og 54. gr. geta þó átt við ef fyrir liggur að landslög girði ekki fyrir að fyrirtæki geti að eigin frumkvæði komið í veg fyrir, takmarkað eða raskað samkeppni (sjá, til samanburðar, mál *Framkvæmdastjórnar Evrópubandalaganna og Lýðveldisins Frakklands gegn Ladbroke Racing* C-359/95 P og C-379/95 P, EU:C:1997:531, 33. og 34. mgr.*)*.

87 Í hinu fyrirliggjandi máli er ekki mælt svo fyrir í lögum um meðhöndlun úrgangs að Sorpu beri að veita eigendum sínum eða Sorpstöð Suðurlands afslætti. Samkvæmt 3. mgr. 11. gr. laganna er Sorpu einungis óheimil gjaldtaka umfram kostnað sem til fellur við þjónustuna. Þannig virðist það vera svo að afslættir sem veittir eru til sveitarfélaga eða byggðasamlaga séu veittir að eigin frumkvæði Sorpu. Samkeppnishömlur sem af þeirri slíkri háttsemi leiða, ef einhverjar eru, myndu í slíkum tilvikum teljast vera á eigin ábyrgð Sorpu.

88 As regards the second part of the third question, the Court notes that, pursuant to Article 59(1) EEA, EEA States may not enact or maintain in force any measure pertaining to public undertakings holding special or exclusive rights which is contrary, in particular, to Articles 53 and 54 EEA. Therefore, should an EEA State, by national legislation, grant public entities a derogation from the application of the EEA competition rules, for instance by granting them special or exclusive rights, it must do so in accordance with the EEA competition rules, in particular with Article 59(1) EEA.

89 The answer to the third question is therefore that Article 54 EEA does not apply to anti-competitive conduct which is required of undertakings by national legislation, or if national legislation creates a legal framework which itself eliminates any possibility of competitive activity on their part. However, Article 54 EEA may apply if national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition. Moreover, should an EEA State, by national legislation, grant public entities a derogation from the application of the EEA competition rules, for instance by granting them special or exclusive rights, it must do so in accordance with the EEA competition rules, in particular with Article 59(1) EEA.

THE FOURTH QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

90 Sorpa submits that its owners cannot be regarded as its trading parties within the meaning of Article 54(2)(c) EEA, since Sorpa is a mere extension of its owners and it carries out the obligations imposed on its owners by the Waste Disposal Act.

88 Hvað annan hluta þriðju spurningarinnar varðar bendir dómurinn á að samkvæmt 1. mgr. 59. gr. EES-samningsins, er aðildarríkjum hans óheimilt að gera eða viðhalda nokkrum þeim ráðstöfunum sem veita opinberum fyrirtækjum sérstök réttindi eða einkarétt, sem fara í bága við samninginn, sérstaklega 53. og 54. gr. hans. Veiti EES-ríki opinberum aðilum undanþágu frá beitingu samkeppnisreglna EES-samningsins samkvæmt landslögum, til dæmis með því að veita þeim sérstök réttindi eða einkarétt, verður því að gera slíkt í samræmi við samkeppnisreglur EES-samningsins, sérstaklega 1. mgr. 59. gr. hans.

89 Þriðju spurningunni verður því að svara með þeim hætti að 54. gr. EES-samningsins gildi hvorki um samkeppnishamlandi háttsemi sem mælt er fyrir um í landslögum né tilvik þar sem landslög útbúa umgjörð sem kemur sé í veg fyrir samkeppni fyrirtækja. Þó getur 54. gr. EES-samningsins átt við ef landslög girða ekki fyrir að fyrirtæki geti að eigin frumkvæði komið í veg fyrir, takmarkað eða raskað samkeppni. EES-ríki sem með löggjöf sinni veitir opinberum aðilum undanþágu frá beitingu samkeppnisreglna EES-samningsins, til dæmis með því að veita þeim sérstök réttindi eða einkarétt, verður að gera slíkt í samræmi við samkeppnisreglur EES-samningsins, sérstaklega 1. mgr. 59. gr. hans.

FJÓRÐA SPURNINGIN

ATHUGASEMDIR SEM LAGÐAR VORU FYRIR DÓMSTÓLINN

90 Sorpa telur að eigendur geti ekki talist viðskiptaaðilar í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, þar sem Sorpa sé einungis framlenging af eigendum sínum og uppfyllir þær skyldur sem lagðar eru á þá samkvæmt lögum um meðhöndlun úrgangs.

91 Moreover, in Sorpa's view, Article 54(2)(c) EEA applies only to conduct liable to restrict competition between the business partners of the dominant undertaking (reference is made to the judgment in *British Airways plc* v *Commission of the European Communities*, C-95/04 P, EU:C:2007:166, paragraphs 143 and 144). In the present case, Sorpa's owners are not competing against Gámaþjónustan. Therefore, by receiving lower discounts than Sorpa's owners, Gámaþjónustan was not placed at a competitive disadvantage vis-à-vis Sorpa's owners within the meaning of Article 54(2)(c) EEA. Furthermore, Gámaþjónustan was not placed at a competitive disadvantage vis-à-vis Sorpa by the terms of the tender for the collection of household waste in the municipality of Hafnarfjörður. That municipality, an owner of Sorpa, simply decided to use its own facilities for the management and disposal of waste.

92 The Competition Authority claims that the concept of trading parties within the meaning of Article 54(2)(c) EEA encompasses all recipients of services provided by the dominant undertaking, irrespective of their financial or structural ties with that undertaking (reference is made to the judgment in *GT-Link A/S v De Danske Statsbaner*, C-242/95, EU:C:1997:376, paragraph 46). Therefore, Sorpa's owners may be regarded as trading parties of Sorpa.

93 Moreover, the Competition Authority asserts that, when the municipality of Hafnarfjörður tendered the collection of domestic waste, tenderers could choose which acceptance centre they would deliver the waste to, including Sorpa's Gufunes centre. Therefore, in granting discounts to the municipality of Hafnarfjörður, its owner, and to Sorpstöð Suðurlands, Sorpa effectively prevented Gámaþjónustan from receiving waste from that municipality, thereby placing Gámaþjónustan at a competitive disadvantage within the meaning of Article 54(2)(c) EEA.

91 Sorpa telur enn fremur að c-liður 2. mgr. 54. gr. EES-samningsins taki einungis til viðskiptahamlandi hegðunar milli viðskiptafélaga hins ráðandi fyrirtækis (vísað er til máls *British Airways plc* gegn *framkvæmdastjórn Evrópubandalaganna*, C-95/04 P, EU:C:2007:166, 143. og 144. mgr.). Í hinu fyrirliggjandi máli eigi eigendur Sorpu ekki í samkeppni við Gámaþjónustuna. Þannig hafi viðskiptastaða Gámaþjónustunnar ekki verið veikt gagnvart eigendum Sorpu í skilningi c-liðar 2. mgr. 54. gr., þótt Gámaþjónustan hafi notið minni afsláttar en eigendur Sorpu. Þá hafi viðskiptastaða Gámaþjónustunnar ekki verið veikt gagnvart Sorpu vegna skilmála útboðs Hafnarfjarðarbæjar á sorphirðu vegna heimilisúrgangs í sveitarfélaginu. Sveitarfélagið, sem einn eigenda Sorpu, hafi einfaldlega ákveðið að nýta eigin aðstöðu til meðhöndlunar úrgangs og förgunar.

92 Samkeppniseftirlitið heldur því fram að hugtakið „viðskiptaaðilar“ í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins taki til allra notenda þjónustu sem veitt er af hálfu hins ráðandi fyrirtækis, óháð fjárhagslegum eða stofnanalegum tengslum þeirra við fyrirtækið (vísað er til máls *GT-Link A/S* gegn *De Danske Statsbaner*, C-242/95, EU:C:1997:376, 46. mgr.). Því geti eigendur Sorpu talist viðskiptaaðilar byggðasamlagsins.

93 Samkeppniseftirlitið fullyrðir að í hinu fyrirliggjandi máli hafi bjóðendur í útboði Hafnarfjarðarbæjar á sorphirðu sveitarfélagsins vegna heimilisúrgangs getað valið til hvaða móttökustöðvar þeir myndu skila úrgangi, þar á meðal móttökustöðvar Sorpu í Gufunesi. Með því að veita eiganda sínum, Hafnarfjarðarbæ, sem og Sorpstöð Suðurlands afslátt hafi Sorpa þannig í raun komið í veg fyrir móttöku Gámaþjónustunnar á úrgangi frá því sveitarfélagi, og þar með veikt samkeppnisstöðu Gámaþjónustunnar í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins.

94 ESA submits that any party with which the dominant undertaking enters into a transaction is covered by the concept of trading parties within the meaning of Article 54(2)(c) EEA. If the dominant undertaking enters into a transaction with its owners, those owners are to be regarded as trading parties.

95 In ESA's view, the condition that the trading parties must be placed at a competitive disadvantage is only met if, first, the trading parties of the dominant undertaking compete against each other, second, the competitive position of one trading party is likely to be hindered vis-à-vis the position of another trading party. This is for the referring court to decide. However, ESA contends that Sorpa's owners may not be in a competitive relationship with the other trading parties, since it appears that the municipalities owning Sorpa only deliver waste from their own municipal areas and no other operator may deliver waste from those areas.

96 In its written observations, the Commission submitted that the transactions between, on the one hand, Sorpa and either its owners or Sorpstöð Suðurlands and, on the other, Sorpa and Gámaþjónustan cannot be regarded as equivalent within the meaning of Article 54(2)(c) EEA, since they have different objects (the former concern the provision of waste acceptance services, whereas the latter concern the provision of waste disposal services). Consequently, the discounts granted by Sorpa to, on the one hand, its owners and Sorpstöð Suðurlands and, on the other, Gámaþjónustan do not fall within the scope of Article 54(2)(c) EEA. Therefore, there is no need, in the Commission's view, to answer the fourth question.

97 At the hearing, the Commission argued that, although the ECJ's judgment in *British Airways* (cited above, paragraphs 143 and 144) suggests that same group companies cannot be regarded as trading parties within the meaning of Article 54(2)(c) EEA, the ECJ has not taken a definite position on the matter. In any event, the condition that the party discriminated against be placed at a competitive

94 ESA bendir á að undir hugtakið viðskiptaaðili, í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, falli sérhver aðili sem hið markaðsráðandi fyrirtæki stofnar til viðskiptasambands við. Stofni hið ráðandi fyrirtæki til viðskiptasambands við eigendur sína, teljist þeir eigendur til viðskiptaaðila.

95 ESA telur að skilyrðið um að samkeppnisstaða viðskiptaaðila sé veikt verði uppfyllt í fyrsta lagi ef viðskiptaaðilar hins markaðsráðandi fyrirtækis eigi í samkeppni sín á milli, og í öðru lagi ef líkur séu á því að þrengt sé að samkeppnisstöðu eins viðskiptaaðilans gagnvart öðrum. Það sé landsdómstólsins að skera úr um framangreind atriði. Eftir sem áður, bendir ESA á að eigendur Sorpu geti ekki verið í samkeppni við aðra viðskiptaaðila, þar eð svo virðist sem sveitarfélögin sem eiga Sorpu skili aðeins úrgangi frá eigin lögsagnarumdæmum og enginn annar megi skila úrgangi frá þeim svæðum.

96 Í skriflegum athugasemdum sínum heldur framkvæmdastjórnin því fram að viðskipti milli annars vegar Sorpu og eigenda hennar eða Sorpstöðvar Suðurlands, og hins vegar Sorpu og Gámaþjónustunnar geti ekki talist „sams konar“ í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, þar sem markmið þeirra sé ólíkt (hin fyrri varði þjónustu við móttöku úrgangs, á meðan hin síðari varði sorpeyðingarþjónustu). Þar af leiðandi falli afslættirnir sem Sorpa veitti eigendum sínum og Sorpstöð Suðurlands, annars vegar, og Gámaþjónustunni, hins vegar, ekki undir gildissvið c-liðar 2. mgr. 54. gr. EES-samningsins. Að mati framkvæmdastjórnarinnar sé því þarflaust að svara fjórðu spurningunni.

97 Við munnlegan flutning málsins hélt framkvæmdastjórnin því fram að þó svo virðist sem Evrópudómstóllinn hafi komist að þeirri niðurstöðu í áður tilvitnuðu máli *British Airways* (143. og 144. mgr.) að fyrirtæki í sömu fyrirtækjasamstæðu geti ekki talist viðskiptaaðilar í skilningi c-liðar 2. mgr. 54. gr. hafi dómstóllinn ekki skorið úr um það atriði með afgerandi hætti. Hvað sem öðru líður

disadvantage is not met in the present case. Article 54(2)(c) EEA applies only where the trading parties are in a competitive relationship, which they do not appear to be.

98 The Commission contends, however, that Sorpa may have infringed Article 54 EEA in some other way.

FINDINGS OF THE COURT

99 By its fourth question the referring court essentially seeks guidance on whether the municipalities in the metropolitan area of Reykjavík may, although they hold all the shares in Sorpa's capital, be considered as trading parties of Sorpa within the meaning of Article 54(2)(c) EEA. If that is the case, the referring court asks whether by granting the owners' discount only to its owners, Sorpa placed other trading parties at a competitive disadvantage with its owners within the meaning of that provision.

100 The Court recalls that the notion of abuse of a dominant position is a legal notion that must be examined in the light of economic considerations (see *Holship*, cited above, paragraph 87 and case law cited).

101 According to Article 54(2)(c) EEA, an abuse of a dominant position may consist, inter alia, in applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage.

102 It is for the referring court to examine, first, whether the dominant undertaking applied dissimilar conditions to equivalent services, second, whether other trading parties were placed at a competitive disadvantage (compare the judgment in *Kanal 5 and TV 4* v *STIM*, C-52/07, EU:C:2008:703, paragraph 44).

uppfylli málið sem hér er til umfjöllunar ekki það skilyrði að samkeppnisaðstaða viðskiptaaðilans sé veikt. Ákvæði c-liðar 2. mgr. 54. gr. eigi aðeins við þegar viðskiptaaðilar eigi í samkeppni, sem virðist ekki raunin í þessu máli.

98 Framkvæmdastjórnin bendir þó á að Sorpa kunni að hafa brotið gegn 54. gr. EES-samningsins með einhverjum öðrum hætti.

ÁLIT DÓMSTÓLSINS

99 Með fjórðu spurningu sinni leitar landsdómstóllinn aðallega svars við því hvort sveitarfélögin á höfuðborgarsvæðinu geti talist viðskiptaaðilar Sorpu í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, þrátt fyrir að þau séu einu hluthafar Sorpu. Ef svo telst vera spyr landsdómstóllinn hvort afsláttur sem Sorpa veitir einungis eigendum veiki samkeppnisstöðu annarra viðskiptaaðila í skilningi sama ákvæðis.

100 Dómurinn bendir á að „misnotkun ráðandi stöðu á markaði“ sé lögfræðilegt hugtak sem skoða verði með hliðsjón af efnahagslegum aðstæðum (sjá áður tilvitnað mál Holship, 87. mgr. og dómaframkvæmd sem þar er vísað til).

101 Samkvæmt c-lið 2. mgr. 54. gr. EES-samningsins getur misnotkun á ráðandi stöðu meðal annars falist í beitingu ólíkra skilmála í sams konar viðskiptum sem veikir samkeppnisstöðu þess viðskiptaaðila sem bjóðast lakari skilmálar.

102 Það er landsdómstólsins að meta, í fyrsta lagi, hvort hið ráðandi fyrirtæki hafi beitt ólíkum skilmálum vegna sömu þjónustu, og í öðru lagi, hvort samkeppnisstaða annarra viðskiptaaðila hafi verið veikt (sjá, til samanburðar, mál Kanal 5 og TV 4 gegn STIM, C-52/07, EU:C:2008:703, 44. mgr.).

103 First, as regards the notion of trading parties within the meaning of Article 54(2)(c) EEA, the Court fails to see why companies belonging to the same group as the dominant undertaking should not be regarded as trading parties of that undertaking within the meaning of Article 54(2)(c) EEA. Same group companies may contract with the dominant undertaking and either receive goods or services from that undertaking or provide it with goods or services. They should as such be regarded as trading parties of the dominant undertaking within the meaning of Article 54(2)(c) EEA.

104 Only if a company belonging to the same group as the dominant undertaking has no economic activity of its own and forms one undertaking with the dominant undertaking, may it avoid qualification as a trading party of the dominant undertaking within the meaning of Article 54(2)(c) EEA.

105 Second, as regards the notion of competitive disadvantage within the meaning of Article 54(2)(c) EEA, according to the findings of the Competition Authority, Sorpa holds a dominant position on the market for waste acceptance in the metropolitan area of Reykjavík, where it faces competition from Gámaþjónustan, and on the market for waste disposal in the same geographic area, where it enjoys a *de facto* monopoly. Since Gámaþjónustan does not operate any landfill site, it is a customer of Sorpa on the market for waste disposal. At the hearing, the representative of the Competition Authority stated that Gámaþjónustan also frequently makes use of Sorpa's acceptance centre in Gufunes. The Competition Authority also found that, by granting its owners a significant discount, the owners' discount, which it denied to other customers, in particular Gámaþjónustan, Sorpa had placed those other customers at a competitive disadvantage within the meaning of Article 54(2)(c) EEA.

103 Í fyrsta lagi, að því er varðar hugtakið „viðskiptaaðilar“ í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins sér dómurinn ekkert sem rennir stoðum undir þá skýringu, að fyrirtæki sem tilheyra sömu fyrirtækjasamstæðu geti ekki talist viðskiptaaðilar í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins. Þau geta samið við hið ráðandi fyrirtæki og bæði fengið vörur eða þjónustu frá því eða veitt því vörur eða þjónustu. Þau ættu því að teljast viðskiptaaðilar hins ráðandi fyrirtækis í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins.

104 Aðeins í tilvikum þar sem fyrirtæki sem heyrir undir sömu fyrirtækjasamstæðu og hið ráðandi fyriræki stundar sjálft enga efnahagsstarfsemi getur það verið undanskilið því að teljast viðskiptaaðili hins ráðandi fyrirtækis í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins.

105 Í öðru lagi, hvað varðar hugtakið „veikt samkeppnisstaða“ í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, hefur Sorpa, samkvæmt niðurstöðu Samkeppniseftirlitsins, ráðandi stöðu á markaði fyrir móttöku úrgangs á höfuðborgarsvæðinu, í samkeppni við Gámaþjónustuna, og á markaði fyrir förgun úrgangs á sama svæði þar sem hún hefur í raun einokunarstöðu. Þar sem Gámaþjónustan rekur engan urðunarstað er hún viðskiptavinur Sorpu á markaði fyrir förgun úrgangs. Við munnlegan flutning málsins sagði fulltrúi Samkeppniseftirlitsins að Gámaþjónustan notist oft við móttökustöð Sorpu í Gufunesi. Samkeppniseftirlitið komst einnig að þeirri niðurstöðu að með því að veita eigendum sínum verulegan afslátt, svokallaðan eigendaafslátt, sem öðrum viðskiptaaðilum væri meinað um, sérstaklega Gámaþjónustunni, hafi Sorpa veikt samkeppnisstöðu annarra viðskiptavina í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins.

106 In that regard, Sorpa submits that, for a trading party of the dominant firm to be placed at a competitive disadvantage within the meaning of Article 54(2)(c) EEA, that party must be a competitor of the favoured party. In the present case, the party discriminated against, Gámaþjónustan, operates an acceptance centre at Berghella 1, while the favoured party, Sorpa's owners, is not active on the market for waste acceptance and thus does not compete against Gámaþjónustan. Therefore, in Sorpa's view, Gámaþjónustan is not placed at a competitive disadvantage within the meaning of Article 54(2)(c) EEA. Consequently, Sorpa's conduct did not infringe that provision. ESA and the Commission support Sorpa's view.

107 By contrast, the Competition Authority argues that Article 54(2)(c) EEA applies also where the party discriminated against is not in a direct relationship of competition with the favoured party.

108 The Court notes that according to Article 54(2)(c) EEA, the party discriminated against must be placed at a competitive disadvantage. Therefore, that party must be placed at a disadvantage vis-à-vis its competitors. Since it is a trading partner of the dominant undertaking, that disadvantage must occur on a market either downstream or upstream of the dominated market.

109 In *British Airways* (cited above, paragraphs 143, 144 and 148), the ECJ held that for the conditions in Article 102(c) TFEU, the provision mirroring Article 54(2)(c) EEA, to be met, there must be a finding not only that the behaviour of the dominant undertaking is discriminatory, but also that it tends to distort the competition relationship, in other words to hinder the competitive position of the business partners of that undertaking in relation to others. Article 102(c) TFEU prohibits a dominant undertaking from distorting competition on an upstream or downstream market, in other words

106 Hvað þetta atriði varðar heldur Sorpa því fram að svo um veikta samkeppnisstöðu viðskiptaaðila hins ráðandi fyrirtækis geti verið að ræða, í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, verður sá viðskiptaaðili að vera samkeppnisaðili fyrirtækisins sem nýtur ívilnunar. Í hinu fyrirliggjandi máli rekur Gámaþjónustan, aðilinn sem mismununin kemur niður á, móttökustöð að Berghellu 1, en aðilarnir sem njóta ívilnunar, eigendur Sorpu, starfi ekki á markaði fyrir móttöku úrgangs og eru því ekki í samkeppni við Gámaþjónustuna. Sorpa telur því samkeppnisstöðu Gámaþjónustunnar ekki veikta í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins. Sorpa telur sig því ekki hafa brotið gegn því ákvæði með háttsemi sinni. ESA og framkvæmdastjórnin taka undir framangreint álit Sorpu.

107 Hins vegar heldur Samkeppniseftirlitið því fram að c-liður 2. mgr. 54. gr. EES-samningsins eigi einnig við þegar aðilinn sem mismununin kemur niður á er ekki í beinni samkeppni við þann sem nýtur ívilnunar.

108 Dómurinn bendir á að samkvæmt c-lið 2. mgr. 54. gr. EES-samningsins þarf samkeppnisstaða aðilans sem mismununin kemur niður á að hafa verið veikt. Hann verður því að standa verr að vígi gagnvart samkeppnisaðilum sínum. Þar sem hann er viðskiptaaðili hins ráðandi fyrirtækis, verður hin veikta samkeppnisstaða að birtast á fráliggjandi eða aðliggjandi markaði hins ráðandi markaðar.

109 Í áður tilvitnuðu máli *British Airways* (143., 144. og 148. mgr.) komst Evrópudómstóllinn að þeirri niðurstöðu að ekki sé nægilegt að fyrir liggi að háttsemi hins ráðandi fyrirtækis mismuni viðskiptaaðilum svo að skilyrði c-liðar 102. gr. SSESB, sem er hliðstætt ákvæði c-liðar 2. mgr. 54. gr., teljist uppfyllt. Einnig verði að liggja fyrir að sú háttsemi hafi tilhneigingu til að raska samkeppni, eða, með öðrum orðum, að þrengja að samkeppnisstöðu eins viðskiptaaðilans gagnvart öðrum. Í c-lið 102. gr. SSESB er lagt bann við röskun samkeppni af hálfu hins ráðandi fyrirtækis, á fráliggjandi og

between suppliers or customers of that undertaking. A similar conclusion was reached in *Kanal 5* (cited above, paragraph 46, see also the Opinion of Advocate General Trstenjak in Kanal 5, C52/07, EU:C:2008:491, points 113 and 114).

110 In the present case, Sorpa granted its owners the owners' discount, whereas its other customers, in particular Gámaþjónustan, were granted lower discounts. For Gámaþjónustan to be placed at a competitive disadvantage within the meaning of Article 54(2)(c) EEA, that firm would have to compete against Sorpa's owners. This is a matter of fact and as such for the referring court to assess. However, the Court notes that none of those who submitted observations in the proceedings before it alleged that, in particular, Gámaþjónustan competes against any of the municipalities of the metropolitan area of Reykjavík on a market upstream or downstream of the market for waste acceptance. Unless evidence to the contrary is adduced before the referring court, the second condition of Article 54(2)(c) EEA cannot be regarded as satisfied.

111 Moreover, the Court observes that Sorpa is a vertically integrated undertaking. It is active on the upstream market for waste acceptance in the metropolitan area of Reykjavík, where it operates a centre at Gufunes and its market share is close to 70%. It is also active on the downstream market for waste disposal in the same geographic area, where it operates a landfill site at Álfsnes and holds a de facto monopoly.

112 The Court further notes that at the hearing, the Competition Authority explained that Sorpa had leveraged its dominant position on the market for waste disposal in order to strengthen its position on the market for waste acceptance. Reference was made, in particular, to the tender for the collection of domestic waste launched in 2009 by the municipality of Hafnarfjörður. Pursuant to the terms of that tender, tenderers could choose for the delivery of

aðliggjandi mörkuðum, það er að segja milli birgja og viðskiptavina þess fyrirtækis. Svipaða niðurstöðu er að finna í áður tilvitnuðu máli *Kanal 5* (46. mgr., sjá einnig álit Trstenjak lögsögumanns í máli *Kanal 5*, C52/07, EU:C:2008:491, 113. og 114. liður).

110 Í málinu sem rekið er fyrir landsdómstólnum veitti Sorpa eigendum sínum „eigendaafslátt“ en öðrum viðskiptavinum, sérstaklega Gámaþjónustunni, voru veittir lægri afslættir. Til að samkeppnisstaða Gámaþjónustunnar yrði talin veikt í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins yrði félagið að vera í samkeppni við eigendur Sorpu. Það er atriði sem lýtur að staðreyndum málsins og þar af leiðandi landsdómstólsins að meta. Dómurinn bendir þó á að enginn þeirra sem skilaði skriflegum greinargerðum í málinu hafi haldið því sérstaklega fram að Gámaþjónustan eigi í samkeppni við sveitarfélögin á höfuðborgarsvæðinu á fráliggjandi eða aðliggjandi markaði fyrir móttöku úrgangs. Ekki verður talið að skilyrði c-liðar 2. mgr. 54. gr. EES-samningsins séu uppfyllt nema færðar séu sönnur á hið gagnstæða fyrir landsdómstólnum.

111 Dómurinn bendir jafnframt á að Sorpa er lóðrétt samþætt fyrirtæki. Það starfar á fráliggjandi markaði fyrir móttöku úrgangs á höfuðborgarsvæðinu, starfrækir móttökustöð í Gufunesi og er með tæplega 70% markaðshlutdeild. Það starfar einnig á aðliggjandi markaði fyrir förgun úrgangs á sama landsvæði þar sem það starfrækir urðunarstað á Álfsnesi og hefur í raun einokunarstöðu.

112 Dómurinn tekur einnig fram að við munnlegan málflutning hélt Samkeppniseftirlitið því fram að Sorpa hafi notfært sér ráðandi stöðu sína á markaði fyrir förgun úrgangs til að styrkja stöðu sína á markaði fyrir móttöku úrgangs. Sérstaklega var vísað til útboðs Hafnarfjarðar á sorphirðu sveitarfélagsins vegna heimilissorps árið 2009. Samkvæmt útboðsskilmálum hafi bjóðendum verið gefinn kostur á að velja hvort úrganginum yrði skilað til móttökustöðvar

waste either Sorpa's acceptance centre at Gufunes or a competing acceptance centre. According to the Competition Authority, if the tenderer elected to use Sorpa's centre at Gufunes, the municipality of Hafnarfjörður would receive the owners' discount twice: first, on the fee for waste acceptance at Gufunes; second, on the fee for waste disposal at Sorpa's landfill site at Álfsnes. If, however, the tenderer delivered the waste to a competing acceptance centre, for instance at Gámaþjónustan's centre at Berghella 1, the municipality of Hafnarfjörður would obviously not receive the owners' discount on the fee for waste acceptance. Nor would it be granted the owners' discount on the fee for waste disposal at Sorpa's landfill site at Álfsnes, which it would be obliged to use since Sorpa has a *de facto* monopoly on the market for waste disposal in the metropolitan area of Reykjavík. It would only receive the lower discount on the fee for waste disposal which Sorpa granted large customers. Therefore, in practice Sorpa prevented its competitors on the market for waste acceptance, in particular Gámaþjónustan, from receiving any business from the municipality of Hafnarfjörður.

113 It is for the referring court to verify whether the situation described in paragraph 112 is accurate. The Court finds that in that situation, be it accurate, Article 54(2)(c) EEA does not apply. Although the first condition of Article 54(2)(c) EEA may be met, the second likely is not.

114 As regards the condition that dissimilar conditions be applied to equivalent transactions, Sorpa grants the owners' discount on the fee for waste disposal to the municipality of Hafnarfjörður, should that waste be bundled at Sorpa's acceptance centre at Gufunes. Gámaþjónustan receives a lower discount on the fee for waste disposal. The first condition of Article 54(2)(c) EEA may thus be met.

115 However, the condition that the party discriminated against be placed at a competitive disadvantage does not appear to be met, since the party receiving the owners' discount, namely the

Sorpu eða móttökustöðvar samkeppnisaðila. Að sögn Samkeppniseftirlitsins var málum þannig háttað að ef bjóðandi kysi að nota móttökustöðina í Gufunesi nyti Hafnarfjörður eigendaafsláttarins í tvígang: fyrst af gjaldinu vegna móttöku úrgangs í Gufunesi, og því næst af gjaldinu vegna förgunar úrgangsins á urðunarstaðnum á Álfsnesi. Ef bjóðandinn skilaði úrganginum á móttökustöð samkeppnisaðila, til dæmis á móttökustöð Gámaþjónustunnar að Berghellu 1, yrði Hafnarfjörður augljóslega af eigendaafslættinum vegna móttöku úrgangsins. Sveitarfélagið nyti heldur ekki eigendaafsláttarins vegna förgunar úrgangsins á urðunarstaðnum á Álfsnesi, sem það yrði þó að nota, þar sem Sorpa hefur í raun einokunarstöðu á markaði fyrir förgun úrgangs á höfuðborgarsvæðinu. Það nyti einungis hins lægri afsláttar sem Sorpa veitti stærri viðskiptavinum vegna förgunar úrgangs. Sorpa hafi því, í reynd, komið í veg fyrir að keppninautar þess á markaði fyrir móttöku úrgangs, sérstaklega Gámaþjónustan, gætu fengið notið viðskipta við sveitarfélagið Hafnarfjörð.

113 Það er landsdómstólsins að meta hvort málsatvik hafi verið með þeim hætti sem er lýst í undanfarandi málsgrein. Sé málsatvikum þar rétt lýst telur dómurinn c-lið 2. mgr. 54. gr. EES-samningsins ekki eiga við. Þótt fyrra skilyrði ákvæðisins kunni að vera uppfyllt, er líklega ekki svo um síðara skilyrðið.

114 Hvað varðar skilyrðið um að ólíkum skilmálum sé beitt um sams konar viðskipti, veitir Sorpa Hafnarfjarðarbæ eigendaafslátt af förgun úrgangs ef úrgangurinn er baggaður á móttökustöð Sorpu á Gufunesi. Gámaþjónustan nýtur minni afsláttar af gjaldi vegna sorpeyðingar. Fyrra skilyrði c-liðar 2. mgr. 54. gr. EES-samningsins kann því að vera uppfyllt.

115 Skilyrðið um að samkeppnisstaða aðilans sem mismununin kemur niður á hafi veikst virðist á hinn bóginn ekki vera uppfyllt þar sem aðilinn sem nýtur eigendaafsláttarins, það er Hafnarfjarðarbær,

municipality of Hafnarfjörður, is not active on the upstream market for waste acceptance, where Gámaþjónustan operates. Rather, Gámaþjónustan is placed at a competitive disadvantage vis-à-vis Sorpa itself on that upstream market. Since the municipality of Hafnarfjörður receives the owners' discount on the fee for waste disposal only if it uses Sorpa's acceptance centre, Gámaþjónustan does not receive any business from that municipality on the upstream market for waste acceptance. Sorpa receives that business.

116 As mentioned by the Commission in its written observations and by the Competition Authority at the hearing, the conduct described in paragraph 112 may nevertheless constitute an abuse within the meaning of Article 54 EEA. In particular, it may constitute unlawful tying or margin squeeze, provided that the conditions laid down by case law are met (as regards tying, compare, for example, the judgment in Microsoft Corp. v Commission, T-201/04, EU:T:2007:289 and, as regards margin squeeze, the judgment in *Telefónica SA* v *Commission*, C-295/12 P, EU:C:2014:2062).

117 Since pursuant to Article 11(3) of the Waste Disposal Act the fee amount charged by Sorpa cannot exceed the costs incurred, Sorpa may furthermore have engaged in predatory pricing by granting rebates on such fees. At the hearing, when asked whether, should Sorpa's conduct not be regarded as an infringement of Article 54(2)(c) EEA, it may constitute another type of abuse, neither the Competition Authority nor ESA or the Commission touched upon predatory pricing. But for the sake of completeness, the Court recalls that prices below average variable costs must be considered prima facie abusive inasmuch as, in applying such prices, an undertaking in a dominant position is presumed to pursue no other economic objective save that of eliminating its competitors, and that prices below average total costs but above average variable costs are to be considered abusive only where they are fixed in the context of a plan

starfar ekki á aðliggjandi markaði fyrir móttöku úrgangs, sem er markaðurinn sem Gámaþjónustan starfar á. Gámaþjónustan virðist frekar búa við veikta samkeppnisstöðu gagnvart Sorpu á þeim aðliggjandi markaði. Þar sem Hafnarfjarðarbær nýtur aðeins eigendaafsláttar af gjaldi vegna sorpeyðingar þegar hann notast við móttökustöð Sorpu, verður Gámaþjónustan af öllum viðskiptum við sveitarfélagið á aðliggjandi markaði fyrir móttöku úrgangs. Sorpa fær þau viðskipti.

116 Líkt og fram kom í skriflegum athugasemdum framkvæmdastjórnarinnar og munnlegum málflutningi Samkeppniseftirlitsins getur háttsemi líkt og sú sem lýst er í 112. mgr. engu að síður talist misnotkun í skilningi 54. gr. EES-samningsins. Hún getur þannig einkum talist ólögmæt samtvinnun eða verðþrýstingur, ef hún uppfyllir þau skilyrði sem mörkuð hafa verið í dómaframkvæmd (sjá til dæmis mál *Microsoft Corp.* gegn *framkvæmdastjórninni*, T-201/04, EU:T:2007:289, varðandi samtvinnun, og mál *Telefónica SA* gegn *framkvæmdastjórninni*, C-295/12 P, EU:C:2014:2062 varðandi verðþrýsting).

117 Þar sem gjaldtaka Sorpu má ekki vera umfram kostnað sem til fellur, í samræmi við 3. mgr. 11. gr. laga um meðhöndlun úrgangs, kann jafnframt að vera að Sorpa hafi stundað undirverðlagningu með því að veita afslætti af þeim gjöldum. Hvorki Samkeppniseftirlitið, ESA né framkvæmdastjórnin nefndu undirverðlagningu er þau voru spurð að því, við munnlegan málflutning, hvort háttsemi Sorpu gæti ekki talist annars konar misnotkun ef hún teldist ekki brjóta gegn c-lið 2. mgr. 54. gr. EES-samningsins. Dómurinn telur engu að síður rétt að benda á að alla jafna megi ganga út frá því að verð sem eru undir meðaltali breytilegs kostnaðar feli í sér misnotkun, þar sem gera megi ráð fyrir því að fyrirtæki sem hefur markaðsráðandi stöðu hafi aðeins útilokun samkeppni að leiðarljósi með slíkri verðlagningu. Verð undir meðaltali heildarkostnaðar en yfir meðaltali breytilegs kostnaðar skulu þó aðeins teljast mismunun í

having the purpose of eliminating a competitor (see, for comparison, the judgment in *France Télécom*, C-202/07 P, EU:C:2009:214, paragraph 109). It is for the referring court to examine whether those conditions are met in the present case.

118 Therefore, the answer to the fourth question is that the owners of a municipal cooperative may be regarded as the trading parties of that cooperative within the meaning of Article 54(2)(c) EEA, unless they form one undertaking with that cooperative. By granting its owners a discount which it denies to its other customers, a dominant undertaking places those other customers at a competitive disadvantage within the meaning of that provision, provided that they compete with the dominant undertaking's owners on a market upstream or downstream of the dominated market.

IV COSTS

119 The costs incurred by 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.

þeim tilvikum þegar þau eru ákveðin með það fyrir augum að losna við samkeppnisaðila (sjá, til samanburðar, mál *France Télécom*, C-202/07 P, EU:C:2009:214, 109. mgr.). Það er landsdómstólsins að meta hvort þeim skilyrðum sé fullnægt í fyrirliggjandi máli.

118 Því ber að svara fjórðu spurningunni með þeim hætti að eigendur byggðasamlags geti talist viðskiptaaðilar byggðasamlagsins í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, nema þau myndi eitt fyrirtæki ásamt byggðasamlaginu. Með veitingu afsláttar til eigenda, sem aðrir viðskiptavinir njóta ekki, veikir ráðandi fyrirtæki samkeppnisstöðu annarra viðskiptavina í skilningi ákvæðisins, að því gefnu að þau fyrirtæki séu keppinautar eigenda hins ráðandi fyrirtækis á markaði sem er aðliggjandi eða fráliggjandi markaði sem fyrirtækið er ráðandi á.

IV MÁLSKOSTNAÐUR

119 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 Hæstarétti Íslands 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 the Supreme Court of Iceland hereby gives the following Advisory Opinion:

1. **A municipality may constitute an undertaking within the meaning of Article 54 EEA when it engages in an economic activity, which consists in the offering of goods or services on the market. In order to determine whether an activity such as waste management is economic, account must be taken of the existence of competition with private entities. In that regard, the fact that the fee received for the provision of waste management services cannot exceed the costs incurred must be balanced against the existence of competition on the market.**

2. **Waste management may constitute a service of general economic interest within the meaning of Article 59(2) EEA. It is for the referring court to determine whether the application of Article 54 EEA would make it impossible for the municipalities to provide the waste management services they have been entrusted with, or to provide them under economically acceptable conditions.**

3. **In order to determine whether a public entity constitutes an undertaking within the meaning of the EEA competition rules when it provides waste management services, it is irrelevant whether that entity is a municipality or a cooperative agency entered into by several municipalities.**

4. **Article 54 EEA does not apply to anti-competitive conduct which is required of undertakings by national legislation, or if national legislation creates a legal framework which itself eliminates any possibility of competitive activity on their part.**

Með vísan til framangreindra forsendna lætur,

Dómstóllinn

uppi svohljóðandi ráðgefandi álit um spurningar þær sem Hæstiréttur Íslands beindi til dómstólsins:

1. **Sveitarfélag getur talist fyrirtæki í skilningi 54. gr. EES-samningsins þegar það sinnir efnahagsstarfsemi sem felur í sér að það bjóði vörur eða þjónustu á markaði. Þegar skorið skal úr um hvort starfsemi á borð við meðferð úrgangs teljist efnahagsleg, verður að taka mið af því hvort samkeppni frá einkaaðilum sé til staðar. Í því sambandi verður að meta þá staðreynd, með hliðsjón af samkeppni á markaðnum, að gjaldið sem innheimt er fyrir þjónustu við meðferð úrgangs má ekki vera umfram kostnað sem til fellur.**

2. **Meðferð úrgangs getur talist þjónusta er hefur almenna efnahagslega þýðingu í skilningi 2. mgr. 59. gr. EES-samningsins. Það er landsdómstólsins að meta hvort beiting 54. gr. EES-samningsins geri sveitarfélögunum ómögulegt að veita þá þjónustu við meðferð úrgangs sem þeim hefur verið falin, eða veita hana við efnahagslega ásættanlegar aðstæður.**

3. **Þegar skorið skal úr um hvort opinber stofnun teljist fyrirtæki í skilningi samkeppnisreglna EES-samningsins þegar hún veitir þjónustu við meðferð úrgangs, skiptir ekki máli hvort stofnunin sé sveitarfélag eða byggðasamlag sem mörg sveitarfélög standa saman að.**

4. **Ákvæði 54. gr. EES-samningsins gildir hvorki um samkeppnishamlandi háttsemi sem mælt er fyrir um í landslögum, né tilvik þar sem landslög útbúa umgjörð sem kemur í veg fyrir samkeppni fyrirtækja. Þó getur 54. gr. EES-**

However, Article 54 EEA may apply if national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.

5. **Should an EEA State, by national legislation, grant public entities a derogation from the application of the EEA competition rules, for instance by granting them special or exclusive rights, it must do so in accordance with the EEA competition rules, in particular with Article 59(1) EEA.**

6. **The owners of a municipal cooperative may be regarded as the trading parties of that cooperative within the meaning of Article 54(2)(c) EEA, unless they form one undertaking with that cooperative.**

7. **By granting its owners a discount which it denies to its other customers, a dominant undertaking places those other customers at a competitive disadvantage within the meaning of Article 54(2)(c) EEA, provided that they compete with the dominant undertaking's owners on a market upstream or downstream of the dominated market.**

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

Delivered in open court in Luxembourg on
22 September 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

samningsins átt við ef landslög girða ekki fyrir að fyrirtæki geti að eigin frumkvæði komið í veg fyrir, takmarkað eða raskað samkeppni.

5. **EES-ríki sem með löggjöf sinni veitir opinberum aðilum undanþágu frá beitingu samkeppnisreglna EES-samningsins, til dæmis með því að veita þeim sérstök réttindi eða einkarétt, verður að gera slíkt í samræmi við samkeppnisreglur EES-samningsins, sérstaklega 1. mgr. 59. gr. hans.**

6. **Eigendur byggðasamlags geta talist viðskiptaaðilar þess í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, nema þau myndi eitt fyrirtæki ásamt byggðasamlaginu.**

7. **Með veitingu afsláttar til eigenda, sem aðrir viðskiptavinir njóta ekki, veikir ráðandi fyrirtæki samkeppnisstöðu annarra viðskiptavina í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, að því gefnu að þau fyrirtæki séu keppinautar eigenda hins ráðandi fyrirtækis á markaði sem er aðliggjandi eða fráliggjandi þeim markaði sem fyrirtækið er ráðandi á.**

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

Kveðið upp i heyranda hljóði í Lúxemborg
***22. september 2016**.*

Gunnar Selvik
Dómritari

Carl Baudenbacher
Forseti

Report for the Hearing

in Case E-29/15

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 Iceland (*Hæstiréttur Íslands*), in a case pending before it between

Sorpa bs.

≡V≡

The Icelandic Competition Authority (*Samkeppniseftirlitið*)

concerning the interpretation of the EEA Agreement, and in particular Article 54 thereof.

I INTRODUCTION

1 By a letter dated 9 December 2015, registered at the Court as Case E29/15 on 10 December 2015, the Supreme Court of Iceland (*Hæstiréttur Íslands*) requested an Advisory Opinion in the case pending before it between Sorpa bs. ("Sorpa") and the Icelandic Competition Authority (*Samkeppniseftirlitið*) ("the Competition Authority"). By its request, the Supreme Court of Iceland referred four questions concerning the interpretation of Article 54 EEA.

2 The case before the referring court concerns an action for annulment of a decision of 18 March 2013 by the Icelandic Competition Appeals Committee (Áfrýjunarnefnd samkeppnismála) upholding a decision by the Competition Authority to impose a fine on Sorpa for abusing its dominant position on the markets for waste acceptance and waste disposal in the metropolitan area of Reykjavík.

Skýrsla Framsögumanns

Í máli E-29/15

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

Sorpu bs.

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Samkeppniseftirlitinu

varðandi skýringu samningsins um Evrópska efnahagssvæðið, sérstaklega 54. gr. hans.

I INNGANGUR

1 Með bréfi dagsettu 9. desember 2015, sem skráð var í málaskrá dómstólsins sem mál E-29/15 þann 10. desember sama ár óskaði Hæstiréttur Íslands ráðgefandi álits í máli sem rekið er fyrir dómstólnum milli Sorpu bs (Sorpa) og Samkeppniseftirlitsins. Hæstiréttur beindi fjórum spurningum um skýringu 54. gr. EES-samningsins til dómstólsins.

2 Í málinu sem rekið er fyrir Hæstarétti er farið fram á ógildingu ákvörðunar áfrýjunarnefndar samkeppnismála frá 18. mars 2013, sem staðfesti ákvörðun Samkeppniseftirlitsins um að sekta Sorpu vegna misnotkunar á ráðandi stöðu sinni á markaði fyrir móttöku og förgun úrgangs á höfuðborgarsvæði Reykjavíkur.

II LEGAL BACKGROUND

EEA LAW

3 Article 54 EEA reads as follows:

An 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.

4 Article 59 EEA reads as follows:

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.

II LÖGGJÖF

EES-RÉTTUR

3 Í 54. gr. EES-samningsins segir:

Misnotkun eins eða fleiri fyrirtækja á yfirburðastöðu á svæðinu sem samningur þessi tekur til, eða verulegum hluta þess, er ósamrýmanleg framkvæmd samnings þessa og því bönnuð að því leyti sem hún kann að hafa áhrif á viðskipti milli samningsaðila.

Slík misnotkun getur einkum falist í því að:

(a) beint eða óbeint sé krafist ósanngjarns kaup- eða söluverðs eða aðrir ósanngjarnir viðskiptaskilmálar settir;

(b) settar séu takmarkanir á framleiðslu, markaði eða tækniþróun, neytendum til tjóns;

(c) öðrum viðskiptaaðilum sé mismunað með ólíkum skilmálum í sams konar viðskiptum og samkeppnisstaða þeirra þannig veikt;

(d) sett sé það skilyrði fyrir samningagerð að hinir viðsemjendurnir taki á sig viðbótarskuldbindingar sem tengjast ekki efni samninganna, hvorki í eðli sínu né samkvæmt viðskiptavenju.

4 Í 59. gr. EES-samningsins segir:

1. Eigi í hlut opinber fyrirtæki, og fyrirtæki sem aðildarríki EB eða EFTA-ríki veita sérstök réttindi eða einkarétt, skulu samningsaðilar tryggja að hvorki séu gerðar né viðhaldið nokkrum þeim ráðstöfunum sem fara í bága við reglur samnings þessa, einkum reglur sem kveðið er á um í 4. gr. og 53.–63. gr.

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.*

3. *The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measure to the States falling within their respective territory.*

NATIONAL LAW

THE COMPETITION ACT

5 Article 11 of the Competition Act No. 44/2005 ("the Competition Act") was enacted in order to fulfil Iceland's obligation under the EEA Agreement to implement Article 54 EEA.

6 Article 11 of the Competition Act reads as follows:

Any abuse by one or more undertakings of a dominant position is prohibited.

Abuse according to Paragraph 1 may, inter alia, 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;

2. Reglur samnings þessa, einkum reglurnar um samkeppni, gilda um fyrirtæki sem falið er að veita þjónustu er hefur almenna efnahagslega þýðingu eða eru í eðli sínu fjáröflunareinkasölur, að því marki sem beiting þeirra kemur ekki í veg fyrir að þau geti að lögum eða í raun leyst af hendi þau sérstöku verkefni sem þeim eru falin. Þróun viðskipta má ekki raska í þeim mæli að það stríði gegn hagsmunum samningsaðilanna.

3. Framkvæmdastjórn EB og eftirlitsstofnun EFTA skulu hvor innan síns valdsviðs tryggja að ákvæðum þessarar greinar sé beitt og gera, eftir því sem þörf krefur, viðeigandi ráðstafanir gagnvart þeim ríkjum sem eru á svæðum hvorrar um sig.

LANDSRÉTTUR

SAMKEPPNISLÖG

5 11. gr. samkeppnislaga nr. 44/2005 (samkeppnislög) var lögtekin til þess að skyldur Íslands samkvæmt EES-samningnum um að innleiða 54. gr. samningsins yrðu uppfylltar.

6 Í 11. gr. samkeppnislaga segir:

Misnotkun eins eða fleiri fyrirtækja á markaðsráðandi stöðu er bönnuð.

Misnotkun skv. 1. mgr. getur m.a. falist í því að:

(a) beint eða óbeint sé krafist ósanngjarns kaup- eða söluverðs eða aðrir ósanngjarnir viðskiptaskilmálar settir,

(b) settar séu takmarkanir á framleiðslu, markaði eða tækniþróun, neytendum til tjóns,

(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.

THE WASTE DISPOSAL ACT

7 The Waste Disposal Act No 55/2003 ("the Waste Disposal Act") was adopted, inter alia, to give effect in Icelandic law to rules corresponding to Directive 75/442/EEC on waste,[1] Directive 1999/31/EC on the landfill of waste,[2] Directive 2000/53/EC on end-of-life vehicles[3] and Directive 2000/76/EC on the incineration of waste.[4]

8 According to Article 4(5) of the Waste Disposal Act, at the material time, municipalities were to determine arrangements for collecting domestic and industrial waste produced in their municipal area and they were responsible for transportation of domestic waste. They were to ensure that collection and acceptance centres were operated in their area. Under Article 5 of the Waste Disposal Act, the Environment Agency of Iceland granted licences for waste acceptance centres, which could not be operated without such a licence. Articles 6 and 8 of the Waste Disposal Act specified that licences should be issued to private as well as public entities.

1 Council Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 L 194, p. 39.

2 Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, OJ 1999 L 182, p. 1.

3 Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles, OJ 2000 L 269, p. 34.

4 Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste, OJ 2000 L 332, p. 91.

(c) viðskiptaaðilum sé mismunað með ólíkum skilmálum í sams konar viðskiptum og samkeppnisstaða þeirra þannig veikt,

(d) sett sé það skilyrði fyrir samningagerð að hinir viðsemjendurnir taki á sig viðbótarskuldbindingar sem tengjast ekki efni samninganna, hvorki í eðli sínu né samkvæmt viðskiptavenju.

LÖG UM MEÐHÖNDLUN ÚRGANGS

7 Með lögum nr. 55/2003 um meðhöndlun úrgangs (lög um meðhöndlun úrgangs) var meðal annars stefnt að því að leiða inn í landsrétt reglur sem svara til tilskipunar 75/442/EBE um úrgang,[1] tilskipunar 1999/31/EB um urðun úrgangs,[2] tilskipunar 2000/53/EB um úr sér gengin ökutæki[3] og tilskipunar 2000/76/EB um brennslu úrgangs. [4]

8 Á þeim tíma sem máli skiptir fyrir atvik þessa máls var í 5. mgr. 4. gr. laga um meðhöndlun úrgangs mælt fyrir um að sveitarfélög skyldu ákveða fyrirkomulag söfnunar og flutnings á heimilis- og rekstrarúrgangi og báru ábyrgð á flutningi heimilisúrgangs. Þeim bar að tryggja rekstur móttöku- og söfnunarstöðva fyrir úrgang í þeirra umdæmi. Samkvæmt 5. gr. laganna veitti Umhverfisstofnun starfsleyfi fyrir móttökustöðvar úrgangs, sem óheimilt var að reka án slíks leyfis. Af 6. og 8. gr. laganna leiddi að slíkt leyfi skyldi veita hvort heldur einka- eða opinberum aðilum.

1 Tilskipun ráðsins 75/442/EBE frá 15. júlí 1975 um úrgang, stjtíð. ESB 1975 L 194, bls. 39.
2 Tilskipun ráðsins 1999/31/EB frá 26. apríl 1999 um urðun úrgangs, stjtíð. ESB 1999 L 182, bls. 1.
3 Tilskipun Evrópuþingsins og ráðsins 2000/53/EB frá 18. september 2000 um úr sér gengin ökutæki, stjtíð. ESB L 269, bls. 34.
4 Tilskipun Evrópuþingsins og ráðsins 2000/76/EB frá 4. desember 2000 um brennslu úrgangs, stjtíð. ESB 2000 L 332, bls. 91.

9 Pursuant to Article 11(1) of the Waste Disposal Act, the entity operating a disposal site, whether this was a municipality, a municipal cooperative undertaking or a private entity, was obliged to charge a fee for the disposal of waste. As regards all other types of waste management, Article 11(2) allowed the municipality to charge a fee. According to Article 11(3), fees charged by a municipality or a municipal cooperative undertaking could not exceed the costs incurred by it for the management of waste and the activities related thereto compatible with the aims of the Waste Disposal Act.

THE LOCAL GOVERNMENT ACT

10 Article 98 of the Local Government Act No 8/1986 ("the Local Government Act") provided, at the material time, that municipalities could enter into an agreement establishing a cooperative undertaking for the performance of specific functions.

11 Pursuant to Article 98 of the Local Government Act, that agreement had to specify, in particular, the share owned by each municipality in the cooperative undertaking, the functions which the cooperative undertaking was to perform, as well as the arrangements for the election of its board and the term of appointment of the board members. That agreement also had to contain provisions relating to the authority of the board to undertake commitments binding upon its owners, and the circumstances in which the municipal councils of the member municipalities were to decide on the cooperative undertaking's affairs. It also had to include provisions authorising the cooperative undertaking to enter into contracts with either private entities or certain owners under which those private entities or individual owners assumed specific aspects of the cooperative undertaking's functions. Further, it had to include provisions pertaining to the withdrawal of its owners from the cooperative undertaking. Finally, Article 98 of the Local Government Act

9 Samkvæmt 1. mgr. 11. gr. laga um meðferð úrgangs, var rekstraraðila förgunarstaðar, hvort sem um sveitarfélag, byggðasamlag eða einkaaðila var að ræða, skylt að innheimta gjald fyrir förgun úrgangs. Í 2. mgr. 11. gr. var kveðið á um heimild sveitarfélags til að innheimta gjald fyrir alla aðra meðferð úrgangs. Í 3. mgr. var mælt fyrir um að gjöld sem sveitarfélag eða byggðasamlag innheimtu skyldu ekki vera hærri en sem næmi kostnaði sem félli á það við meðferð úrgangs og tengda starfsemi sem samræmdist markmiðum laganna um meðhöndlun úrgangs.

SVEITARSTJÓRNARLÖG

10 Þegar atvik málsins átti sér stað var í 98. gr. sveitarstjórnarlaga nr. 8/1986 kveðið á um að sveitarfélögum væri heimilt að gera með sér samning um stofnun byggðasamlags til að taka að sér framkvæmd afmarkaðra verkefna.

11 Samkvæmt 98. gr. sveitarstjórnarlaga nr. 8/1986 (sveitarstjórnarlög) bar sveitarfélögunum að tiltaka í samningnum hvaða eignarhlut hvert þeirra ætti í samlaginu, hvaða verkefnum samlagið ætti að sinna og hvernig færi um kjör stjórnar þess og kjörtímabil stjórnarmanna. Samningurinn skyldi einnig innihalda ákvæði um umboð stjórnarinnar til að skuldbinda eigendur og undir hvaða kringumstæðum sveitarstjórnir sveitarfélaganna sem aðild ættu að samlaginu þyrftu sjálf að taka ákvarðanir um málefni samlagsins. Einnig bar að tiltaka í samningnum, heimildir samlagsins til að gera samninga við annað hvort einkaaðila eða einstaka eigendur þess um að viðkomandi einkaaðilar eða einstakir eigendur tækju yfir afmarkaða þætti í starfsemi samlagsins. Enn fremur, skyldi samningurinn innihalda ákvæði um heimildir eigendanna til að ganga úr samlaginu. Loks var mælt fyrir um í 98. gr. sveitarstjórnarlaga að eigendur bæru ábyrgð hver fyrir sig á fjárhagslegum skuldbindingum sem byggðasamlagið hefði gengist

provided that the owners were individually liable for the financial obligations undertaken by the cooperative undertaking. However, *inter partes* their liability was proportional to their population.

III FACTS AND PROCEDURE

BACKGROUND

12 Sorpa was established on 15 February 1988 as a cooperative undertaking by an agreement ("the establishment contract") between the City of Reykjavík and the municipalities of Kópavogur, Garðabær, Bessastaðahreppur, Hafnarfjörður, Mosfellsbær and Seltjarnarnes (Sorpa's "owners"), pursuant to the Local Government Act No 8/1986. The name "Sorpa" is an abbreviation for "Sorpeyðing höfuðborgarsvæðisins", which means "Metropolitan Area Waste Disposal". Each of those municipalities owns a share in Sorpa. However, since the municipalities of Garðabær and Bessastaðahreppur have merged, Sorpa now has only six owners.

13 Sorpa is active in the waste management sector, including waste recycling. On 11 June 2001, two licences were issued to Sorpa for the operation of an acceptance, sorting and bundling centre for waste at Gufunes and a landfill site at Álfsnes, both situated in Reykjavík. Those licences were to run until the end of 2012.

14 Sorpa is not engaged in waste collection, either from homes or from businesses.

15 Sorpa's functions, as defined by the establishment contract, consist in providing and operating landfill sites, building and operating acceptance centres, transporting waste from such centres, producing and selling fuel and energy from waste, and processing and selling substances derived from waste for recycling. Sorpa's functions also include collaboration with companies active in the waste

undir. Innbyrðis skiptist ábyrgðin milli þeirra í hlutfalli við íbúatölu þeirra.

III MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

FORSAGA MÁLSINS

12 Sorpa var stofnuð 15. febrúar 1988 sem byggðasamlag með samningi (stofnsamningurinn) milli Reykjavíkurborgar, Kópavogsbæjar, Garðabæjar, Bessastaðahrepps, Hafnarfjarðarbæjar, Mosfellsbæjar og Seltjarnarnesbæjar (eigendur Sorpu) samkvæmt þágildandi sveitarstjórnarlögum nr. 8/1986. Nafnið „Sorpa“ er stytting á heitinu „Sorpeyðing höfuðborgarsvæðisins“. Hvert þessara sveitarfélaga á hlut í Sorpu, en þar sem Garðabær og Bessastaðahreppur hafa síðan sameinast eru eigendur Sorpu aðeins sex í dag.

13 Sorpa starfar á sviði meðhöndlunar úrgangs, þar á meðal endurvinnslu hans. Gefin voru út starfsleyfi, 11. júní 2001, sem Sorpu voru veitt til starfrækslu móttöku-, flokkunar- og böggunarstöðvar fyrir úrgangsefni í Gufunesi í Reykjavík og urðunarstaðar á Álfsnesi í Reykjavík. Þau leyfi áttu að gilda til ársloka 2012.

14 Sorpa fæst ekki við sorphirðu, hvort heldur frá heimilum eða fyrirtækjum.

15 Verkefni Sorpu, eins og þau eru skilgreind í stofnsamningnum felast í því að útvega og starfrækja urðunarstaði fyrir sorp, reisa og reka móttökustöðvar, flytja sorp frá slíkum stöðvum, framleiða og selja eldsneyti og orku úr sorpi, vinna og selja efni úr því til endurnýtingar. Verkefni Sorpu taka einnig til samstarfs við fyrirtæki sem starfa á sviði meðhöndlunar úrgangsefna, að fylgjast með

management sector, following technical developments in that sector, seeing to the disposal of hazardous waste, developing new methods for extracting value from waste materials, and promoting its projects. Sorpa is also engaged in advocating the importance of giving proper consideration to environmental issues in the handling of waste and the preparation of the regional plans provided for by national legislation. Moreover, the establishment contract provides that its owners may entrust Sorpa with other tasks at any given time.

16 The establishment contract provides that Sorpa's board of directors consists of one representative per member municipality. The board approves the annual budget and the project schedule, as well as all "major agreements that are made and are not considered part of the day-to-day management functions of the general manager". The board also appoints the general manager. It sets the amount of the fees to be paid for the services provided by the cooperative undertaking.

17 Sorpa's sources of income include, according to the establishment contract, the fees received "for weighed-in waste accepted from the waste disposal services of the relevant municipality and from private entities". They also include the revenues generated by the sale of substances derived from waste recycling and the sale of energy produced from waste, as well as the fees received for the acceptance and the disposal of hazardous waste substances and the dividends received from undertakings of which Sorpa is a shareholder.

18 Sorpa's expenses consist, inter alia, of dividends paid to its owners. The establishment contract provides that those dividends may take the form of "owner's discounts". Sorpa does not charge its owners the full amount of the fee that it sets for accepting waste at the Gufunes centre, and which covers only the costs incurred. Instead, Sorpa grants its owners a discount on such fee. In 2010, the owner's discount amounted to 18 % as regards domestic waste.

tækniþróun í þeim geira, sjá um eyðingu hættulegra úrgangsefna, þróa nýjar aðferðir til að vinna verðmæti úr úrgangsefnum og kynna verkefni sín. Sorpa fæst einnig við kynningarstarf um mikilvægi þess að hæfilegt tillit sé tekið til umhverfissjónarmiða við meðferð sorps og gerð svæðisáætlana í samræmi við landslög. Í stofnsamningnum er enn fremur kveðið á um að eigendurnir geti falið Sorpu að sinna öðrum verkefnum þegar þörf krefur.

16 Samkvæmt stofnsamningnum skal einn fulltrúi frá hverju aðildarsveitarfélagi eiga sæti í stjórn Sorpu. Stjórnin samþykkir árlega fjárhags- og starfsáætlun auk allra „meiriháttar samninga sem gerðir eru og ekki teljast til daglegrar stjórnunar framkvæmdastjóra." Stjórnin ræður einnig framkvæmdastjóra og hún ákveður gjaldskrá fyrir þjónustu sem veitt er af hálfu byggðasamlagsins.

17 Samkvæmt stofnsamningnum eru tekjur Sorpu gjöld „fyrir innvegið sorp sem tekið er við frá sorphirðu viðkomandi sveitarfélags og einkaaðilum". Einnig samanstanda tekjurnar af söluverði efna sem til verða vegna endurvinnslu úrgangs og söluverði orku sem unnin er úr úrgangsefnum, sem og gjöldum sem innheimt eru fyrir móttöku og eyðingu hættulegra úrgangsefna, auk móttekins arðs úr hendi félaga sem Sorpa er hluthafi í.

18 Útgjöld Sorpu felast meðal annars í arðgreiðslum til eigenda. Stofnsamningurinn kveður á um að þær arðgreiðslur megi vera í formi „eigendaafsláttar". Sorpa rukkar eigendur sína ekki um alla fjárhæð þess gjalds sem það tekur fyrir móttöku sorps í móttökustöðinni í Gufunesi, og sem nemur einungis útlögðum kostnaði. Þess í stað veitir Sorpa eigendum sínum afslátt af slíku gjaldi. Árið 2010 nam eigendaafslátturinn 18% vegna heimilisúrgangs.

19 Customers other than Sorpa's owners are granted "customer discounts", whose amount varies in accordance with the monthly turnover achieved with the customer. As from 1 December 2009, customer discounts amounted to 3 % for a monthly turnover between ISK 500 000 and ISK 1 000 000; 5 % for a monthly turnover between ISK 1 001 000 and ISK 5 000 000; and 7% for a monthly turnover in excess of ISK 5 million.

20 Gámaþjónustan hf. ("Gámaþjónustan") is a private company active in the waste management and recycling business. It runs an acceptance and sorting centre at Berghella 1 in Hafnarfjörður, under an operating licence issued on 18 February 2011 and valid for 16 years. The waste treated at Berghella 1 originates, inter alia, from the municipality of Hafnarfjörður, an owner of Sorpa.

21 Gámaþjónustan has also collected waste for the municipality of Hafnarfjörður since 2003.

22 Gámaþjónustan's centre at Berghella 1 competes with Sorpa's acceptance and sorting centre at Gufunes. In 2009, the Gufunes centre accounted for 68.2 % by income and 67.3 % by volume of the market in the metropolitan area of Reykjavík, while the market share of the Berghella 1 centre amounted to 31.8 % by income and 32.7 % by volume during the same period. In 2010, while the Gufunes centre held 72.6 % of the market by income and 68.8 % by volume, the Berghella 1 centre accounted for 27.4 % of the market by income and 31.2 % by volume.

23 Gámaþjónustan does not run any landfill sites. Only one landfill site is operated in the metropolitan area: Sorpa's centre at Álfsnes. Therefore, Gámaþjónustan disposes of the waste that, after treatment at Berghella 1, cannot be recycled, by depositing it at Álfsnes.

24 On 10 December 2009, Gámaþjónustan lodged a complaint against Sorpa with the Competition Authority.

19 Viðskiptavinum Sorpu, öðrum en eigendum, er veittur „afsláttur viðskiptavina“ sem er breytilegur eftir mánaðarlegri veltu viðskiptavinarins hjá fyrirtækinu. Frá 1. desember 2009 var veittur 3% afsláttur vegna mánaðarlegrar veltu á milli 500.000 kr. og 1.000.000 kr., 5% vegna veltu á milli 1.001.000 kr. og 5.000.000 kr. og 7% vegna mánaðarlegrar veltu sem næmi meir en 5.000.000 kr.

20 Gámaþjónustan hf. (Gámaþjónustan) er félag í einkaeigu sem fæst við meðhöndlun úrgangs og endurvinnslu. Félagið rekur móttöku- og flokkunarstöð að Berghellu 1 í Hafnarfirði, samkvæmt starfsleyfi sem henni var veitt 18. febrúar 2011 og gildir til 16 ára. Úrgangurinn sem meðhöndlaður er að Berghellu 1 kemur meðal annars frá Hafnarfjarðarbæ, einum eigenda Sorpu.

21 Gámaþjónustan hefur einnig sinnt sorphirðu fyrir Hafnarfjarðarbæ frá 2003.

22 Stöð Gámaþjónustunnar að Berghellu er í samkeppni við móttöku- og flokkunarstöðina í Gufunesi. Á árinu 2009 var markaðshlutdeild Gufunesstöðvarinnar á höfuðborgarsvæðinu 68,2% miðað við tekjur og 67,3% miðað við magn, en á sama tímabili var markaðshlutdeild stöðvarinnar að Berghellu 1 var 31,8% miðað við tekjur og 32,7% miðað við magn. Á árinu 2010 nam hlutdeild Gufuness 72,6% miðað við tekjur og 68,8% miðað við magn, en hlutdeild Berghellu 27,4% miðað við tekjur og 31,2% miðað við magn.

23 Gámaþjónustan rekur engar urðunarstöðvar. Aðeins er rekin ein urðunarstöð á höfuðborgarsvæðinu og er það stöð Sorpu á Álfsnesi. Gámaþjónustan flytur því úrgang, sem ekki er hægt að endurvinna að lokinni meðferð að Berghellu, til urðunar á Álfsnesi.

24 Hinn 10. desember 2009 beindi Gámaþjónustan erindi til Samkeppniseftirlitsins vegna Sorpu.

25 According to the complaint, Sorpa had engaged in discriminatory pricing, thereby infringing, in particular, Article 11 of the Competition Act. First, Sorpa granted its owners, inter alia the municipality of Hafnarfjörður, favourable discounts on the fee for waste acceptance at its Gufunes centre. Therefore, when in 2009 the municipality of Hafnarfjörður launched a tender for the collection of domestic waste, whereby tenderers could choose which acceptance centre they would deliver the waste to, Gámaþjónustan was placed at a disadvantage in comparison with Sorpa. Second, by contract of 22 May 2009, Sorpa granted favourable discounts not only to its owners but also to Sorpstöð Suðurlands bs. ("Sorpstöð Suðurlands"), a cooperative undertaking established by 13 municipalities located outside Sorpa's operating area. Such discounts amounted to between 12 % and 45 % for waste delivered to Sorpa's centre at Gufunes. Consequently, Gámaþjónustan requested the Competition Authority to prohibit Sorpa from granting such favourable discounts. Alternatively, it requested the Competition Authority to order Sorpa to grant it similar discounts.

26 By decision of 21 December 2012, the Competition Authority found that Sorpa had infringed Article 11 of the Competition Act.

27 The Competition Authority rejected Sorpa's argument that basic services of waste acceptance and treatment, prescribed by law and performed using official powers, fell outside the scope of the Competition Act. The Competition Authority also rejected Sorpa's argument that, since it was not seeking profits, it could not be regarded as an undertaking within the meaning of the Competition Act.

28 The Competition Authority defined two relevant markets: the market for waste acceptance, including the sorting and bundling of waste; and the market for waste disposal. Both markets covered the metropolitan area of Reykjavík. As regards the market for waste acceptance in the metropolitan area of Reykjavík, Sorpa held a

25 Samkvæmt erindinu hafði Sorpa mismunað við viðskiptavinum við verðlagningu og þar með brotið gegn, einkum og sér í lagi, 11. gr. samkeppnislaga. Í fyrsta lagi veitti Sorpa eigendum sínum, þar á meðal Hafnarfjarðarbæ, hagstæð afsláttarkjör af móttökugjöldum vegna úrgangs, á Gufunesstöðinni. Vegna þessa hafi Gámaþjónustan staðið verr að vígi gagnvart Sorpu, þegar Hafnarfjörður bauð út sorphirðu sveitarfélagsins vegna heimilissorps árið 2009 og veitti bjóðendum kost á að velja til hvaða móttökustöðvar úrganginum yrði skilað. Í öðru lagi veitti Sorpa ekki aðeins eigendum sínum hagstæðari afslætti. Samkvæmt samningi frá 22. maí 2009, veitti hún einnig öðru byggðasamlagi afslátt, Sorpstöð Suðurlands bs. (Sorpstöð Suðurlands), sem sett hafði verið á fót af 13 sveitarfélögum utan starfssvæðis Sorpu. Slíkir afslættir voru á bilinu 12% til 45% af móttökugjöldum vegna úrgangs sem skilað var á stöð Sorpu í Gufunesi. Vegna þessa fór Gámaþjónustan fram á að við Samkeppniseftirlitið, að það bannaði Sorpu að veita svo hagstæð afsláttarkjör. Til vara fór hún fram á að Sorpu yrði gert að veita sér sambærileg afsláttarkjör.

26 Samkeppniseftirlitið komst að þeirri niðurstöðu að Sorpa hefði brotið gegn 11. gr. samkeppnislaga með ákvörðun þann 21. desember 2012.

27 Samkeppniseftirlitið hafnaði röksemdum Sorpu um að grunnþjónusta við móttöku og meðferð úrgangs, sem teldist til lögbundinna skyldna og þar sem opinberum valdheimildum væri beitt við starfsemina, félli utan gildissviðs samkeppnislaga. Samkeppniseftirlitið hafnaði jafnframt röksemdum Sorpu um að hún gæti ekki talist fyrirtæki í skilningi samkeppnislaga, þar sem hún væri ekki rekin í hagnaðarskyni.

28 Samkeppniseftirlitið skilgreindi tvo markaði sem á reyndi: annars vegar markað fyrir móttöku úrgangs, þar með talin flokkun og böggun úrgangs og hins vegar markað fyrir förgun úrgangs. Báðir markaðir náðu yfir höfuðborgarsvæði Reykjavíkur. Hvað varðaði markað fyrir móttöku úrgangs á höfuðborgarsvæði Reykjavíkur átti

65-75 % market share through its Gufunes centre, while Gámaþjónustan held a 25-35 % share through its Berghella 1 centre. Therefore, Sorpa held a dominant position on that market. As regards the market for waste disposal in the metropolitan area of Reykjavík, Sorpa was the only operator through its landfill site at Álfsnes. Sorpa was thus in a dominant position on that market too.

29 The Competition Authority found that, in granting its owners favourable discounts on the fee for waste acceptance at its Gufunes centre and in granting Sorpstöð Suðurlands substantial discounts on the same fee, Sorpa had infringed Article 11(2)(c) of the Competition Act. It imposed on Sorpa a fine of ISK 45 million.

30 On 17 January 2013, Sorpa brought an appeal against the Competition Authority's decision to the Competition Appeals Committee, which upheld the decision by ruling of 18 March 2013.

31 On 11 September 2013, Sorpa brought an action before Reykjavík District Court, seeking the annulment of the decision of the Competition Appeals Committee. That action was dismissed on the merits by judgment of 16 January 2015.

32 On 15 April 2015, Sorpa brought an appeal against the judgment of Reykjavík District Court (*Héraðsdómur Reykjavíkur*) to the Supreme Court of Iceland. On 10 December 2015, the Court received a request from the Supreme Court of Iceland for an Advisory Opinion.

IV QUESTIONS

33 The following questions have been referred to the Court:

1. **Is a municipality in a Contracting Party to the EEA Agreement which carries out, in its jurisdiction, the management of waste**

Sorpa 65-75% markaðshlutdeild með rekstri stöðvarinnar í Gufunesi, en Gámaþjónustan átti 25-35% markaðshlutdeild með rekstri stöðvar sinnar að Berghellu 1. Vegna þessa, var Sorpa í ráðandi stöðu á þeim markaði. Hvað varðaði markað fyrir förgun úrgangs á höfuðborgarsvæði Reykjavíkur, var Sorpa eini starfandi aðilinn með urðunarstað á Álfsnesi. Sorpa var því einnig í ráðandi stöðu á þeim markaði.

29 Samkeppniseftirlitið komst að þeirri niðurstöðu að Sorpa hafi brotið gegn c-lið 2. mgr. 11. gr. samkeppnislaga með því að veita eigendum sínum hagstæð afsláttarkjör af gjöldum fyrir móttöku úrgangs í stöðinni á Gufunesi og með því að veita Sorpstöð Suðurlands verulega afslætti af sömu gjöldum. Það gerði Sorpu því sekt að fjárhæð 45 milljónir kr.

30 Hinn 17. janúar 2013 kærði Sorpa ákvörðun Samkeppniseftirlitsins til áfrýjunarnefndar samkeppnismála, sem staðfesti hana með úrskurði sínum 18. mars 2013.

31 Hinn 11. september 2013 höfðaði Sorpa mál fyrir Héraðsdómi Reykjavíkur þar sem leitað var ógildingar á úrskurði áfrýjunarnefndar samkeppnismála. Þeirri kröfu var hafnað með dómi sem kveðinn var upp 16. janúar 2015.

32 Sorpa áfrýjaði dómi Héraðsdóms Reykjavíkur til Hæstaréttar 15. apríl 2015 áfrýjaði. Hinn 10. desember sama ár barst EFTA-dómstólnum beiðni Hæstaréttar Íslands um ráðgefandi álit.

IV SPURNINGAR

33 Eftirfarandi spurningum var beint til dómstólsins:

1. **Telst sveitarfélag í ríki sem á aðild að EES-samningnum og annast í umdæmi sínu meðferð úrgangs í samræmi við**

in conformity with the provisions of Directives 75/442/EEC, 1999/31/EC and 2000/76/EC, an undertaking in the sense of Article 54 of the Agreement? In this connection, the Court asks whether, when this question is answered, the following are of significance: a) That the treatment of waste is among the legally-prescribed functions of municipalities according to the laws of the relevant Contracting Party. b) That competition may exist over the treatment of waste between private entities and public entities under the laws of the Contracting Party. c) That it is prescribed, in the laws of the Contracting Party, that in this field, a municipality may not charge a higher fee than covers the cost of the treatment of waste and related activities.

2. **If the answer to the first question is in the negative, does the same apply to a cooperative undertaking which is operated by two or more municipalities and attends, on their behalf, to the management of waste in their operating areas?**

3. **When assessing whether Article 54 EEA applies to an activity of a municipality or a cooperative undertaking, is it of significance that the laws of the Contracting Party in question contain provisions authorising or obliging public bodies to perform the activity? Is it compatible with the EEA Agreement that a Contracting Party exempts, through legislation, certain activities by public entities from the scope of competition law?**

4. **Can municipalities which are the owners of a cooperative undertaking such as the one referred to in Question 2 be considered as its trading parties in the sense of Article 54(2)(c) EEA? And if so, does a discount granted to the owners which is not available to other parties constitute placing other parties at a disadvantage in the sense of the same provision?**

ákvæði tilskipana 75/442/EBE, 1999/31/EB og 2000/76/EB, fyrirtæki í skilningi 54. gr. samningsins? Í því sambandi er spurt hvort máli skipti þegar spurningunni er svarað: a) Að meðferð úrgangs er eitt af lögbundnum verkefnum sveitarfélaga samkvæmt lögum viðkomandi ríkis. b) Að samkeppni getur verið um meðferð úrgangs milli einkaaðila og opinberra aðila samkvæmt lögum ríkisins. c) Að mælt sé svo fyrir í lögum ríkisins að á þessu sviði megi sveitarfélag ekki taka hærra gjald en sem nemur kostnaði af meðferð úrgangs og tengdri starfsemi.

2. **Ef svarið við fyrstu spurningunni er neitandi, gildir það sama um byggðasamlag sem rekið er af tveimur eða fleiri sveitarfélögum og annast í þeirra stað meðferð úrgangs á starfssvæði þeirra?**

3. **Skiptir máli þegar metið er hvort 54. gr. EES-samningsins gildir um starfsemi sveitarfélags eða byggðasamlags að lög viðkomandi ríkis hafa að geyma reglur um heimild eða skyldu opinberra aðila til hennar? Er samrýmanlegt EES-samningnum að ríki sem aðild á að honum undanskilur í lögum tiltekna starfsemi opinberra aðila samkeppnislögum?**

4. **Geta sveitarfélög sem eru eigendur byggðasamlags eins og þess sem um ræðir í annarri spurningunni talist til viðskiptaaðila samlagsins í skilningi c. liðar 2. mgr. 54. gr. EES-samningsins? Ef svo telst vera er spurt hvort afsláttur til eigenda, sem ekki býðst öðrum, feli í sér mismunun í skilningi sama ákvæðis?**

V WRITTEN OBSERVATIONS

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

- Sorpa, represented by Hörður Felix Harðarson, Supreme Court Attorney;
- the Competition Authority, represented by Gizur Bergsteinsson, Supreme Court Attorney;
- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Clémence Perrin, and Øyvind Bø, Members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Henning Leupold and Ioannis Zervas, members of its Legal Service, acting as Agents.

VI SUMMARY OF THE ARGUMENTS SUBMITTED AND ANSWERS PROPOSED

SORPA

35 As regards the first question, Sorpa states that, according to Article 1 of Protocol 22 to the EEA Agreement and the case law of the Court of Justice of the European Union ("the ECJ")[5], the concept of undertaking encompasses every entity engaged in an economic activity, regardless of its legal status and the way in which it is

5 Reference is made to judgments in *Klaus Höfner and Fritz Elser* v *Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraphs 21 to 23, and *Diego Calì & Figli Srl* v *Servizi ecologici porto di Genova SpA*, C-343/95, EU:C:1997:160, paragraphs 22 and 23.

V SKRIFLEG MÁLSMEÐFERÐ FYRIR DÓMSTÓLNUM

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

– Sorpa, fyrir hönd þess fer með málið Hörður Felix Harðarson, hrl.

– Samkeppniseftirlitinu, fyrir hönd þess fer með málið Gizur Bergsteinsson, hrl.

– ESA, fyrir hönd þess fara með málið Carsten Zatschler, Clémence Perrin og Øyvind Bø sem umboðsmenn.

– Framkvæmdastjórn Evrópusambandsins (framkvæmdastjórnin), fyrir hönd þess fara með málið Henning Leupold og Ioannis Zervas frá lagaskrifstofu framkvæmdastjórnarinnar, sem umboðsmenn.

VI SAMANTEKT MÁLSÁSTÆÐNA OG TILLÖGUR AÐ SVÖRUM

SORPA

35 Hvað varðar fyrstu spurninguna tekur Sorpa fram að samkvæmt 1. gr. bókunar 22 við EES-samninginn og dómaframkvæmd dómstóls Evrópusambandsins[5] (Evrópudómstóllinn), taki hugtakið fyrirtæki til allra stofnana sem leggja stund á efnahagsstarfsemi, óháð lagalegri stöðu þeirra og því hvernig þær eru fjármagnaðar.

5 Vísað er til mála *Klaus Höfner og Fritz Elser* gegn *Macrotron GmbH*, C-41/90, EU:C:1991:161, 21. til 23 mgr., og *Diego Calì & Figli Srl* gegn *Servizi ecologici porto di Genova SpA*, C-343/95, EU:C:1997:160, 22. og 23. mgr.

financed. Public entities may constitute undertakings. However, when they act in the exercise of public powers, they are not carrying out an economic activity.

36 Sorpa submits that waste management is not an economic activity, since under Icelandic law it is usually carried out by municipalities, it is performed in the public interest and serves important environmental purposes.

37 Sorpa notes that the function of waste collection and disposal has been assigned to municipalities by the Local Government Act, and municipalities are thus obliged to carry out such function. Moreover, the tasks of waste management are defined by Icelandic statutes and regulations as well as the national plans of the Environment and Food Agency on handling of waste, and they are limited to the most basic tasks of waste collection and disposal. Therefore, municipalities have no leeway in determining their exact duties. Sorpa argues that it provides only the tasks assigned to municipalities by law. Other services of waste management, such as the collection of non-domestic waste and the rental of containers, are opened to competition. However, Sorpa does not provide such services.

38 Moreover, Sorpa maintains that, in order to determine whether the activity carried out by a public entity is economic, it is irrelevant whether that activity may be performed by a private company.[6] Therefore, it is of limited significance that the municipalities do not hold exclusive rights to perform the services at stake.

39 Finally, Sorpa contends that its decision to take advantage of the authorisation laid down in Article 11 of the Waste Disposal Act to request a fee for the services it provides is irrelevant. Since the

6 Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62, paragraph 80.

Opinberar stofnanir geti verið álitnar fyrirtæki. Hins vegar leggi þær ekki stund á efnahagsstarfsemi þegar þær starfi í skjóli opinbers valds.

36 Sorpa telur meðhöndlun úrgangs ekki falla undir efnahagsstarfsemi, þar sem henni sé, samkvæmt íslenskum lögum, alla jafna sinnt af sveitarfélögum. Starfsemin sé í almannaþágu og þjóni mikilvægum umhverfissjónarmiðum.

37 Sorpa bendir á að með sveitarstjórnarlögum hafi sveitarfélögum hafi verið falið að sinna sorphirðu og förgun og sveitarfélögum sé því skylt að sinna því hlutverki. Verkefni er tengjast meðhöndlun úrgangs séu enn fremur skilgreind í íslenskum lögum og reglugerðum, sem og í landsáætlun Umhverfisstofnunar um meðhöndlun úrgangs, og þau takmarkist við grunnþætti sorphirðu og –eyðingu. Sveitarfélögin hafi því ekkert svigrúm til að ákveða hvað felist nákvæmlega í skyldum þeirra. Sorpa bendir á að hún sinni einungis lögbundnum verkefnum sveitarfélaga. Önnur þjónusta sem tengist meðhöndlun úrgangs, svo sem sorphirða annars en heimilissorps, og gámaleiga sé opin samkeppni. Sorpa veitir þó ekki slíka þjónustu.

38 Sorpa heldur því enn fremur fram að þegar skera skuli úr um hvort starfsemi opinberrar stofnunar sé efnahagsstarfsemi, skipti ekki máli hvort einkafyrirtæki geti leyst hana af hendi. [6] Það hafi því takmarkaða þýðingu að sveitarfélögin hafi ekki einkarétt á að sinna þeirri þjónustu sem um ræðir.

39 Loks staðhæfir Sorpa að ákvörðun hennar um að nýta sér heimild til gjaldtöku vegna þjónustunnar, sem sé að finna 11. gr. laga um meðhöndlun úrgangs, hafi enga þýðingu. Þar sem fjárhæð slíks

6 Vísað er til máls E-5/07 *Private Barnehagers Landsforbund* gegn *Eftirlitsstofnun EFTA* [2008] EFTA Ct. Rep. 62, 80. mgr.

amount of such a fee cannot exceed the costs of the services provided it cannot be deduced that Sorpa seeks economic gain. Furthermore, if municipalities were subject to competition rules when deciding to levy a fee for the provision of waste management services, they would be unable to achieve the objectives of the Waste Disposal Act, for instance, they would not be in a position to reduce charges for certain categories of waste in order to encourage greater recovery.

40 As regards the second question, Sorpa claims that there is no reason to make a distinction between municipalities and municipal cooperatives. The Local Government Act provides that municipalities may establish cooperatives to perform the mandatory tasks entrusted to municipalities and which they would otherwise have to perform themselves. Therefore, the services at stake, whether provided by the municipalities or by a cooperative set up by those municipalities, do not constitute an economic activity.

41 As regards the third question, Sorpa submits that Article 54 EEA does not apply where the anti-competitive behaviour under consideration is required by national legislation.[7] In the present case, when performing the waste management services at issue, Sorpa and its owners have restricted autonomy, since they have to comply with national statutes and regulations. Therefore, Article 54 EEA is not applicable.

42 Moreover, Sorpa claims that the national legislation exempting certain activities by public entities from the scope of competition rules is compatible with the EEA Agreement. Under Article 59(2) EEA, undertakings entrusted with the operation of services of

7 Reference is made to judgments in *Altair Chimica SpA* v *ENEL Distribuzione SpA*, C-207/01, EU:C:2003:451, paragraph 30, and *Commission of the European Communities and French Republic* v *Ladbroke Racing Ltd* and *France* v *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33.

gjalds geti ekki verið hærri en kostnaðurinn við að veita þjónustuna sé ekki hægt að líta svo á að Sorpa sækist eftir fjárhagslegum ávinningi. Sorpa telur enn fremur, að ef sveitarfélög yrðu að lúta samkeppnisreglum við ákvarðanatöku um að taka gjald fyrir þjónustu við meðhöndlun úrgangs, væri þeim ókleift að ná markmiðum laga um meðhöndlun úrgangs. Þau væru, til dæmis, ekki í aðstöðu til að lækka gjöld vegna tiltekinna flokka úrgangs, til að hvetja til frekari tryggja betri endurnýtingu þeirra.

40 Hvað aðra spurninguna varðar, heldur Sorpa því fram, að engin rök standi til þess að greint sé milli sveitarfélaga og byggðasamlaga. Sveitarstjórnarlög kveði á um að sveitarfélög megi stofna byggðasamlag til að taka að sér framkvæmd skyldubundinna verkefna sem þau þyrftu annars sjálf að sinna. Því geti þjónustan sem um ræðir ekki talist efnahagsstarfsemi, hvort sem hún er innt af hendi af sveitarfélögunum eða byggðasamlagi þeirra sveitarfélaga.

41 Hvað þriðju spurninguna varðar, telur Sorpa að 54. gr. EES-samningsins eigi ekki við þegar landslög mæli fyrir um samkeppnishamlandi hegðun.[7] Í málinu sem hér um ræði, búi Sorpa og eigendur hennar við skert sjálfræði þegar þjónusta sé veitt vegna meðhöndlunar úrgangs, þar sem þau verði að fara eftir lögum og stjórnvaldsfyrirmælum. Því eigi 54. gr. EES-samningsins ekki við.

42 Sorpa heldur því enn fremur fram að ákvæði landslaga sem undanþiggja tiltekna starfsemi opinberra stofnana gildissviði samkeppnislöggjafar samrýmist EES-samningnum. Samkvæmt 2. mgr. 59. gr. EES-samningsins gildi samkeppnisreglur um fyrirtæki

7 Vísað er til mála *Altair Chimica SpA* gegn *ENEL Distribuzione SpA*, C-207/01, EU:C:2003:451, 30. mgr., og *Framkvæmdastjórnar Evrópubandalaganna og Lýðveldisins Frakklands* gegn *Ladbroke Racing Ltd* og *Frakklands* gegn *Ladbroke Racing*, C-359/95 P og C-379/95 P, EU:C:1997:531, 33. mgr.

general economic interest are subject to competition rules if (i) the application of those rules does not obstruct the performance of the tasks assigned to them, and (ii) the development of trade is not affected to such an extent as would be contrary to the interest of the Contracting Parties. Waste management is to be regarded a service of general economic interest.[8] According to case law, for undertakings entrusted with services of general economic interest to fall outside the scope of competition rules, the application of those rules does not have to threaten their survival. It is sufficient that the application of those rules would obstruct the performance of the services at stake under economically acceptable conditions.[9] In the present case, if the municipalities were bound by competition rules, their ability to achieve the objectives of Directives 75/442/EEC, 1999/31/EC and 2000/76/EC would be seriously jeopardised. Furthermore, the non-application of competition rules does not prejudice the development of trade.

43 As regards the fourth question, Sorpa submits that its owners cannot be regarded as its "trading parties" within the meaning of Article 54(2)(c) EEA, since Sorpa is a mere extension of its owners. Therefore, even if the discounts granted by Sorpa to its owners were to be regarded as discriminatory, they do not fall within the scope of Article 54(2)(c) EEA.

44 Moreover, in Sorpa's view, Article 54(2)(c) EEA applies to conduct liable to restrict competition between the business partners of the dominant undertaking.[10] In the present case, Sorpa's owners are not

8 Reference is made to the judgment in *Sydhavnens Sten & Grus ApS* v Københavns Kommune, C-209/98, EU:C:2000:279, paragraph 75.

9 Reference is made, in particular, to the judgment in *Criminal proceedings against Paul Corbeau*, C-320/91, EU:C:1993:198, paragraph 16.

10 Reference is made to judgments in *Portuguese Republic* v *Commission of the European Communities*, C-163/99, EU:C:2001:189, paragraph 52, and *British Airways plc* v *Commission of the European Communities*, C-95/04 P, EU:C:2007:166, paragraphs 143 and 144.

sem falið er að veita þjónustu er hefur almenna efnahagslega þýðingu, ef (i) beiting þeirra reglna kemur ekki í veg fyrir að þau geti að lögum eða í raun leyst af hendi þau verkefni sem þeim eru falin og (ii) þróun viðskipta sé ekki raskað í þeim mæli að það stríði gegn hagsmunum samningsaðilanna. Meðhöndlun úrgangs skuli teljast til þjónustu sem hafi almenna efnahagslega þýðingu.[8] Samkvæmt dómaframkvæmd þurfi beiting þeirra reglna ekki að ógna tilvist þeirra fyrirtækja, sem ætlað sé að sinna þjónustu sem hafi almenna efnahagslega þýðingu, til að þau falli utan gildissviðs samkeppnisreglna. Nægilegt sé að beiting þeirra reglna myndi hindra framkvæmd þjónustunnar sem um ræðir við ásættanlegar efnahagslegar aðstæður.[9] Í hinu fyrirliggjandi máli væri geta sveitarfélaganna til að uppfylla markmið tilskipana 75/442/EBE, 1999/31/EB og 2000/76/EB stefnt verulega í tvísýnu ef þau væru bundin af samkeppnisreglum. Enn fremur hefði það ekki neikvæð áhrif á viðskiptaþróun að samkeppnisreglum yrði ekki beitt.

43 Hvað fjórðu spurninguna varðar telur Sorpa að eigendur hennar geti ekki talist „viðskiptaaðilar“ í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins þar sem Sorpa sé einungis framlenging af eigendum sínum. Jafnvel þótt afslættirnir sem Sorpa veitti eigendum sínum yrðu taldir fela í sér mismunun, myndu þeir ekki falla undir gildissvið c-liðar 2. mgr. 54. gr. EES-samningsins.

44 Að mati Sorpu tekur c-liður 2. mgr. 54. gr. EES-samningsins þá til viðskiptahamlandi hegðunar milli viðskiptafélaga hins ráðandi fyrirtækis.[10] Í hinu fyrirliggjandi máli eigi eigendur Sorpu ekki í

8 Vísað er til máls *Sydhavnens Sten & Grus ApS* gegn *Københavns Kommune*, C-209/98, EU:C:2000:279, 75. mgr.

9 Vísað er sérstaklega til málsins: Ákæruvaldið gegn *Paul Corbeau*, C-320/91, EU:C:1993:198, 16. mgr.

10 Vísað er til málanna *Lýðveldisins Portúgals* gegn *framkvæmdastjórn Evrópubandalaganna*, C-163/99, EU:C:2001:189, 52. mgr., og *British Airways plc* gegn *framkvæmdastjórn Evrópubandalaganna*, C-95/04 P, EU:C:2007:166, 143. og 144. mgr.

competing against Gámaþjónustan. Therefore, by receiving lower discounts than Sorpa's owners, Gámaþjónustan was not placed "at a competitive disadvantage" vis-à-vis Sorpa's owners. Furthermore, Gámaþjónustan was not placed "at a competitive disadvantage" vis-à-vis Sorpa by the terms of the tender for the collection of household waste in the municipality of Hafnarfjörður. That municipality, an owner of Sorpa, simply decided to use its own facilities for the management and disposal of waste.

45 Sorpa therefore proposes that the Court should answer the questions as follows:

1. *A municipality which carries out the management of waste in its jurisdiction, as provided for by law and regulation and in conformity with the provisions of Directives 75/442/EEC, 1999/31/EC and 2000/76/EC, is not an undertaking in the sense of Article 54 of the EEA Agreement.*

2. *A co-operative undertaking, operated by two or more municipalities, which attends to the management of waste on behalf of the municipalities in their operating areas and in conformity with Directives 75/442/EEC, 1999/31/EC and 2000/76/EC is not an undertaking in the sense of Article 54 of the EEA Agreement.*

3. *Article 54 EEA applies to anti-competitive conduct engaged in by undertakings by their own initiative. If such conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possible activity, Article 54 EEA does not apply.*

4. *It is compatible with the EEA Agreement that a Contracting Party exempts from the rules of competition, through legislation, a public entity which is entrusted with the operation of services of general economic interests, if the application of such rules would otherwise obstruct the performance, in law or in fact, of the tasks assigned to the public entity, and provided that development of trade is not*

samkeppni við Gámaþjónustuna. Þannig hafi viðskiptastaða Gámaþjónustunnar ekki verið veikt gagnvart eigendum Sorpu, þótt Gámaþjónustan hafi notið minni afsláttar en eigendur Sorpu. Enn fremur hafi viðskiptastaða Gámaþjónustunnar ekki heldur verið veikt gagnvart Sorpu vegna skilmála útboðs Hafnarfjarðarbæjar á sorphirðu vegna heimilisúrgangs í sveitarfélaginu. Sveitarfélagið, sem einn eigenda Sorpu, hafi einfaldlega ákveðið að nýta eigin aðstöðu til meðhöndlunar úrgangs og förgunar.

45 Sorpa leggur því til að dómstóllinn svari spurningunum með eftirfarandi hætti:

1. *Sveitarfélag sem annast í lögsagnarumdæmi sínu meðferð úrgangs, eins og mælt er fyrir um í lögum og reglugerðum og í samræmi við* ákvæði tilskipana 75/442/EBE, 1999/31/EB og 2000/76/EB, telst ekki fyrirtæki í skilningi 54. gr. EES- samningsins.

2. *Byggðasamlag, sem rekið er af tveimur eða fleiri sveitarfélögum og sem annast meðhöndlun úrgangs á starfssvæði þeirra fyrir þeirra hönd og í samræmi við tilskipanir 75/442/EBE, 1999/31/EB og 2000/76/EB, telst ekki fyrirtæki í skilningi 54. gr. EES- samningsins.*

3. *54. gr. EES-samningsins gildir um samkeppnishamlandi hegðun fyrirtækja að þeirra eigin frumkvæði. Ef landslög krefjast slíkrar hegðunar, eða ef þau skapa lagaramma sem kemur í veg fyrir annars konar hegðun, á 54. gr. ekki við.*

4. Það samrýmist EES-samningnum að aðildarríki veiti, með lagasetningu, opinberri stofnun, sem falið er að veita þjónustu *sem hefur almenna efnahagslega þýðingu, undanþágu frá samkeppnisreglum, að því marki sem beiting slíkra reglna kæmi í veg fyrir að stofnunin geti að lögum eða í raun leyst af hendi þau verkefni sem henni eru falin, að því gefnu að* þróun viðskipta

affected to such an extent as would be contrary to the interests of the Contracting Parties.

5. *Municipalities which are the owners of a co-operative undertaking, such as the one referred to in question two, cannot be considered as its trading parties in the sense of Article 54(2)(c). A discount granted by such co-operative undertaking to its owners does not constitute placing other parties at a disadvantage in the sense of the same provision.*

THE COMPETITION AUTHORITY

46 As regards the first question, the Competition Authority submits that pursuant to Article 1 of Protocol 22 to the EEA Agreement, an undertaking shall be any entity carrying out activities of a commercial and economic nature. According to settled case law, any entity engaged in an economic activity may be regarded as an undertaking, regardless of its legal status and the way in which it is financed. In that regard, any activity consisting in offering goods and services on a given market is an economic activity.[11] Moreover, an entity vested with official powers may be regarded as an undertaking within the meaning of competition rules.[12]

47 In the present case, the Competition Authority notes that Directives 75/442/EEC, 1999/31/EC and 2000/76/EC make no distinction between public and private entities as regards the permit requirements for carrying out waste treatment and consequently contends that public entities compete with private companies for the

11 Reference is made, in particular, to judgments in *Total SA* v *European Commission*, C-597/13, EU:C:2015:613, paragraph 33; *Höfner and Elser*, cited above, paragraph 21; and *Pavel Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 75.

12 Reference is made to the judgment in *Aéroports de Paris* v *Commission of the European Communities*, C-82/01 P, EU:C:2002:617, paragraph 74.

raskist ekki í þeim mæli að það stríði gegn hagsmunum samningsaðilanna.

5. *Sveitarfélög sem eru eigendur byggðasamlags á borð við það sem um ræðir í spurningu tvö geta ekki talist til viðskiptaaðila* þess *í skilningi c. liðar 2. mgr. 54. gr. EES-samningsins. Afsláttur sem veittur er af hálfu slíks byggðasamlags til eigenda sinna, felur ekki í sér að öðrum aðilum sé mismunað* í skilningi sama ákvæðis.

SAMKEPPNISEFTIRLITIÐ

46 Hvað fyrstu spurninguna varðar telur Samkeppniseftirlitið að samkvæmt 1. gr. bókunar 22 við EES-samninginn sé fyrirtæki stofnun þar sem lögð er stund á viðskipta-eða efnahagsstarfsemi. Samkvæmt viðurkenndri dómaframkvæmd geti sérhver stofnun sem fæst við efnahagsstarfsemi talist fyrirtæki, óháð lagalegri stöðu hennar eða fjármögnunar. Að þessu leyti geti hvers kyns starfsemi sem felst í að bjóða vöru eða þjónustu á tilteknum markaði talist efnahagsstarfsemi.[11] Jafnframt geti stofnun sem fer með opinbert vald talist fyrirtæki í skilningi samkeppnislöggjafar.[12]

47 Í hinu fyrirliggjandi máli bendir Samkeppniseftirlitið á að tilskipanir 75/442/EBE, 1999/31/EB og 2000/76/EB geri engan greinarmun á opinberum aðilum og einkaaðilum þegar kemur að skilyrðum fyrir leyfisveitingu til meðferðar úrgangs og þar af leiðandi keppi opinberir aðilar við einkafyrirtæki þegar kemur að veitingu þjónustu

11 Vísað er sérstaklega til mála *Total SA* gegn *Framkvæmdastjórn Evrópusambandsins*, C-597/13, EU:C:2015:613, 33. mgr., áður tilvitnað máls *Höfner and Elser*, 21. mgr.; og *Pavel Pavlov og aðrir* gegn *Stichting Pensioenfonds Medische Specialisten*, C-180/98 til C-184/98, EU:C:2000:428, 75. mgr.

12 Vísað er til máls *Aéroports de Paris* gegn *framkvæmdastjórn Evrópubandalaganna*, C-82/01 P, EU:C:2002:617, 74. mgr.

provision of waste management services. In its view, the call for tenders by the municipality of Hafnarfjörður evidenced that such competition exists, since tenderers could choose which acceptance and sorting centre they would use. Icelandic law also provides for competition between public entities and private companies for the provision of waste management services. Competition between municipalities and private companies is a clear indication that such services are to be regarded as an economic activity.[13]

48 The Competition Authority submits that entities whose controlling shareholder is a municipality or which have been granted exclusive rights have been held to be undertakings within the meaning of Article 102 TFEU.[14]

49 According to the Competition Authority, it is irrelevant that the municipalities were prescribed their task of waste management by national legislation. Since the three directives mentioned provide that waste management may be carried out by either public or private entities, municipalities cannot avoid classification as undertakings simply by reason of the legal origin of their task.

50 It is equally irrelevant, in the view of the Competition Authority, that under Article 11 of the Waste Disposal Act a municipality may not charge a fee whose amount exceeds the costs incurred. Article 102 TFEU has been applied whether or not the activities at stake are carried out with a profit-making aim.[15]

13 Reference is made to the judgment in *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430, paragraph 79.

14 Reference is made to judgments in *Chemische Afvalstoffen Dusseldorp BV and Others* v *Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, C-203/96, EU:C:1998:316, paragraphs 16 and 68, and *Sydhavnens*, cited above, paragraphs 54 and 83.

15 Reference is made to judgments in *Albany*, cited above, paragraphs 79 and 85, and *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, C222/04, EU:C:2006:8, paragraph 123.

við meðferð úrgangs. Að mati Samkeppniseftirlitsins sýndi útboð Hafnarfjarðarbæjar fram á að slík samkeppni sé fyrir hendi, þar sem bjóðendur gátu valið hvaða móttöku- og flokkunarstöð þeir vildu notast við. Íslensk lög geri einnig ráð fyrir samkeppni milli opinberra aðila og einkafyrirtækja við veitingu þjónustu vegna meðferðar úrgangs. Samkeppni milli sveitarfélaga og einkaaðila sé skýr vísbending um að slíka þjónustu skuli teljast efnahagsstarfsemi.[13]

48 Samkeppniseftirlitið heldur því fram að aðilar, sem hafa hlotið einkarétt eða þar sem sveitarfélög eru ráðandi eigendur, hafi talist fyrirtæki í skilningi 102. gr. sáttmálans um starfshætti Evrópusambandsins (SSESB).[14]

49 Að mati Samkeppniseftirlitsins hefur það enga þýðingu í málinu að meðferð úrgangs sé eitt af lögbundnum verkefnum sveitarfélaga samkvæmt landslögum. Þar sem hinar þrjár fyrrnefndu tilskipanir kveði á um að meðferð úrgangs megi hvort heldur vera í höndum einka- eða opinbers aðila, geti sveitarfélög ekki komist hjá því að flokkast sem fyrirtæki vegna þess eins að verkefni þeirra séu lögbundin.

50 Að sama skapi telur Samkeppniseftirlitið engu skipta að gjaldtaka sveitarfélags megi ekki vera hærri en sem nemur kostaði sem til fellur, samkvæmt 11. gr. laga um meðferð úrgangs. 102. gr. SSESB hafi verið beitt, óháð því hvort starfsemin sem um ræðir sé innt af hendi í hagnaðarskyni.[15]

13 Vísað er til málsins *Albany International BV* gegn *Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430, 79. mgr.

14 Vísað er til mála *Chemische Afvalstoffen Dusseldorp BV og aðrir* gegn *Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, C-203/96, EU:C:1998:316, 16. og 68. mgr., og áður tilvitnað mál *Sydhavnens*, 54. og 83. mgr.

15 Vísað er til áður tilvitnaðs máls *Albany*, 79. og 85. mgr. og *Ministero dell'Economia e delle Finanze* gegn *Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato og Cassa di Risparmio di San Miniato SpA*, C222/04, EU:C:2006:8, 123. mgr.

51 As regards the second question, the Competition Authority maintains that the legal form of the entity is not a decisive factor when assessing whether that entity is an undertaking within the meaning of Article 54 EEA.[16] If a municipality carrying on waste management activities is not engaged in an economic activity, neither is a cooperative operated by several municipalities and carrying out the same activities on their behalf.

52 As regards the third question, the Competition Authority submits that a Contracting Party may not restrict by law the scope of application of Article 54 EEA, except in accordance with Article 59(2) EEA. However, an EEA State does not infringe Article 54 EEA by granting exclusive rights to an undertaking, provided that such undertaking does not abuse its dominant position or is not led necessarily to commit an abuse.[17] In the present case, Icelandic law requires that the amount of the fee received by Sorpa may not exceed the costs incurred. It neither authorises nor obliges Sorpa to set the fee at a level where it makes a profit. Therefore, Icelandic law does not authorise Sorpa to distribute dividends in the form of discounts granted to its owners.

53 As regards the fourth question, the Competition Authority claims that the concept of "trading parties" within the meaning of Article 54(2)(c) EEA encompasses all recipients of services provided by the dominant undertaking, irrespective of their financial or structural ties with that undertaking.[18] Therefore, Sorpa's owners may be regarded as trading parties of Sorpa.

16 Reference is made to the judgment in *Diego Calì*, cited above, paragraphs 16 to 18.

17 Reference is made, in particular, to the judgment in *Corsica Ferries France SA* v *Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione*, C-266/96, EU:C:1998:306, paragraph 41.

18 Reference is made to judgments in *Clearstream Banking AG and Clearstream International SA* v *Commission of the European Communities*, T-301/04, EU:T:2009:317, paragraphs 143, 194 and 195, and *GT-Link A/S* v *De Danske Statsbaner*, C-242/95, EU:C:1997:376, paragraph 46.

51 Varðandi aðra spurninguna heldur Samkeppniseftirlitið því fram að rekstrarform aðila hafi ekki úrslitaáhrif við mat á því hvort sá aðili sé fyrirtæki í skilningi 54. gr. EES-samningsins.[16] Ef sveitarfélag sem sér um meðferð úrgangs sinnir ekki efnahagsstarfsemi, á slíkt heldur ekki við um byggðasamlag sem annast sömu starfsemi fyrir þeirra hönd.

52 Hvað varðar þriðju spurninguna tekur Samkeppniseftirlitið fram að aðildarríki geti ekki takmarkað gildissvið 54. gr. EES-samningsins með lögum, nema í samræmi við 2. mgr. 59. gr. EES-samningsins. EES-ríki brjóti þó ekki gegn 54. gr. samningsins með því að veita fyrirtæki einkarétt, að því gefnu að slíkt fyrirtæki misnoti ekki ráðandi stöðu sína eða sé gert annað óhjákvæmilegt.[17] Í hinu fyrirliggjandi máli kveði íslensk lög á um að gjaldtaka Sorpu megi ekki vera umfram kostnað sem til fellur. Þau leiði hvorki til heimildar né skyldu Sorpu að ákvarða gjaldtökuna með þeim hætti að hún skili hagnaði. Þannig heimili íslensk lög ekki úthlutun arðs í búningi afsláttar til eigenda.

53 Varðandi fjórðu spurninguna telur Samkeppniseftirlitið að hugtakið „viðskiptaaðilar“ í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins taki til allra notenda þjónustu sem veitt er af hálfu hins ráðandi fyrirtækis, óháð fjárhagslegum eða stofnanalegra tengsla þeirra við fyrirtækið.[18] Þannig geti eigendur Sorpu talist viðskiptaaðilar félagsins.

16 Vísað er til áður tilvitnaðs máls *Diego Calì*, 16. til 18. mgr.

17 Vísað er sérstaklega til máls *Corsica Ferries France SA* gegn *Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl og Ministero dei Trasporti e della Navigazione*, C-266/96, EU:C:1998:306, 41. mgr.

18 Vísað er til mála *Clearstream Banking AG og Clearstream International SA* gegn *Framkvæmdastjórn Evrópubandalaganna*, T-301/04, EU:T:2009:317, 143., 194. og 195. mgr., og *GT-Link A/S* gegn *De Danske Statsbaner*, C-242/95, EU:C:1997:376, 46. mgr.

54 Moreover, the Competition Authority submits that, for a trading party to be placed "at a competitive disadvantage" within the meaning of Article 54(2)(c) EEA, its competitive position must be likely to be hindered by the discriminatory behaviour of the dominant undertaking.[19] In the present case, the Competition Authority notes that, when the municipality of Hafnarfjörður tendered the collection of domestic waste, tenderers could choose which acceptance centre they would deliver the waste to, including Sorpa's Gufunes centre. Therefore, in granting discounts to the municipality of Hafnarfjörður, its owner, and to Sorpstöð Suðurlands, Sorpa effectively prevented Gámaþjónustan from receiving waste from that municipality, thereby placing Gámaþjónustan at a competitive disadvantage within the meaning of Article 54(2)(c) EEA.[20]

55 Therefore, the Competition Authority proposes that the Court should answer the questions as follows:

1. A municipality that carries out the management of waste in accordance with Directives 75/442/EEC, 1999/31/EC, and 2000/76/EC constitutes an undertaking within the meaning of Article 54 EEA when its services are economic in nature. When answering the first question, (i) it is not relevant that the treatment of waste is a legally-prescribed function of municipalities according to the laws of the Contracting Party; (ii) it can be relevant that competition over the treatment of waste may exist between private entities and public entities under the laws of the Contracting Party; and (iii) it is not relevant that it is prescribed in the laws of the Contracting Party that a municipality may not charge a higher fee than covers the cost of the management of waste and related activities.

19 Reference is made to the judgment in *British Airways* v *Commission*, C-95/04, EU:C:2006:133, points 143 to 145.

20 Reference is made to the judgment in *Deutsche Bahn AG* v *Commission of the European Communities*, T-229/94, EU:T:1997:155, paragraph 128.

54 Samkeppniseftirlitið telur enn fremur að til þess að unnt sé að líta svo á að samkeppnisstaða viðskiptaaðila sé veikt, í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, verði að teljast líklegt að samkeppnisstaða hans sé torvelduð vegna mismununar hins markaðsráðandi fyrirtækis.[19] Samkeppniseftirlitið bendir á að í hinu fyrirliggjandi máli hafi bjóðendur í útboði Hafnarfjarðarbæjar á sorphirðu sveitarfélagsins vegna heimilisúrgangs getað valið til hvaða móttökustöðvar þeir myndu skila úrgangi, þar á meðal móttökustöðvar Sorpu í Gufunesi. Með því að veita eiganda sínum, Hafnarfjarðarbæ, sem og Sorpstöð Suðurlands afslátt hafi það þannig í raun komið í veg fyrir móttöku Gámaþjónustunnar á úrgangi frá því sveitarfélagi, og þar með veikt samkeppnisstöðu Gámaþjónustunnar í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins. [20]

55 Samkvæmt framansögðu leggur Samkeppniseftirlitið til að dómstóllinn svari spurningunum með eftirfarandi hætti:

1. *Sveitarfélag sem annast meðferð úrgangs í samræmi við tilskipanir 75/442/EBE, 1999/31/EB og 2000/76/EB, telst fyrirtæki í skilningi 54. gr. samningsins þegar þjónusta þess er efnahagslegs eðlis. Þegar fyrstu spurningunni er svarað (i) skiptir ekki máli að meðferð úrgangs sé eitt af lögbundnum verkefnum sveitarfélaga samkvæmt lögum viðkomandi ríkis. (ii) Það getur skipt máli að samkeppni milli einkaaðila og opinberra aðila um meðferð úrgangs geti verið fyrir hendi, samkvæmt lögum aðildarríkisins. (iii) Ekki skiptir máli að mælt sé svo fyrir í lögum aðildarríkisins að sveitarfélag megi ekki taka hærra gjald en sem nemur kostnaði af meðferð úrgangs og tengdri starfsemi.*

19 Vísað er til máls *British Airways* gegn *framkvæmdastjórninni*, C-95/04, EU:C:2006:133, 143. til 145. mgr.

20 Vísað er til máls *Deutsche Bahn AG* gegn *Framkvæmdastjórn Evrópubandalaganna*, T-229/94, EU:T:1997:155, 128. mgr.

2. *If the first question is answered in the negative, the same applies to an inter-municipal undertaking that is operated by two or more municipalities*

3. *When assessing the applicability of Article 54 EEA to activities of a municipality or an inter-municipal undertaking it is not relevant whether the laws of the Contracting Party contain provisions authorising or obliging public bodies to perform the activities. It is incompatible with the EEA Agreement for a Contracting Party, by legislation, to exempt certain activities of public bodies, which would otherwise fall within the scope of the EEA Agreement, from the scope of its competition law.*

4. *Municipalities that are the owners of an inter-municipal undertaking can be considered the undertaking's trading parties within the meaning of Article 54(2)(c) EEA. In that case, a discount granted to the undertaking's owners, but not to others, can constitute placing others at a disadvantage in the meaning of Article 54(2)(c) EEA.*

ESA

56 ESA notes that the decision of the Competition Authority whose annulment is sought in the national proceedings is based on national competition law and not Article 54 EEA. Nevertheless, according to ESA, the Court has jurisdiction to give an advisory opinion. This is because, according to settled case law of the ECJ, where the facts in the main proceedings fall outside the scope of EU law, the ECJ may nevertheless answer the questions referred provided that the provisions of EU law at stake have been rendered applicable by

2. *Ef svarið við fyrstu spurningunni er neitandi, gildir það sama um byggðasamlag sem rekið er af tveimur eða fleiri sveitarfélögum.*

3. *Við mat á því hvort 54. gr. EES-samningsins gildi um starfsemi sveitarfélags eða byggðasamlags hefur enga þýðingu að lög viðkomandi ríkis mæli fyrir um heimild eða skyldu opinberra aðila til að sinna henni. Það er ósamrýmanlegt EES-samningnum að aðildarríki undanskilji með lögum tiltekna starfsemi opinberra aðila samkeppnislöggjöf ríkisins, er ella myndi falla undir gildissvið EES-samningsins.*

4. *Sveitarfélög sem eru eigendur byggðasamlags geta talist til viðskiptaaðila samlagsins í skilningi c. liðar 2. mgr. 54. gr. EES-samningsins. Í því tilviki getur afsláttur veittur eigendum, en ekki öðrum, falið í sér að samkeppnisaðstaða hinna síðarnefndu sé veikt í skilningi c. liðar 2. mgr. 54. gr. EES-samningsins.*

ESA

56 ESA bendir á að ákvörðun Samkeppniseftirlitsins sem leitað er ógildingar á í málinu sem rekið er fyrir Hæstarétti byggist á samkeppnislöggjöf að landsrétti, en ekki 54. gr. EES-samningsins. Engu að síður telur ESA að dómstóllinn hafi lögsögu til að veita ráðgefandi álit. Það helgist af því að samkvæmt dómaframkvæmd Evrópudómstólsins geti hann svarað þeim spurningum sem til hans er beint, þótt sakarefni málsins sem rekið sé fyrir landsdómstólnum falli utan gildissviðs Evrópuréttar, að því gefnu að þau ákvæði

national law to purely internal situations.[21] In the present case, Article 11 of the Competition Act was adopted in order to incorporate Article 54 EEA. Therefore, the former should be interpreted in accordance with the latter.

57 ESA considers it appropriate to reply to the first, second and third questions together.

58 ESA submits that, according to Article 1 of Protocol 22 to the EEA Agreement and settled case law, the concept of undertaking encompasses every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[22] Any activity consisting in offering goods or services on a given market is an economic activity.[23] Moreover, it is irrelevant whether the entity at stake is a private company or a public entity. In particular, a municipality or a cooperative undertaking operated by several municipalities may be regarded as exercising an economic activity.[24]

59 ESA states that, where an entity carries out several activities, each activity must be assessed separately in order to determine whether it is an economic activity.[25] Therefore, an entity may be classified as an

21 Reference is made to the judgment in *SIA «Maxima Latvija»* v *Konkurences padome*, C-345/14, EU:C:2015:784, paragraph 12.

22 Reference is made, in particular, to Case E-8/00 *Norwegian Federation of Trade Unions and Others* v *Norwegian Association of Local and Regional Authorities and Others* [2002] EFTA Ct. Rep. 114, paragraph 62.

23 Reference is made to Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft* v *EFTA Surveillance Authority* [2011] EFTA Ct. Rep. 16, paragraph 54.

24 Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 80.

25 Reference is made to judgments in *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v *Elliniko Dimosio*, C-49/07, EU:C:2008:142, paragraph 25, and *SELEX Sistemi Integrati SpA* v *Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)*, C-113/07 P, EU:C:2009:191, paragraphs 65 to 119.

Evrópuréttar sem um sé að ræða hafi verið talin eiga við að landsrétti þegar um staðbundin mál er að ræða.[21] Hvað varðar hið fyrirliggjandi mál, hafi 11. gr. samkeppnislaga verið sett til að innleiða 54. gr. EES-samningsins og því eigi að skýra þá fyrrnefndu til samræmis við hina síðarnefndu.

57 ESA telur viðeigandi að svara saman fyrstu, annarri og þriðju spurningunni.

58 ESA heldur því fram að samkvæmt 1. gr. bókunar 22 við EES-samninginn og viðurkenndri dómaframkvæmd nái hugtakið fyrirtæki til allra stofnana sem stundi efnahagsstarfsemi, óháð lagalegri stöðu þeirra og því hvernig þær eru fjármagnaðar.[22] Hvers kyns starfsemi sem felst í því að bjóða vöru eða þjónustu á tilteknum markaði teljist efnahagsstarfsemi.[23] Það hafi enn fremur enga þýðingu hvort stofnunin sem um ræðir sé einkafyrirtæki eða opinber aðili. Einkum geti sveitarfélag eða byggðasamlag sem rekið er af fleiri sveitarfélögum talist stunda efnahagsstarfsemi.[24]

59 Þegar stofnun fæst við ýmiss konar starfsemi verður, að sögn ESA, að meta hverja þeirra um sig til að unnt sé að ákvarða hvort hún teljist efnahagsstarfsemi.[25] Því geti stofnun talist fyrirtæki og fallið undir

21 Vísað er til máls *SIA «Maxima Latvija»* gegn *Konkurences padome*, C-345/14, EU:C:2015:784, 12. mgr.

22 Vísað er sérstaklega til máls E-8/00 *Norwegian Federation of Trade Unions og aðrir* gegn *Norwegian Association of Local and Regional Authorities og öðrum* [2002] EFTA Ct. Rep. 114, 62. mgr.

23 Vísað er til sameinaðra mála E-4/10, E-6/10 og E-7/10 *Furstadæmið Liechtenstein, REASSUR Aktiengesellschaft og Swisscom RE Aktiengesellschaft* gegn *Eftirlitsstofnun EFTA* [2011] EFTA Ct. Rep. 16, 54. mgr.

24 Vísað er til áður tilvitnaðs máls *Private Barnehagers Landsforbund*, 80. mgr.

25 Vísað er til máls *Motosykletistiki Omospondia Ellados NPID (MOTOE)* gegn *Elliniko Dimosio*, C-49/07, EU:C:2008:142, 25. mgr., og *SELEX Sistemi Integrati SpA* gegn *Framkvæmdastjórn Evrópubandalaganna og Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)*, C-113/07 P, EU:C:2009:191, 65. til 119. mgr.

undertaking and subject to EEA competition rules for some of its activities but fall outside the scope of those rules for the remainder of its activities.

60 ESA submits that, where the activity under consideration is a State prerogative and falls within the exercise of public powers, it is not of an economic nature. Such is the case with regard to the activities of the army and the police,[26] as well as that of anti-pollution surveillance.[27]

61 However, in ESA's view, although the character of the activity must be taken into account, it cannot be determined a priori whether a given activity is economic. A concrete assessment must also be carried out. This is because an economic activity as defined by case law consists in the offering of goods or services *on a market*. Therefore, an activity cannot be regarded as economic unless it is carried out in a market environment. An activity is likely to be performed in a market environment where the entity at stake receives a remuneration for the services provided and where it faces competition from other operators.[28] Consequently, medical aid organisations entrusted with the performance of a public service obligation such as the provision of public ambulance services can be regarded as undertakings if they face competition and their services are provided for remuneration.[29]

26 Reference is made, in particular, to judgments in *Ivana Scattolon* v *Ministero dell'Istruzione, dell'Università e della Ricerca*, C-108/10, EU:C:2011:542, paragraph 44, and *MOTOE*, cited above, paragraph 24.

27 Reference is made to the judgment in *Diego Calì*, cited above, paragraph 22.

28 Reference is made, in particular, to *Private Barnehagers Landsforbund*, cited above, paragraph 80, and the Opinion of Advocate General Poiares Maduro in *Federación Española de Empresas de Tecnología Sanitaria (FENIN)* v *Commission of the European Communities*, C205/03 P, EU:C:2005:666, point 13.

29 Reference is made to the judgment in *Firma Ambulanz Glöckner* v *Landkreis Südwestpfalz*, C-475/99, EU:C:2001:577, paragraphs 19 to 22.

gildissvið samkeppnisreglna EES-samningsins vegna tiltekinnar starfsemi hennar, en fallið utan gildissviðsins með tilliti til annarrar starfsemi hennar.

60 ESA tekur fram að þegar starfsemin sem til skoðunar sé, sé einungis á forræði ríkisins og þar sem opinberu valdi sé beitt, sé hún ekki efnahagslegs eðlis. Slíkt eigi við um starfsemi hers og lögreglu,[26] sem og eftirlit með mengunarvörnum.[27]

61 Þótt taka verði tillit til eðlis starfseminnar, telur ESA ekki unnt að skera úr um það fyrirfram hvort tiltekin starfsemi sé efnahagsleg. Sérstakt mat verði einnig að fara fram. Ástæðan sé sú að efnahagsstarfsemi eins og hún hafi verið skilgreind í dómaframkvæmd feli í sér framboð vöru eða þjónustu á markaði. Starfsemi geti því ekki talist efnahagsstarfsemi nema hún fari fram í markaðsumhverfi. Líklegt megi teljast að starfsemin fari fram í markaðsumhverfi þegar stofnunin sem um ræðir fær endurgjald fyrir veitta þjónustu og þar sem það á í samkeppni við aðra söluaðila.[28] Þar af leiðandi geti samtök á sviði heilbrigðisþjónustu, sem bjóða upp á opinbera þjónustu á borð við sjúkraflutninga, talist til fyrirtækja ef þau eiga í samkeppni og krefjast endurgjalds fyrir þjónustuna.[29] Á

26 Vísað er sérstaklega til máls *Ivana Scattolon* gegn *Ministero dell'Istruzione, dell'Università e della Ricerca*, C-108/10, EU:C:2011:542, 44. mgr., og áður tilvitnaðs máls *MOTOE*, 24. mgr.

27 Vísað er til áður tilvitnaðs máls *Diego Calì*, 22. mgr.

28 Vísað er til áður tilvitnaðs máls Private Barnehagers Landsforbund, 80. mgr., og álits Poiares Maduro lögsögumanns í máli *Federación Española de Empresas de Tecnología Sanitaria (FENIN)* gegn *Framkvæmdastjórn Evrópubandalaganna*, C205/03 P, EU:C:2005:666, 13. mgr.

29 Vísað er til máls *Firma Ambulanz Glöckner* gegn *Landkreis Südwestpfalz*, C-475/99, EU:C:2001:577, 19 til 22. mgr.

Conversely, municipalities operating kindergartens are not to be considered undertakings if there is no connection between the costs incurred and the fees paid.[30]

62 In the present case, ESA claims that, although waste management services are not intrinsically a State prerogative, since private undertakings may offer such services for remuneration, they may nevertheless be carried out in the public interest and avoid classification as an economic activity. Therefore, a closer examination of the waste management services provided by Sorpa is needed in order to determine whether they are to be regarded as an economic activity. In other words, the Court must assess whether Sorpa's activities are performed in a market environment. Moreover, since each activity must be assessed separately, Sorpa's activity consisting in the management of its owners' waste must be assessed separately from its activity consisting in the management of the waste from its other customers.

63 First, as regards the waste management services provided by Sorpa to its owners, ESA submits that the information in the request for an advisory opinion is insufficient and it is thus for the referring court to decide whether the provision of those services constitutes an economic activity. However, ESA proposes that the Court should assist the referring court by explaining how to assess whether the competition faced by Sorpa on the market (if any) and any remuneration received warrant the classification of Sorpa's services as an economic activity.

64 On the question of the competition faced by Sorpa, ESA maintains that if the referring court finds that Sorpa's owners awarded Sorpa a contract for waste management without calling for bids from other operators and that no other provider was allowed to process waste

30 Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 80.

hinn bóginn geti sveitarfélög sem reka leikskóla ekki talist til fyrirtækja ef ekkert samhengi er á milli kostnaðar sem til fellur og greiddrar þóknunar.[30]

62 Í hinu fyrirliggjandi máli heldur ESA því fram að þótt þjónusta við meðferð úrgangs verði ekki nauðsynlega að vera á forræði ríkisins, þar sem einkafyrirtæki geti boðið slíka þjónustu gegn gjaldi, megi engu að síður framkvæma hana í almannaþágu og komast hjá því að hún teljist efnahagsstarfsemi. Nánari skoðun sé þannig nauðsynleg á þjónustu Sorpu við meðferð á úrgangi svo skera megi úr um hvort telja eigi hana til efnahagsstarfsemi. Dómstóllinn verði, með öðrum orðum, að meta hvort starfsemi Sorpu fari fram í markaðsumhverfi. Þar sem meta þurfi hverja starfsemi fyrir sig skuli jafnframt aðgreina þá starfsemi sem varðar meðferð Sorpu á úrgangi eigenda þess og þá starfsemi sem tekur til meðferðar úrgangs annarra viðskiptavina þess.

63 Hvað varðar þjónustu Sorpu við meðferð úrgangs fyrir eigendur sína bendir ESA í fyrsta lagi á að upplýsingarnar sem fram koma í beiðninni um ráðgefandi álit séu ófullnægjandi og því sé það landsdómstólsins að taka afstöðu til þess hvort veiting þeirrar þjónustu verði álitin efnahagsstarfsemi. ESA leggur þó til að dómurinn leggi landsdómstólnum lið með því að útskýra hvernig meta skuli hvort samkeppnin við Sorpu, ef einhver er, og endurgjaldið skuli flokkast sem efnahagsstarfsemi.

64 Hvað varðar spurninguna sem lýtur að samkeppni við Sorpu tekur ESA fram að komist landsdómstóllinn að því að eigendur Sorpu hafi gert samning við félagið án þess að leita tilboða hjá öðrum fyrirtækjum og engum öðrum þjónustuaðila hafi gefist kostur á að

30 Vísað er til áður tilvitnaðs máls *Private Barnehagers Landsforbund*, 80. mgr.

from Sorpa's owners, it must conclude that Sorpa does not operate on a competitive market. In ESA's view, the fact that Sorpa was established by seven municipalities as an entity to which they could entrust some of their tasks suggests that it functions as an in-house operator for its owners and does not face competition from other operators on the market. The referring court should also take into consideration the upstream market for waste collection and assess whether that market is open for competition or whether Sorpa's owners hold a monopoly.

65 On the remuneration received by Sorpa, ESA argues that the existence of remuneration is not sufficient for an activity to be classified as economic. In the present case, the fees charged by Sorpa are set by its owners themselves, which is not a normal feature of a competitive market. However, the fact that those fees merely cover the costs incurred and that Sorpa did not seek to make a profit does not prevent its activity from being economic, since the same activity could be carried out by other operators seeking to make a profit.

66 Second, as regards the waste management services provided by Sorpa to its customer Sorpstöð Suðurlands, ESA submits that those services are to be regarded as an economic activity. Sorpa provides those services for remuneration and competes with other possible providers.

67 In relation to the fourth question, ESA submits that conduct qualifies as an abuse under Article 54(2)(c) EEA if three conditions are met. First, dissimilar conditions must be applied by the dominant undertaking; second, those dissimilar conditions must be applied to equivalent transactions between trading parties; third, this must place those trading parties at a competitive disadvantage. In ESA's analysis, the referring court seeks guidance on the second element

meðhöndla sorp frá eigendum Sorpu verði dómstóllinn, að mati ESA, að komast að þeirri niðurstöðu að Sorpa starfi ekki á samkeppnismarkaði. Að mati ESA, er sú staðreynd, að félagið hafi verið stofnað af sjö sveitarfélögum sem aðili sem þau gætu falið að sjá um sum verkefni á þeirra höndum, bendir til þess að það starfi sem innanhússaðili með tilliti til eigenda þess og eigi ekki í samkeppni við aðra aðila á markaðnum. Landsdómstólnum beri einnig að taka mið af aðliggjandi markaði sorphirðu og meta hvort sá markaður sé opinn samkeppnisaðilum eða hvort eigendur Sorpu séu þar í einokunarstöðu.

65 Varðandi endurgjald sem Sorpa móttekur, heldur ESA fram að tilvist gjalds nægi ekki til þess að starfsemi verði flokkuð sem efnahagsstarfsemi. Í hinu fyrirliggjandi máli ákveði eigendurnir fjárhæð þeirra gjalda sem Sorpa innheimtir, sem sé ekki venjulegt fyrirkomulag á samkeppnismarkaði. Sú staðreynd, að gjaldtakan nægi eingöngu til að mæta þeim kostnaði sem til fellur, og það að Sorpa sé ekki rekin í hagnaðarskyni, kemur ekki í veg fyrir að um efnahagsstarfsemi geti verið að ræða, þar sem annar aðili gæti verið með sömu starfsemi með það að markmiði að skila hagnaði.

66 Í öðru lagi telur ESA að þjónusta Sorpu við meðferð úrgangs fyrir viðskiptavin þess, Sorpstöð Suðurlands, skuli teljast efnahagsstarfsemi. Sorpa veitir þessa þjónustu gegn endurgjaldi og í samkeppni við aðra þjónustuveitendur.

67 Um fjórðu spurninguna tekur ESA fram að hegðun teljist misnotkun í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins að þremur skilyrðum uppfylltum. Í fyrsta lagi verði hið ráðandi fyrirtæki að bjóða ólíka skilmála. Í öðru lagi verði þessir ólíku skilmálar að gilda um viðskiptaaðila í sams konar viðskiptum. Í þriðja lagi verði skilmálarnir að veikja samkeppnisstöðu þeirra viðskiptaaðila. Samkvæmt greiningu ESA leitar landsdómstóllinn ráðgjafar um

(the concept of trading parties) and the third element (competitive disadvantage).

68 As regards the concept of trading parties, ESA submits that any party with which the dominant undertaking enters into a transaction is covered by that concept. If the dominant undertaking enters into a transaction with its owners, those owners are to be regarded as trading parties within the meaning of Article 54(2)(c) EEA.

69 As regards the condition that the trading parties must be placed at a competitive disadvantage, in ESA's view this condition is only met if, first, the trading parties of the dominant undertaking compete against each other, and, second, the competitive position of one trading party is likely to be hindered vis-à-vis the position of another trading party.[31] This is for the referring court to decide. However, ESA notes that Sorpa's owners (to which Sorpa grants discounts) may not be in a competitive relationship with the other trading parties (Sorpa's other customers, to which it does not grant discounts), since it appears that the municipalities owning Sorpa only deliver waste from their own municipal areas and no other operator may deliver waste from those areas.

70 Therefore, ESA proposes that the Court should answer the questions as follows:

1. *A municipality, or a cooperative undertaking set up by two or more municipalities, processing domestic waste at a sorting and bundling centre will constitute an undertaking under Article 54 of the Agreement on the European Economic Area if, taking into account all the relevant circumstances of that activity, the processing of that*

31 Reference is made, in particular, to the judgments in *Coöperatieve Vereniging "Suiker Unie" UA and Others* v *Commission of the European Communities*, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraphs 523 to 528, and *British Airways*, cited above, paragraph 144.

annað atriðið (hugtakið viðskiptaaðili) og þriðja atriðið (veikt samkeppnisstaða).

68 ESA bendir á að undir hugtakið viðskiptaaðili falli sérhver aðili sem hið markaðsráðandi fyrirtæki stofnar til viðskiptasambands við. Stofni hið ráðandi fyrirtæki til viðskiptasambands við eigendur sína, teljist þeir eigendur til viðskiptaaðila í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins.

69 Að sögn ESA telst skilyrðið um að samkeppnisstaða viðskiptaaðila sé veikt aðeins uppfyllt í fyrsta lagi ef viðskiptaaðilar hins markaðsráðandi fyrirtækis eigi í samkeppni sín á milli, og í öðru lagi ef líkur séu á því að þrengt sé að samkeppnisstöðu eins viðskiptaaðilans gagnvart öðrum.[31] Það sé landsdómstólsins að skera úr um framangreind atriði. Eftir sem áður, bendir ESA á að eigendur Sorpu (sem veittur er afsláttur af hálfu Sorpu) geti ekki verið í samkeppni við aðra viðskiptaaðila (aðrir viðskiptavinir Sorpu sem ekki er veittur afsláttur), þar eð svo virðist sem sveitarfélögin sem eiga Sorpu skili aðeins úrgangi frá eigin lögsagnarumdæmum og enginn annar megi skila úrgangi frá þeim svæðum.

70 ESA leggur því til að dómstóllinn svari spurningunum með eftirfarandi hætti:

1. *Sveitarfélag, eða byggðasamlag sem stofnað er af tveimur eða fleiri sveitarfélögum, sem meðhöndlar heimilissorp í flokkunar- og böggunarstöð telst fyrirtæki samkvæmt 54. gr. EES-samningsins, ef meðhöndlun úrgangsins felur í sér viðskipta- eða efnahagsstarfsemi*

31 Vísað er sérstaklega til mála *Coöperatieve Vereniging "Suiker Unie" UA og aðrir* gegn *Framkvæmdastjórn Evrópubandalaganna*, 40/73 til 48/73, 50/73, 54/73 til 56/73, 111/73, 113/73 og 114/73, EU:C:1975:174, 523. til 528. mgr., og áður tilvitnaðs máls *British Airways*, 144. mgr.

waste is of a commercial or economic nature within the meaning of Article 1 of Protocol 22 to that Agreement. Whether the activity of offering waste management services consists in offering goods or services on a given market requires a concrete assessment of the circumstances of the case, taking into account, in particular, the extent of market mechanisms such as the presence of competition and whether the services are remunerated. Whether the municipalities are obliged or authorised to process the waste, whether competition exists for the treatment of the waste and whether the fee the municipality charges for processing the waste is limited to covering the costs are all matters of fact which may be taken into account in the assessment.

2. *A Contracting Party cannot in national law exempt certain activities by public entities from the scope of EEA competition law, but the way in which it organises such activities may as a matter of fact have an impact on whether that activity is subject to those rules.*

3. *Municipalities which are owners of a cooperative undertaking may be considered as its trading parties within the meaning of Article 54(2)(c). Granting discounts to the owners will constitute an abuse within the meaning of that provision if the conditions of that provision are fulfilled.*

THE COMMISSION

71 The Commission considers it appropriate to reply to the first and second questions and the first part of the third question together.

72 The Commission states that pursuant to Article 1 of Protocol 22 to the EEA Agreement, an undertaking within the meaning of Articles 53 and 54 EEA shall be any entity carrying out activities of a commercial or economic nature. According to settled case law this applies regardless of the legal status of the entity concerned and the

í skilningi 1. gr. bókunar 22 þegar tekið er mið af öllum aðstæðum. Hvort sú starfsemi, að bjóða þjónustu við meðferð úrgangs, feli í sér framboð vöru- eða þjónustu á markaði veltur á sérstöku mati á atvikum máls, einkum að teknu tilliti til markaðsfyrirkomulags, svo sem hvort samkeppni sé til staðar og hvort þjónustan sé veitt gegn endurgjaldi. Atriði á borð við það hvort sveitarfélögum sé skylt eða heimilt að vinna sorp, hvort samkeppni sé fyrir hendi við meðferð úrgangs og hvort gjaldtaka sveitarfélagsins vegna sorpvinnslunnar takmarkist við útlagðan kostnað eru allt staðreyndir sem taka má mið af við matið.

2. *Aðildarríki getur ekki með landslögum undanskilið tiltekna starfsemi opinberra aðila gildissviði samkeppnislöggjafar EES-réttar, en það hvort starfsemi falli undir þær reglur getur ráðist af því hvernig ríkið kýs að haga slíkri starfsemi.*

3. *Sveitarfélög sem eru eigendur byggðasamlags geta talist viðskiptaaðilar þess í skilningi c. liðar 2. mgr. 54. gr. EES-samningsins. Veiting afsláttar til eigenda mun fela sér mismunun í skilningi þess ákvæðis, ef skilyrði ákvæðisins eru uppfyllt.*

FRAMKVÆMDASTJÓRNIN

71 Framkvæmdastjórnin telur viðeigandi að svara saman fyrstu, annarri og fyrri hluta þriðju spurningarinnar.

72 Framkvæmdastjórnin tekur fram að samkvæmt 1. gr. bókunar 22 við EES-samninginn, skuli fyrirtæki í skilningi 53. og 54. gr. EES-samningsins vera sérhver stofnun sem fæst við starfsemi sem er efnahagslegs eða viðskiptalegs eðlis. Samkvæmt viðurkenndri dómaframkvæmd eigi þetta við óháð lagalegri stöðu viðkomandi

way in which it is financed.[32] As regards the concept of economic activity, it encompasses any activity consisting in offering goods and services on a given market.[33] Moreover, the fact that an entity is a non-profit-making body is not decisive in assessing whether it is an undertaking within the meaning of Article 54 EEA. A non-profit making body may still be regarded as an undertaking.[34]

73 As regards public law entities, the Commission submits that a distinction must be made between the situation where they act in the exercise of official authority, in which case they do not constitute undertakings within the meaning of Article 54 EEA, and the situation where they carry on an economic activity, in which case they constitute undertakings.[35] An entity acts in the exercise of public powers where it carries out in the public interest an activity which forms part of the essential functions of the State.[36] In order to determine whether the activity carried out by a public entity is an economic activity, it is not decisive that by performing such activity the entity fulfils a public service obligation.[37] Conversely, it is of paramount importance whether the activity at stake is also carried out by private companies. If that is the case, and public entities compete with private companies, that activity will likely be regarded as economic.[38]

32 Reference is made to *Norwegian Federation of Trade Unions and Others*, cited above, paragraph 62.
33 Reference is made, in particular, to the judgment in *Compass-Datenbank GmbH* v *Republik Österreich*, C-138/11, EU:C:2012:449, paragraph 35.
34 Reference is made to the judgment in *Albany*, cited above, paragraph 85.
35 Reference is made to *Norwegian Federation of Trade Unions and Others*, cited above, paragraph 63.
36 Reference is made, in particular, to the judgment in *Diego Calì*, cited above, paragraph 23.
37 Reference is made to the judgment in *Ambulanz Glöckner*, cited above, paragraph 18 et seq.
38 Reference is made, in particular, to the judgment in *Aéroports de Paris*, cited above, paragraph 82.

stofnunar eða því hvernig hún er fjármögnuð.[32] Hvað varði hugtakið efnahagsstarfsemi taki það til hvers kyns starfsemi sem felist í að bjóða vöru eða þjónustu á tilteknum markaði. [33] Enn fremur ráði sú staðreynd að stofnun sé ekki rekin í hagnaðarskyni ekki úrslitum þegar metið sé hvort um fyrirtæki sé að ræða í skilningi 54. gr. EES-samningsins. Stofnun sem ekki sé rekin í hagnaðarskyni geti engu að síður talist fyrirtæki. [34]

73 Þegar rætt er um opinberar stofnanir telur framkvæmdastjórnin að gera verði greinarmun á þeim aðstæðum þegar þær beita opinberu valdi, og teljast þá ekki fyrirtæki í skilningi 54. gr. EES-samningsins, og aðstæðum þar sem þær sinna efnahagsstarfsemi, og teljast þá til fyrirtækja í skilningi greinarinnar.[35] Stofnun beitir opinberu valdi þegar hún sinnir starfsemi í almannaþágu sem heyrir undir eitt af grundvallarhlutverkum ríkisins.[36] Þegar ákvarða skal hvort starfsemin á vegum opinberrar stofnunar sé efnahagsleg, ræður það ekki úrslitum að við framkvæmd hennar uppfylli stofnunin skyldu til að veita opinbera þjónustu.[37] Á hinn bóginn skipti mestu máli hvort einkafyrirtæki sinni einnig þeirri starfsemi sem um ræðir. Ef svo er, og keppi opinberar stofnanir við einkafyrirtæki, mun sú starfsemi líklega teljast efnahagsleg.[38]

32 Vísað er til áður tilvitnaðs máls *Norwegian Federation of Trade Unions og annarra*, 62. mgr.
33 Vísað er sérstaklega til máls *Compass-Datenbank GmbH* gegn *Republik Österreich*, C-138/11, EU:C:2012:449, 35. mgr.
34 Vísað er til áður tilvitnaðs máls *Albany*, 85. mgr.
35 Vísað er til áður tilvitnaðs máls *Norwegian Federation of Trade Unions og a*ðrir, 63. mgr.

36 Vísað er sérstaklega til áður tilvitnaðs máls *Diego Calì*, 23. mgr.
37 Vísað er til áður tilvitnaðs máls *Ambulanz Glöckner*, 18. mgr. og áfram
38 Vísað er til áður tilvitnaðs máls *Aéroports de Paris*, 82. mgr.

74 In the Commission's view, if a public entity carries out an economic activity and that activity can be separated from the remainder of its activities which fall within the exercise of public powers, that entity acts as an undertaking in relation to that activity.[39]

75 Moreover, the Commission claims that the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic the activity of the entity holding those shares. Only if the shareholder exercises its control over the company whose shares it holds, will it be regarded as taking part in the economic activity carried on by the controlled entity and as forming one undertaking with the controlled entity.[40]

76 In the present case, the Commission submits that, in order to determine whether Sorpa is engaged in an economic activity and as such subject to Article 54 EEA, the operation of an acceptance centre at Gufunes should be assessed separately from that of a landfill at Álfsnes.

77 First, as regards the operation of an acceptance centre at Gufunes, the Commission claims that this operation is to be regarded as an economic activity. Public entities and private companies compete to provide waste management services, since under Icelandic law private companies as well as public entities may obtain a licence to operate an acceptance centre. Further, Sorpa competes with Gámaþjónustan for the acceptance of waste from the municipality of Hafnarfjörður and with third parties for the acceptance of waste from Sorpstöð Suðurlands. It is irrelevant that the fees received by Sorpa for its waste management services are cost-based, since an entity that does not make profits may be regarded nonetheless as an

39 Reference is made, in particular, to the judgment in *Compass-Datenbank*, cited above, paragraph 38.

40 Reference is made to the judgment in *Cassa di Risparmio di Firenze*, cited above, paragraphs 111 to 113.

74 Sinni opinber stofnun efnahagsstarfsemi og ef unnt er að skilja þá starfsemi frá annarri starfsemi þess sem fram fer í tengslum við beitingu opinbers valds, telur framkvæmdastjórnin að stofnunin geti talist fyrirtæki hvað starfsemina varðar.[39]

75 Sú staðreynd ein, að vera hluthafi, eða jafnvel ráðandi hluthafi nægi ekki til að starfsemi þeirrar stofnunar sem hlutinn á teljist efnahagslegs eðlis að mati framkvæmdastjórnarinnar. Aðeins ef hluthafinn beitir yfirráðum sínum yfir því fyrirtæki sem hann á hlut í verður hann talinn þátttakandi í efnahagsstarfsemi þess fyrirtækis og talinn mynda með því eitt fyrirtæki sem.[40]

76 Þegar ákvarða skal hvort Sorpa leggi stund á efnahagsstarfsemi og falli þannig undir 54. gr. EES-samningsins, telur framkvæmdastjórnin að við mat í fyrirliggjandi máli verði að aðgreina rekstur móttökustöðvar í Gufunesi og urðunarstaðarins á Álfsnesi.

77 Í fyrsta lagi telur framkvæmdastjórnin að rekstur móttökustöðvar í Gufunesi skuli teljast efnahagsstarfsemi. Opinberar stofnanir og einkafyrirtæki keppi um að veita þjónustu við meðferð úrgangs þar sem samkvæmt íslenskum lögum geti einkafyrirtæki jafnt sem opinberar stofnanir geti fengið leyfi til starfrækslu móttökustöðvar. Sorpa eigi þá í samkeppni við Gámaþjónustuna um móttöku úrgangs frá Hafnarfjarðarbæ og við þriðju aðila um móttöku úrgangs frá Sorpstöð Suðurlands. Ekki skiptir máli að gjaldtaka Sorpu vegna þjónustu þess við meðferð úrgangs miðist við útgjöld, þar sem stofnun sem ekki er rekin í hagnaðarskyni getur engu að síður talist

39 Vísað er til áður tilvitnaðs máls *Compass-Datenbank*, 38. mgr.

40 Vísað er til áður tilvitnaðs máls *Cassa di Risparmio di Firenze*, 111. til 113. mgr.

undertaking. It is equally irrelevant that, under Icelandic law, municipalities have an obligation to ensure the operation of acceptance centres, since an entity which fulfils a public service obligation may also be regarded as an undertaking.

78 Second, as regards the operation by Sorpa of a landfill at Álfsnes, the Commission submits that this should also be regarded as an economic activity. Under Icelandic legislation private companies as well as public entities may obtain a licence for the operation of landfill sites. It is thus irrelevant that Sorpa is currently the only entity operating a landfill site in the relevant geographic market.

79 Consequently, the Commission considers that Sorpa is an undertaking within the meaning of Articles 53 and 54 EEA.

80 The Commission notes that it appears from the request for an advisory opinion that the acceptance centre at Gufunes and the landfill at Álfsnes are operated by Sorpa itself and not by its owners. However, if the municipalities owning Sorpa do, in fact, operate those centres themselves, they must be regarded as undertakings. This is because the waste management services under consideration constitute an economic activity whether they are performed by Sorpa or by its owners. Moreover, if the owners exercise control over Sorpa, which is a question of fact and as such is for the referring court to decide, they may be regarded as forming one undertaking with Sorpa.

81 As regards the second part of the third question, namely whether a Contracting Party to the EEA Agreement may exempt from the application of competition rules certain activities by public entities, the Commission claims that the EEA Agreement does not allow for an exemption *in abstracto*. Such an exemption is permitted only if it is compatible with Article 59 EEA.

fyrirtæki. Að sama skapi er málinu óviðkomandi að samkvæmt íslenskum lögum hvíli skylda á sveitarfélögum til að tryggja starfrækslu móttökustöðva þar sem stofnun sem sinnir opinberri þjónustuskyldu geti líka talist fyrirtæki.

78 Í öðru lagi, telur framkvæmdastjórnin að starfræksla Sorpu á urðunarstað á Álfsnesi, beri einnig að vera virt sem efnahagsstarfsemi. Samkvæmt íslenskum lögum geti bæði einkafyrirtæki og opinberir aðilar fengið leyfi til starfrækslu urðunarstaða. Það hafi því enga þýðingu fyrir málið að eins og er sé Sorpa eini aðilinn sem starfræki slíkan urðunarstað á þeim landfræðilega markaði sem um ræðir.

79 Samkvæmt framansögðu telur framkvæmdastjórnin að Sorpa sé fyrirtæki í skilningi 53. og. 54. gr. EES-samningsins.

80 Framkvæmdastjórnin bendir á að samkvæmt beiðninni um ráðgefandi álit virðist sem móttökustöðin í Gufunesi og urðunarstaðurinn á Álfsnesi séu rekin af Sorpu, en ekki eigendum þess. Sé raunin sú að sveitarfélögin sem eigi Sorpu reki þessar stöðvar sjálf verði að líta á þau sem fyrirtæki. Það helgist af því að sú þjónusta við meðferð úrgangs sem til skoðunar er telst efnahagsstarfsemi, hvort sem henni sé sinnt af hálfu Sorpu eða eigenda þess. Beiti eigendurnir yfirráðum sínum yfir Sorpu, en það ráðist af staðreyndum málsins og því landsdómstólsins að ákvarða, sé það enn fremur svo að þeir kunni að teljast mynda eitt fyrirtæki ásamt Sorpu.

81 Framkvæmdastjórnin telur að fræðilega geti aðildarríki EES-samningsins ekki undanþegið tiltekna starfsemi opinberra aðila gildissviði samkeppnisreglna, eins og spurt er um í öðrum hluta þriðju spurningarinnar. Slík undanþága sé aðeins heimil, ef hún samrýmist 59. gr. EES-samningsins.

82 As regards the fourth question, the Commission notes that for conduct to be incompatible with Article 54(2)(c) EEA, four conditions must be met: (i) there must be transactions between the dominant undertaking and its "trading parties"; (ii) those transactions must be "equivalent"; (iii) "dissimilar conditions" must be applied to those equivalent transactions; and (iv) this must place one or more of the trading partners "at a competitive disadvantage" vis-à-vis other trading partners of the dominant undertaking.[41]

83 In the Commission's view, the transactions between, on the one hand, Sorpa and either its owners or Sorpstöð Suðurlands and, on the other, Sorpa and Gámaþjónustan cannot be regarded as "equivalent" within the meaning of Article 54(2)(c) EEA, since they have different objects (the former concern the provision of waste acceptance services, whereas the latter concern the provision of waste disposal services). Consequently, the discounts granted by Sorpa to, on the one hand, its owners and Sorpstöð Suðurlands and, on the other, Gámaþjónustan do not fall within the scope of Article 54(2)(c) EEA. Therefore, there is no need, in the Commission's view, to answer the fourth question. The Commission observes, however, that Sorpa may have infringed Article 54 EEA in some other way.

84 The Commission does not propose any specific answers to the questions referred.

Carl Baudenbacher
Judge-Rapporteur

41 Reference is made to the judgment in *British Airways*, cited above, paragraphs 142 to 149.

82 Um fjórðu spurninguna, tekur framkvæmdastjórnin fram að fjögur skilyrði verði að vera uppfyllt til þess að hegðun sé andstæð c-lið 2. mgr. 54. gr. EES-samningsins: (i) viðskipti verði að eiga sér stað milli hins markaðsráðandi fyrirtækis og „viðskiptaaðila þess“, (ii) viðskiptin verði að vera „sams konar“, (iii) beita verði „ólíkum skilmálum“ um þau viðskipti, og (iv) framangreint verði að leiða til „veiktrar samkeppnisstöðu“ eins eða fleiri aðila gagnvart öðrum viðskiptaaðila hins markaðsráðandi fyrirtækis.[41]

83 Framkvæmdastjórnin telur viðskipti milli annars vegar Sorpu og eigenda félagsins eða Sorpstöðvar Suðurlands, og hins vegar Sorpu og Gámaþjónustunnar geti ekki talist „sams konar“ í skilningi c-liðar 2. mgr. 54. gr. EES-samningsins, þar sem markmið þeirra sé ólíkt (hin fyrri varða þjónustu við móttöku úrgangs, á meðan hin síðari varði sorpeyðingarþjónustu). Þar af leiðandi falli afslættirnir sem Sorpa veitti eigendum sínum og Sorpstöð Suðurlands, annars vegar, og Gámaþjónustunni, hins vegar, ekki undir gildissvið c-liðar 2. mgr. 54. gr. EES-samningsins. Að mati framkvæmdastjórnarinnar sé því þarflaust að svara fjórðu spurningunni. Framkvæmdastjórnin bendir þó á að Sorpa kunni að hafa brotið gegn 54. gr. EES-samningsins með einhverjum öðrum hætti.

84 Framkvæmdastjórnin leggur ekki til sérstök svör við þeim spurningum sem beint hefur verið til dómstólsins.

Carl Baudenbacher
Framsögumaður

41 Vísað er til áður tilvitnaðs máls *British Airways*, 142. til 149. mgr.

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